Notice to the reader

This report is a preliminary report intended for discussion not for publication. The final version of this report will depend on the outcome of discussions and arguments produced during the debate of the annual meeting of the EATLP on June 4th. 2004 in Paris. This preliminary report is about ideas and arguments. Therefore there are no footnotes in this preliminary version, although there will be in the final version. The reader should be aware that the first 18 pages are a summary of the sub reports presented by Axel Cordewener, Morris Lehner and Luc Hinnekens. If you have already read those sub reports, you do not need to read those pages. You can start immediately on page 18 with chapter III: "Preliminary conclusions from the sub reports, new questions to be asked".

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General Report on
The fundamental freedoms and national sovereignty in the European Union

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I. INTRODUCTION

The general theme of this conference is "Fundamental freedoms and national sovereignty in the European Union". As such however this theme is one size too big. This is a conference of tax professors and therefore we mean by national sovereignty, national sovereignty exercised in the field of taxation. After the devolution to the E.U. of the right to issue national bank notes and to fix national interest rates, the power to tax is indeed the last bastion of national sovereignty remaining with the Member States in the area of economic policy. There are still other areas of national sovereignty left such as foreign policy and defence, but they do not belong to the competence of tax professors.

On the other hand the theme of the conference may be too narrow. The fundamental freedoms are indeed only mentioned in the EC Treaty as the instruments to achieve a fully integrated internal market and this integrated internal market is a somewhat wider concept involving more basic rules than just the fundamental freedoms. Although this is not an attempt to change the theme of the conference, the angle from which the fundamental freedoms will be studied is the wider impact of the more general rules of the internal market on the unrestricted and sovereign taxing power of the Member States of the European Union.

In setting up this report six major questions have been raised. Only the first four questions deal directly with the general theme of the fundamental freedoms and national tax sovereignty. The last two questions deal with the problem of how the fully integrated internal market through the impact of the fundamental freedoms is affecting national tax systems of countries that do not, or do not yet belong to the European Union: the E.E.A. states, Switzerland and the accession countries. Each of these countries has a specific relationship with the E.U. either through the European Economic Area Treaty, or through a series of rather traditional bilateral agreements or through the Treaty of accession, which means, in the latter case, that the European legal order with its "acquis communautaire" is completely taking over. These reports are to be considered as self-standing reports and will not be integrated in the discussion of the general report.

Unlike a general report at an IFA Congress this general report is not an attempt to make a short summary of the sub-reports. In order to deal with the questions it is of course inevitable to give a short survey of what the distinguished reporters have been writing so well in their individual reports. Since there are only six reports, it has been possible to read them all in advance and this survey is only intended as a memory aid. The purpose of the general report is to carry the discussion somewhat further than what the reporters have been writing, to ask (provocative) questions and to fuel the debate with (contrasting) views, which, hopefully, may shed more light and less heat on the issues which tax lawyers in Europe have been debating now for almost two decades.

In formulating the questions for the general theme the emphasis has been on the case law as it has been developed by the ECJ. I.e. the focus was on the question whether, within the conceptual framework established by the ECJ, it would be possible to strike a balance between the imperatives of the fully integrated internal market and the basic economic freedoms on the one hand and the "legitimate interests" of the Member States on the other. From this approach followed a logical sequence of questions: (1) the first question on the significance and impact of the respective concepts of discrimination and restriction in establishing a fully integrated internal market, (2) the second question on the possibility of equivalence between "internal tax rules" and "internal selling arrangements" and the exclusion of such tax rules from the scope of the basic freedoms, (3) the third question on the separate status of tax rules in the application of the basic freedoms and (4) the fourth question on the possible more general grounds for justification of some forms of restriction.

The reason why this theme was chosen at this point in time, is the feeling among many European tax experts, that the flow of decisions coming out of the ECJ has reached a watershed. If the ECJ continues to decide future cases along the lines that it has set out during the last years many tax experts feel that the very foundations of national tax systems of the Member States are threatened and that the "integrity" or "coherence" (in the economic sense) of national tax systems will be in doubt. If on the other hand the Court would change course and return on its steps, the fear is that it would have no place to stop and that in the area of taxation the fundamental freedoms would unravel slowly but inexorably to the point where it all started almost twenty years ago. Scholars of European tax law are looking desperately for criteria to strike a balance between the "legitimate interests" of the national treasuries of the Member States and the basic tenets of the internal market. Also in the construction of the fully integrated internal market, taxation is the last building block that has been missing now for some time. All these considerations seemed sufficient justification for the choice of this theme.

II. SHORT SUMMARY OF THE REPORTS ON THE BASIC FREEDOMS

1. The role of prohibitions of discrimination and of restriction in establishing the fully integrated internal market

A. Questions

- Is there a difference in the way in which the principles of non-discrimination and non-restriction operate?
- Is there a difference in the way in which the basic freedoms should be tested, should some freedoms be tested on the basis of non-discrimination and some other freedoms on the basis of non-restriction, or should all freedoms be tested on the basis of both principles?
- Is there a difference to be made in the application of the principles of non-discrimination and non-restriction between inbound or outbound transactions?

B. Summary of the report

a. The difference in the way in which the principles of non-discrimination and non-restriction operate:

(i) non-discrimination and non-restriction as the two sides of the same fundamental freedom coin and the over-arching concept of the internal market

In the literature non-discrimination and non-restriction are used as distinct concepts and the development of the case law of the ECJ has often been described as an evolution of the fundamental freedoms from a prohibition of "discrimination" to one of "restriction". In this respect the terminology used by the ECJ is often inconsistent and confused. The reason for this confusion is that the Treaty itself uses the principle of non-discrimination to describe some freedoms and the prohibition of restrictions to describe some others. The ECJ also sticks to the two different principles, because of the difference in grounds for justification: overtly discriminatory rules can only be justified by grounds explicitly mentioned in the Treaty, while restrictive national rules or practices could also be justified by the unwritten "rule of reason".

The judgements on the interpretation and application of the fundamental freedoms by the ECJ can only be understood if it is recognised that the individual freedoms are to be adapted to an overall functional context i.e. the concept of the E.U. wide internal market. This is very clear in the cases in which the ECJ granted the right to free movement to citizens against their own Member State on outbound movements. In these cases there was no discrimination on the basis of nationality, but there were effective restrictions on the exercise of the right of free movement between Member States.

Therefore the controlling concept for the interpretation of the fundamental freedoms is to be found in the over-arching concept of the "internal market", which must be regarded as a legal term with an economic content. The fully integrated internal market is a market in which goods, services and also all factors of production can move freely from one Member State to another. This concept permeates the interpretation of the basic freedoms not only in a vertical way but also in a horizontal way through which the signals for the interpretation of one freedom are passed on to other freedoms. Therefore the four freedoms should be interpreted through the concept of "obstacles" which would encompass both (a) a non-discrimination component for tackling unfavourable treatment of cross-border transactions and (b) a non-restriction component for tackling non-discriminatory hindrances to market access or exit. If we want to maintain the term restrictions, we should distinguish between "discriminatory restrictions" and "restrictions proper or restrictions in the closer sense". This means that each individual freedom has a dual legal structure: it does not contain either a prohibition of discrimination or of (non-discriminatory) restrictions, but it comprises a non-discrimination component as well as a non-restriction component. In addition all freedoms have a dual territorial perspective. They cover both outbound and inbound movements and transactions.

(ii) The differences between non-discrimination and non-restriction

Non-discrimination is a relative concept which requires a comparison with a "tertium comparationis" as a point of reference. In the internal market the point of reference is the hypothetical, purely domestic situation that is to be compared with the effective cross-border situation. As a basic rule the ECJ will assume the existence of a potential discrimination when a Member State treats a specific cross-border transaction less favourably than the corresponding hypothetical purely domestic transaction. Any discrimination on a specific cross-border transaction, including also minor discriminations will be struck down.

This concept of non-discrimination has been gradually extended by the ECJ in successive steps. The fist step was the extension of the concept from non- discrimination against foreign nationals to covert or indirect discrimination in the form of discrimination against foreign residents. This extension illustrates clearly that the economic freedoms are about opening a Member State's domestic market for commercial activities coming in from abroad. The obstacles resulting from this form of discrimination are absolutely prohibited and cannot be justified by the "rule of reason", but only on the grounds specifically stated in the Treaty.

The second step concerns the extension of the freedoms to so called "restrictions" on outbound transactions. An analysis of these cases shows that in fact the ECJ is applying a non-discrimination test by comparing the tax burdens between outbound transactions and purely domestic transactions: when the outbound transaction is subject to a more onerous tax treatment than the domestic transaction the ECJ considers this to be a discrimination that results in a prohibited "restriction" on a cross-border transaction. The application of the "non-discrimination" concept to outbound transactions is basically not different from the broadened interpretation of the "non-discrimination" approach on inbound situations. The only reason why the ECJ still uses the term "restriction" is probably that this is the textual wording to protect the freedoms that is to be found in the Treaty. Once it is accepted that discrimination of cross-border commerce is only a specific case of a "restriction" or, more generally, an obstacle, there is no contradiction between the substantial test as used by the ECJ and the wording of the Treaty.

A third step consists in looking at the impact of national rules on cross-border transactions from both sides, that is on the supply and demand relationship on both sides of the border, whereby the effect of the behaviour of passive economic operators (e.g. consumers) on the potential activities of active economic operators (e.g. the suppliers of goods and services across the border) is taken into account. This is illustrated with the Svensson and Gustavsson case where a foreign bank was obliged to have an office in the Member State for the borrower to be entitled to obtain an interest subsidy from the latter State. Although the customer was allowed to borrow from a foreign bank not having an office in the State, the idea underpinning the decision was that foreign banks would be at a disadvantage in comparison with domestic banks in providing bank loans. With respect to the right of establishment this approach is illustrated a.o. by the Lankhorst-Hohorst case. The thin capitalisation rule puts the foreign parent company at a disadvantage compared to a domestic parent company in granting a loan to a German subsidiary company.

The non-restriction concept is an absolute concept that does not require the comparison with a purely domestic situation. The non-restriction concept is necessary for establishing the internal market, because there are many instances of non-discriminatory measures that do constitute obstacles to the free movement of goods, persons, services and capital. However there are very few cases that have been decided solely on the prohibition of non-restriction. Most of these non-restriction cases have been decided on the basis of a non-discrimination reasoning. The pure non-restriction cases can be divided into two categories: instances of overlapping non-discriminatory national regulations which impose a double burden on cross-border transactions and non-discriminatory national rules which make market access in the other Member States very difficult if not impossible. The first category of cases is illustrated by the Futura participations case, in which the combination of the accounting requirements in two different Member States was held to be a restriction. The second category is illustrated by the Decoster case where a community tax on satellite dishes was held to affect reception of foreign television programmes, to that it was very difficult for foreign broadcasters, who could not rely on cable connections, to have access to the Belgian television audience. Even in these two examples however, the "restriction" was considered prohibitive taking into account the situation of domestic economic operators, which finally points again to the non-discrimination principle.

(iii) Some unresolved issues in the application of the non-discrimination principle

The discrimination has been defined by the ECJ as "the application of different rules to comparable situations or the application of the same rule to different situations". In particular the meaning of the second half of the definition is not always clear. The question even is whether this second half has a function of its own. It may have a function when the application of the same rule to domestic and cross-border situations would result in substantial obstacles to cross border movements. This could be considered as the application from the non-discrimination principle seen from the angle of "non-restriction".

In the application of the non-discrimination principle in non-tax cases, abstraction has always been made of the fact that the actual situations of nationals and non-nationals and residents and non-residents was not similar, for the simple reason that this factor of dissimilarity precisely constituted the criterion that was prohibited for justifying a different treatment. Therefore it was remarkable when the Court held in Schumacker that "the situations of residents and non-

residents are not, as a rule comparable". That holding seems as a rule to justify different treatment of resident and non-resident taxpayers, which is precisely forbidden under the doctrine of covert discrimination. The ECJ has made an exception to the acceptance of this difference in cases where a taxpayer receives a substantial part of his income in the source state, so that he cannot benefit from his personal tax deductions in the state of residence. The exception even when extended, does not resolve the question of the relevance of a difference in residence for the application of the non-discrimination principle in tax cases.

By the same token the ECJ has been taking into account the tax situation on both sides of the border. When the taxpayer is unable to exercise his personal credits and deductions on either side of the border, the ECJ has been indicating which Member State is responsible for allowing these credits or deductions. In a growing number of decisions the ECJ has been looking into the interaction between the two tax systems of the source state and the residence state to decide whether there had been an obstacle to cross border trade. In looking for solutions the ECJ has not been consistent in imposing the responsibility for the non-restrictive treatment of the cross-border movement: sometimes the burden has been put upon the source state and sometimes it has been on the state of residence.

Finally one unresolved issue is the horizontal comparison between cross-border activities i.e. the question of the "most favoured nation treatment" in tax cases. On these cases the ECJ may have to rule in the near future.

b. Should all basic freedoms be tested in the same way or in a different way:

(i) The development of ECJ case law from non-discrimination to non-restriction and partly from non-restriction to non-discrimination

It can be safely stated that today all basic freedoms apply as prohibitions of non-discrimination, as well as prohibitions of (non-discriminatory restrictions). But the decisive question is whether there is a particular threshold to establish an infringement of the freedoms. The lower the threshold, the wider and deeper the impact of the freedoms on national law. The question is where this development ends, because the mere existence of a tax by itself could be characterised as a "restriction" to free economic movement. Seen from this angle the issue of interpreting the fundamental freedoms as prohibitions of (non-discriminatory) restrictions has an important constitutional dimension, because it involves a decision on the range of the competences of the Member States that remain unaffected by EC law.

Outside the area of taxation, the "Keck" judgement must be seen as a trade-off between, on the one hand, the need for full market integration and, on the other hand the respect for the Member States' competences. In that case the Court made a distinction, for the application of the free movement of goods, between "selling arrangements" and "product requirements". For the former category of rules the protection of the free movement of goods is limited to a prohibition of discrimination and for the latter the non-restriction principle still applies. Therefore this decision is tantamount to a partial "restriction of the non-restriction principle". The main conclusion to be drawn from the "Keck" decision is that the non-restriction component of the free movement of goods is triggered against non-discriminatory domestic rules only, when access of goods to the market of destination is impeded. This market access test should also apply to all other freedoms.

In a number of cases the ECJ has applied a sort of threshold, when it held that the restrictive effects of a non-discriminatory national rule on the cross border movement were "too uncertain and indirect" to be regarded as being capable of obstructing the exercise of the economic freedom. This approach has been described as "the rule of remoteness" in the legal doctrine.

It may prove to be very difficult to transplant the "Keck" exception for "selling arrangements" from the freedom to move goods to the other freedoms. However the substance of the "market access" test should be applicable to the other freedoms within the wider concept of the integrated internal market. The basic test should be whether a particular national measure has the effect of splitting up the internal market into several domestic markets. In deciding this test primarily an economic and not a legal analysis should be applied. The basic question is whether a national, non-discriminatory measure seals off a domestic market by constituting a prohibited "barrier to entry" or to "exit" into the market of a particular Member State, in a way similar to the restrictive agreements and practices between private enterprises that are prohibited under art. 81 of the EC Treaty.

(ii) Classification of non-discriminatory restrictions

Non-discriminatory restrictions can be classified into two categories. First are the provisions, which due to their sole existence put an absolute and insurmountable burden on cross-border movements. Examples are the domestic ban on "cold calling" and the single practice rule prohibiting members of liberal professions from having more than one place of business.

The second category are non-discriminatory restrictions caused by national regulations imposing double burdens on a cross-border activity. Examples are the minimum alcohol requirement or the "Reinheidsgebot" in Germany or the requirement to obtain a full professional education in the host state for someone who already has obtained a similar education in his home state. Many of these cases have been analysed as non-discrimination cases, because indirectly they affect foreigners more than nationals, but in order to avoid stretching the non-discrimination concept too far it may be more correct to analyse these cases in the light of the "market access" principle as non-restriction cases.

The limit to this double burden analysis is that the mere co-existence of different national rules does not to trigger the "non-restriction" protection under the four freedoms. The fact that a Member State imposes a tax that does not exist in other Member States, may be considered as an additional burden for residents and non-residents alike, but does not segment the internal market in a protected market for residents and a market inaccessible to non-residents.

(iii) The basic structure of all fundamental freedoms should be identical

The fundamental freedoms should be applied in a "symmetric structure", because the common denominator for all these freedoms is the definition of the "internal market", which does not make a distinction between the scope and the structure of the different freedoms. In addition it is sometimes very difficult to find out which of the freedoms is applicable. The distinctions between free movement of goods and services on the one hand and between free movement of workers or self employed persons as the right of establishment on the other are not always very clear. It would be very unfortunate if the scope and depth of the protection under the four freedoms for cross border activities would depend on the coincidence of different interpretations of the various freedoms.

(iv) The non-discrimination principle should have priority over the non- restriction principle.

If it is accepted that each freedom contains a non-discrimination and a non-restriction component, the question arises as to the mutual relationship between both components within each freedom. It is submitted that the non-discrimination component should have priority over the non-discrimination component for the following reasons: (1) the non-discrimination concept has a double function of guaranteeing (a) equal treatment to all market participants as well as (b) guaranteeing market access when the market is sealed off because of discriminatory regulations, (2) the pure non-restriction approach does not work in cases where advantages are reserved purely for domestic operations, only the non-discrimination approach will help and (3) the effect of the pure non-restriction approach is quite severe on national law, because the non-discriminatory national rule is simply pushed aside by the overriding force of EC law. For all these reasons the basic rule should be that the non-restriction principle should only be applied when the non-discriminatory character of a particular natural measure has been established.

c. Should there be a distinction between inbound and outbound transactions?

Since the controlling concept for the application of the fundamental freedoms is the E.U. wide internal market, the obstacles to the internal market must be abolished irrespective of whether they are caused by the home state (state of origin) or the host state (state of destination).

2. The relevance for taxation of the distinction between restrictions within the scope of the freedoms and the "internal selling arrangements" and the distinction in the application of the freedoms between tax law and non-tax law.

A. Questions:

- For the application of the non-restriction principle in areas other than taxation, the ECJ has made a distinction between non-discriminatory restrictions and "internal selling arrangements", would it be possible for tax purposes to make a similar distinction between rules that intend to regulate purely internal domestic situations, rules intended to regulate both internal and cross-border situations and finally rules intended exclusively to regulate cross-border situations.?

- Is it possible for the application of the basic freedoms to make a distinction between the tax law and non-tax law, thereby setting the tax system apart, or should the fundamental freedoms apply without any distinction?

B. Summary of the report

a. Preliminary remarks

This report starts from the analysis made in the first report that each freedom contains a non-discrimination and a non-restriction component, that all freedoms are applicable both to inbound and outbound movements and that a distinction should be made between "discriminatory restrictions" and "restrictions in the closer sense" in the sense of non-discriminatory measures that form an obstacle to cross-border movements.

In general discriminations will follow from rules regulating exclusively domestic situations and rules regulating exclusively cross-border tax situations. Rules regulating both internal domestic situations and cross border situations at the same time, will tend to result in non-discriminatory restrictions in a closer sense.

b. Systematisation of tax rules and their effect as a discrimination or restriction:

(i) Unlimited tax liability resulting in rules regulating both domestic and cross- border situations

With the only exception of the traditional French corporate income tax, the large majority of tax rules in the Member States are applicable to taxpayers with an unlimited (e.g. a worldwide) tax liability. Hence these rules are applicable to purely domestic and cross-border situations. In most instances these rules will treat domestic and foreign source income alike as well as domestic income flowing to non-residents and as a consequence they are as a matter of principle non-discriminatory.

(ii) Exceptions: rules indirectly applicable to exclusively domestic situations

Sometimes there are exceptions to the extensive application of these general tax rules. Examples are the unlimited loss compensation across different sources of income, the tax free reorganisation of companies, the deduction of personal allowances, the application of which may be limited to taxpayers subject to unlimited tax liability. Through these limitations the general rules are indirectly restricted to exclusively domestic situations.

(iii) Rules regulating both domestic and cross-border situations without differentiating between inbound and outbound activities

Some of the rules that regulate both internal domestic and cross-border tax situations may constitute a restriction, precisely because they do not make a distinction between the domestic and the cross-border situation. The reason for this restrictive effect does not lie with the rule as such, but with the combined effect of the domestic rules of two Member States on cross-border activities: either by burdening the cross-border activity with demands which do not exist in the state of origin, or by cumulating the different requirements both of the state of origin and the state of destination. This effect is possible (a) in substantive law: double taxation, rules relating to the determination of profits, rules establishing liability for taxes due, rules of private law (e.g. company law requirements) and (b) in procedural law: obligations for cooperation with the tax authorities (e.g. providing information), obligations under the accounting rules, obligation to provide documentation (transfer pricing), rules on investigation procedures, mismatches in reporting, auditing and assessment periods.

(iv) Rules regulating both domestic and cross-border (inbound) situations

Taking into account taxation of non-residents in their state of origin, taxation of inbound activities according to the rules of limited tax liability causes an obstacle through double taxation in principle even when the source state taxes domestic activities of residents the same way.

(v) Rules regulating both domestic and cross-border (outbound) situations

Because worldwide income (including income from outbound activities) is taxed in the country of residence, double taxation causes an obstacle from the country of residence, even though domestic activities are taxed the same way as outbound activities.

(vi) Rules regulating exclusively cross-border situations, e.g. outbound and inbound situations

These rules are primarily the rules of double tax agreements. Domestic rules regulating exclusively outbound situations are mainly CFC rules, rules on exit taxes, rules extending the unlimited tax liability and transfer pricing adjustment rules. Domestic rules on inbound situations are the rules that are specifically related to the limited tax liability.

c. Application of the discrimination and restriction principles to the various categories of tax rules:

(i) Rules regulating exclusively domestic tax situations

Disadvantages caused to outbound activities by regulations restricting tax benefits to exclusively domestic situations trigger the non-restriction principle as a prohibition of non-discrimination, because the outbound activities do not benefit from the domestic tax benefits.

(ii) Rules regulating exclusively cross-border situations

Rules regulating outbound situations tend to block access to another market and may trigger the non-restriction principle as a prohibition of discrimination. Rules regulating inbound situations are dealt with on the basis of the traditional non-discrimination principle.

Double taxation is not the effect of rules regulating cross-border situations, but rather the effect of cumulative non-discriminatory rules regulating domestic as well as cross-border activities. Tax treaties are designed to eliminate these double burdens in cross-border situations. However the treaty rules may well be discriminatory with respect to inbound and outbound activities, because they may either block access to the domestic market (non-discriminatory restriction in terms of national treatment) or to the foreign market (traditional discrimination).

(iii) Rules regulating domestic and cross-border situations

These rules which do not differentiate between domestic and cross-border situations do not discriminate but they may constitute an obstacle to market access by equal treatment of domestic and cross-border inbound situations as well as by equal treatment of domestic and cross-border outbound situations. These obstacles should be judged on the basis of the distinction between “discriminatory restrictions” and “non-discriminatory restrictions”, or “restrictions in a closer sense”.

Until now only one case has been identified in direct taxation regulating a domestic and a cross-border (inbound) situation, e.g. the Futura Participations decision on accounting obligations in the state of source. The obstacle to market access was not caused because of the requirements of one national legislation, but because of the cumulative legal requirements of the state of source and the state of residence, which put a double burden on the establishment of a branch in the state of source. All other judgements of the ECJ refer to non-discriminatory restrictions in other areas of the fundamental freedoms.

These cases are based on Dassonville, holding that “all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered having an effect equivalent to (prohibited) quantitative restrictions. This general rule is limited on three counts: by the rule of reason (Cassis de Dijon) allowing some justifications for restrictions not provided for in the Treaty, the Keck decision excluding non-discriminatory domestic selling arrangements from the scope of the Treaty and the “rule of remoteness” when the effect on market access is “too indirect and too uncertain”.

However the main problem is that so far no clear criteria have been found according to which a distinction could be made between non-discriminatory measures that are restrictive and non-discriminatory measures that are not restrictive. In its case law the ECJ has drawn a very wide borderline for the application of the fundamental freedoms. Accordingly it is agreed that the market access test which was first developed only for the free movement of goods now also applies to all market freedoms and that it applies both to inbound and outbound activities. Therefore restrictions or hindrances caused by rules of direct taxation, although not relevant in the scope of art. 28 of the Treaty, must not be excluded from the requirements established by the ECJ in this area. This applies to situations of “absolute” (due to unilateral regulations) and “double” burdens (due to dual regulations) in areas of substantive and procedural law, as referred to in the first report.

The outer border of the application of the fundamental freedom has been drawn by the ECJ at mere differences or disparities between the legal and tax systems of the Member States, when these differences and disparities are applied in a non)-discriminatory way. The fact that there is a trade tax in one Member State and not in the others is not an obstacle to market access, even though such a trade tax is an additional burden to foreign business seeking access to that Member State's market, because the burden is exactly the same for a domestic operator seeking access to the same market.

d. The distinction between tax law and non-tax law: setting the tax law apart?

It is necessary to make distinctions between the application of the non-restriction principle to non-tax issues and their application to tax issues, thereby setting the tax system apart. This distinction however, is not compatible with the establishment of a fully integrated internal market.

(i) Arguments for this differentiation

The arguments for this different application of the fundamental freedoms are the following:
- The constitutional requirements with respect to the justification of differences in treatment between taxpayers in tax law are more strict than the requirements justifying differences in treatment in the trade of goods and services.
- This difference is also reflected in the EC Treaty because the articles on the free movement of goods do not address persons but prohibit restrictions on imports and exports, while the other freedoms address persons, primarily protecting them against non-discrimination.
- This different approach is also reflected in the ECJ case law emphasising market access (non-restriction) for the free movement of goods and non-discrimination for the other freedoms.
- The power of taxation is essential to government authority, because governmental authority is inconceivable without public funds.
- In the field of taxation the Member State which causes the restrictions because of additional burdens is not necessarily the Member State which is responsible for removing the obstacle. The answer to the latter question which state should remove the obstacles depends on which state has the primary right of taxation. In international law the right to tax is based on the territorial foundation of the tax liability (resulting in taxation in the state of source and the state of residence), because the territorial link is considered to be an essential precondition for economic productivity and hence the realisation of income in a particular state.

It is clear that this concept of market related income is incompatible with the concept of the fully integrated internal market.

(ii) Consequences of setting the tax law apart

The consequences of setting the tax law apart are apparent in the solutions that are proposed to resolve the non-restriction problems.

Issues of substantive law

Double taxation caused by dual burdens is specifically provided for in art. 293 EC Treaty and should be resolved by double tax treaties in accordance with the standards approved by the ECJ. Dual burdens may also arise because of discrepancies in rules of profit determination. This should be resolved again by double tax treaties and the EC Arbitration convention. Problems caused by unilateral provisions such as thin capitalisation rules are not resolved, even when these rules are made non-discriminatory by extending them to domestic taxpayers, because the obstacle to market access for foreign taxpayers remains unchanged. Double burdens resulting from dual enforcement by two Member States of their unilateral national tax claims should also be taken care of by art. 25 OECD model treaty and the EC Arbitration convention.

Issues of procedural law

Issues of double procedural requirements should be resolved on the basis of the mutual agreement procedure in double tax treaties and the 1977 directive on mutual assistance and exchange of information.

(iii) The core question

What is usually described as non-discriminatory measures seen from a “one state” or “one market” perspective becomes discriminatory when seen from a “two State” or “internal market” perspective. This leaves unanswered the basic question that equal treatment traditionally has always been understood as equal treatment within “one single legal system” or equality within boxes (Kästchengleichkeit), while when all the boxes are considered together the different treatments in all these boxes leads to inequality. The basic question then is whether the internal market is just “a” market , or whether it is “the” market i.e. “one consolidated legal system”. His answer is “no(t yet)”.

III. PRELIMINARY CONCLUSION FROM THE SUBREPORTS: NEW QUESTIONS TO BE ANSWERED

1. The answers of the sub reports

Summarising the three sub reports to the extreme, the answers to the questions are the following:

A. On the distinction between discrimination and restriction

Discrimination and restriction are the two sides of the same fundamental freedoms and should not be dissociated from each other. The fundamental freedoms should not be interpreted or applied in different ways, depending on the use of the words discrimination or restriction in the Treaty, but should be interpreted and applied in the light of the over-arching concept of the fully integrated internal market, one of the main objectives of the EC treaty. In applying these principles the non-discrimination principle should have priority over the non-restriction principle. The non-restriction principle should only be relied upon, when the non-discriminatory character of a particular tax rule has been established.

B. On the equivalence between internal tax rules and internal selling arrangements

In making the distinction between exclusively internal tax rules and tax rules regulating both internal and cross-border situations as a possible equivalent of the “internal selling arrangements”, one is confronted with the tax concepts of unlimited and limited tax liability. Generally speaking the same rules apply to taxpayers with unlimited and limited tax liability. The application of the same rules to dissimilar situations often results into discrimination, precisely because these rules do not make the distinction between limited and unlimited tax liability. Excess burdens may also result from the cumulative application of national tax rules that each taken by themselves do not discriminate. In some cases general tax rules are restricted in their application to purely domestic situations (e.g. unlimited loss carry forwards, deduction of personal allowances), thereby causing a discrimination precisely because the application of general tax benefits is limited to purely domestic situations.

C. Separate status of taxation for the application of the basic freedoms

On the question whether tax law should be set apart as a special field of law the answer of the reporter is affirmative, although he concedes that such separation is not compatible with the concept of the fully integrated internal market.

D. Widening the scope of justifications

In the search for justifications balancing the infringements of the basic freedoms it is argued that in some cases the ECJ is disregarding completely the legitimate interests of the Member States. It is submitted that if there are sufficiently robust principles of discrimination and non-restriction these principles should be open to a broad range of justifications in the public interest.

2. A critical analysis of the questions and answers:

From the analysis of the ECJ case law in these reports it follows without any doubt that the fundamental freedoms do have some impact on the way the Member States are allowed to exercise their sovereign decision making power in taxation. The answer to the question whether the fundamental freedoms are compatible with unfettered national tax sovereignty is clearly negative. However that is the easy and incomplete answer to an easy and incomplete question.

The core question is indeed whether the fundamental freedoms, as they have been interpreted by the ECJ, leave enough room for the Member States to operate a functioning national tax system. That is the real question behind the

many legal principles such as the principle of coherence or cohesion, the principle of territoriality and the exception of fiscal supervision which have been invoked by the Member States in defence of their tax systems against the encroachment by the fundamental freedoms. The answers to this question given in the subreports are not entirely satisfactory, but that was probably because the question was put in too absolute terms without any nuances.

From the Cordewener report we can conclude that the basic concept for testing tax rules, incorporating the concepts of discrimination and non-restriction within the same rule, should be the concept of the fully integrated internal market. Hence the fundamental freedoms should be applied and interpreted in the same way, i.e. taking into account that they are only instruments to achieve this market. It should be noted that this integrated approach of the fundamental freedoms is not universally shared.

In his contribution to the 40th. Anniversary of the Common Market Law Review Peter Oliver states: "At the end of the day the four freedoms cannot all be treated the same way. To my mind, the principal dividing line should be drawn, where common sense and humanity suggest that it should be drawn: between the movement of human beings on the one hand and purely economic transactions on the other". In support of his position he cites AG Fenelly : "Persons are not products and the process of migration for the purposes of employment or establishment abroad… cannot be so neatly divided into (mass) production and marketing stages (Case C-190/98 Graf, 2000 ECR I-493, 501)

I concur with Cordewener however and respectfully disagree with Oliver. The factual circumstances for market access and discriminatory treatment may be somewhat different for goods and services on the one hand and for persons and businesses run by persons on the other, but the economic tests guaranteeing the free movement across borders do have the same inspiration and purpose as will be demonstrated. This will be elaborated more specifically later on

From the analysis by Morris Lehner it follows that the distinction between "internal selling arrangements" on the one hand and "objective product requirements on the other" does not help very much in direct taxation. It would be very difficult to make an exception to the basic freedoms for rules restricted to purely domestic situations, because such rules precisely tend to discriminate against foreign taxpayers. They cannot be compared to internal selling arrangements that may hinder some business transactions from abroad, but that do so in a non-discriminatory manner. This means that the Keck doctrine is not very much of any use in defending national tax rules.

Some solace for national tax rules may be sought in the "rule of remoteness". When the impact on the market of a rule is too uncertain and too indirect the ECJ does not apply the fundamental freedoms. This exception is tantamount to a kind of economic "de minimis" rule, which is not a very big help in effectively operating a tax system. Lehner pointedly indicates that: "Until now no clear criteria have been found according to which non-discriminatory measures which are restrictive could be set apart from non-discriminatory measures which are not restrictive" (p. 13) His solution for this apparent absence of criteria is that "distinctions in the application of the non-restriction principle are necessary as long as the common market is not fully integrated. In order to achieve this aim the basic economic freedoms have to be complemented and supported by measures of harmonisation in the field of direct taxation". (p.27)

This answer begs the question what the ECJ should do when a preliminary ruling is requested in the absence of any harmonisation in direct taxation. Lehner's answer is: "The ECJ must not decide political questions but apply community law according to the Treaty" (p. 27, 28) Does that mean that in the absence of harmonisation the ECJ should abstain from issuing a ruling? That looks tantamount to granting the Member States not only veto power on the progress of harmonising tax legislation, but also a veto power on progress in ECJ case law under the Treaty.

The solution suggested by Luc Hinnekens in his report looks more adequate but has the same unsatisfactory result. The ECJ is invited to allow more room for public interest matters, without indicating precisely which public interest matters would be acceptable and which not. If tax avoidance, economic coherence and a decrease in revenue, arguments often submitted by the Member States, would be accepted the pace would be set to wind the clock back to the situation before the Avoir Fiscal case, because the main arguments of the French government in that case were precisely the decrease in revenue and the fight against abuses. Economic coherence has been argued by almost every Member State since Bachmann. Again when we open the justification box of Pandora we have no remedy to welcome the good spirits and to chase the bad spirits.

Morris Lehner points to the core of the problem when he cites Ekkerhart Reimer: "What is usually described as non-discriminatory is discussed under the (silent) presumption of a "one state" or a "one market" perspective. But if non-discriminatory restrictions are examined from a "two state" perspective of from an "internal market" perspective they are discriminatory". Referring to Dieter Birk, Morris Lehner states: "Equal treatment has always been understood as equal

treatment within the realm of "one legal system" in terms of "Kästchengleichkeit" (equality in boxes). The question is whether the internal market is deemed to be only a market, or if it is also requires "one consolidated legal system". My (Lehner's) answer is (not yet)". To paraphrase an earlier comparison:the question is whether taxpayers are presumed to play snooker simultaneously on different national snooker tables, or whether they all play at the same European table.

3. Conclusion: new questions to be answered

The answers given to the questions result in new questions to be answered. In order to give a satisfactory answer to the question whether the fundamental freedoms, as they are currently applied by the ECJ, allow the Member States to operate a viable national tax system it is necessary to raise and answer new questions, which have not been asked before.

A. What is exactly meant when it is stated that non-discrimination and restriction are two sides of the same rule under the fundamental freedoms and that these freedoms are the instruments are to be considered as instruments in achieving the over-arching objective of the fully integrated internal market? Is it possible to submit a workable and balanced concept that would make it possible to make a distinction between restrictions that are compatible and restrictions that are not compatible in the fully integrated internal market?

B. What is a functioning national tax system, or rather at what point do Member States loose control of their national tax system as an instrument for achieving their economic and social policy goals, and has this point been reached under the current trend in ECJ decisions?

C. Is it justified to make a distinction in the application of the basic freedoms between taxation and other areas of law and is it necessary to make this distinction to save functioning national tax systems?

IV. A CRITICAL ANALYSIS OF THE DISTINCTION BETWEEN RESTRICTIONS COMPATIBLE AND RESTRICTIONS NOT COMPATIBLE WITH THE INTERNAL MARKET

1. The distinction between restrictions and discrimination in indirect taxation

It is conventional wisdom that the free movement of goods is "par excellence" the freedom in which the non-restriction concept is predominant. All measures having an effect equivalent to import or export levies or quantitative restrictions are prohibited under the EC Treaty. This prohibition is absolute and without discussion, because to the fathers of the Treaty of Rome it was clear that import and export restrictions had an immediate and obvious negative impact upon intra-community trade.

However with respect to taxation on goods and services yet another article guarantees an unrestricted flow of intra-community trade and that is article 90. This article states that it is prohibited to subject foreign products to a tax burden that exceeds the tax on similar domestic products, or a tax that has a protective effect on domestic products. This rule which applies to all taxes (direct and indirect) on all products (goods and services) is not an application of the restriction principle, but is based on the principle of non-discrimination. It makes a comparison between foreign and domestic products and in that comparison foreign and domestic products should be treated the same way.

I.e. in testing the compatibility of taxes with the free movement of goods, both the non-restriction principle (art. 28) and the non-discrimination (art. 90) principle apply, although article 90 is not placed under the heading "free movement of goods".
Contrary to the case law with respect to the other basic freedoms, the ECJ has in its decisions in the area of free movement of goods, drawn an almost "iron curtain" between the application of the restriction approach under art. 28 and the non-discrimination approach under art. 90 based on the absolute distinction between levies or restrictive measures at the border on the one hand and internal taxes that also affect foreign products entering a Member State and coming from another Member State. The ECJ has repeatedly held that a levy was either to be a measure having an equivalent effect (restriction) or an internal tax not specifically levied at the border and therefore not subject to application of art. 28. The latter tax could violate the free movement of goods however by discriminating against foreign products of by protecting domestic products. However an (indirect) tax could not at the same time constitute a measure

having an equivalent effect at the border and an internal tax discriminating against foreign products. I.e. restriction to market access and discrimination in the domestic were always separated.

In the logic of this reasoning a domestic tax rule intended for purely internal purposes could never have a restrictive effect, because the restriction followed from the qualification "measure having an equivalent effect". Domestic tax rules could only be tested on the basis of discrimination of foreign products.

The question should be raised whether this strict distinction between the restriction principle applicable to rules on cross-border transactions and the discrimination principle on rules applicable to domestic and cross-border transaction could be transplanted to the other freedoms and the area of direct taxation.

2. Transplanting the dichotomy between restriction and discrimination from indirect taxation to direct taxation

The answer to the legitimate question whether we can transplant to direct taxation the dichotomy between internal tax rules and rules only applicable to cross-border situations, which has been used in indirect taxation should be answered to the negative for the reasons explained below.

In decisions with respect to non-tax cases the ECJ established convincingly that exclusively domestic rules intended for internal purposes could be qualified as a measure having an equivalent restrictive effect when applied to foreign economic operators. There is no reason why this non tax doctrine should not be applied in the field of taxation. Lehner's classification of tax rules with respect to their effect on domestic and cross-border transactions has convincingly demonstrated that ordinary tax rules because of the unlimited tax liability of resident taxpayers do have an effect on cross-border transactions and flows of income.

The development with respect to the case law in indirect taxation should also be seen in its historic context. The abolition of customs duties and all taxes that were exclusively applicable on cross-border movements of goods was the first stage in the achievement of the common market, before there was any discussion about applying the other basic freedoms to taxation. It was quite natural not only for the ECJ to consider this as a separate area for the application of the EC Treaty. The idea that taxes designed mainly for internal transactions could also have an impact on cross-border transactions, that should be appreciated under the rules of restrictions having an equivalent effect did come up, but only for levies for which the domestic economic operators were fully and totally compensated. All other issues were dealt with under the non-discrimination rules of art. 90.

The other four freedoms which are enshrined in the articles 39 to 60 do not make this clear distinction in their wording. The concepts of restriction and discrimination are used alternatively. Also, like many other rules in the field of economic regulations, income tax rules intended for domestic use, do have a spill-over effect on cross border transactions. Therefore copying for purposes of direct taxation, the dichotomy between restriction and discrimination that is the hall-mark of the ECJ case law in indirect taxation would make no sense.

If we accept the position that the concept of restriction, as it has been applied in the area of indirect taxation, cannot as such be transplanted into the field of direct taxation, because income taxes contain rules that apply to domestic as well as to cross-border transactions, this does have some consequences for the interpretation of the four basic freedoms. It means that contrary to the provisions of customs duties and measures having an equivalent effect, a measure of direct taxation having a restrictive effect does not constitute automatically a restriction in violation of the EC treaty. For customs duties and other import and export taxes such conclusion could be justified, because as a measure specifically designed to hit cross-border movement of goods they could be considered as intrinsically restricting. Rules of direct taxation however are not intrinsically designed to block cross-border transactions or flows of income. Such rules incidentally may have restrictive effects. This brings us back to the essential question: when are the restrictions resulting from such rules a violation of the basic economic freedoms, or what kind of justification is acceptable to excuse the restrictive effect of such rules?

It should be noted that the legal framework with respect to the free movement of goods has been more consistent with the concept of the fully integrated internal market, than the other basic economic freedoms. Indeed measures exclusively designed to block cross-border transactions were always deemed to constitute a violation. The only justification could be found in art. 30 of the EC treaty and the rule of reason would not apply to such measures exclusively applicable to cross-border transactions. To rules regulating domestic and cross-border transactions, the

ECJ would sometimes accept the defence that such rules did not have any protective effect for the domestic. Such decisions would be based on a market analysis of the measures sub judice. When a Member State would demonstrate that the litigated measure did not have any effect on competition, the measure would be vindicated. The analysis used in those cases was mostly derived from the market analysis used in anti-trust cases. Unfortunately such analysis cannot be used in cases of direct taxation. The impact of direct taxes on prices and wages and the analysis of market shares of foreign workers and foreign establishments in a national market would be too vague and too complicated to draw a conclusion with any certainty.

V. SHOULD TAX RULES BE TREATED DIFFERENTLY UNDER THE FUNDAMENTAL FREEDOMS?

In his sub report professor Lehner states several reasons why the application of the fundamental freedoms under the EC treaty should be treated differently. I respectfully disagree with my distinguished colleague for the following reasons.

The constitutional requirements for the justification of differences in treatment between taxpayers are more strict than the criteria to make differences between goods and services:

Lehner states his argument, based on no less authority than Klaus Vogel ( )(K. Vogel, Der offene Finanz und Steuerstaat, Heidelberg, 1991, p. 509), as follows: "Although tax policy allows the realisation of far reaching social and economic programmes, the individual burden, due to strict constitutional requirements in terms of equality and personal freedom, has to be justified according to the highest constitutional standards." I cannot agree more with this proposition, although it is very much founded on the principle of equality as it has been elaborated in a rather strict sense under the German constitution. If we look to other constitutions, like those of Belgium or the U.S. which also apply the principle of equality, we find that there is more leeway for the government to make distinctions. The major conclusion from this proposition however is that the criteria to make distinctions between individual taxpayers are very strict and that the standards for justifying infringements should be very high, which seems to make it more likely to find violations of the freedoms in the area of taxation, than in the other areas of law.

The other difference which is emphasized by Vogel and Lehner is that the free movement of goods do not directly address persons but prohibit restrictions on imports and exports of goods while the freedoms guaranteed under art. 30 e.s. primarily protect against discrimination, which is a constitutional right in terms of national legal systems. This seems to indicate that the non-restriction approach seems less appropriate than the non-discrimination approach in applying the basic freedoms of art. 39 e.s. in direct taxation.

The analysis above of restrictions and discriminations in indirect taxation has clearly demonstrated that at least in indirect taxation there is a strong prohibition of non-discrimination of goods and services under art. 90 EC treaty that is as well developed as for the freedoms under art. 39 e.s. Therefore for tax purposes there is no reason to make a distinction between the free movement of goods and the other freedoms.

Finally there is the proposition of Cordewener which states that there is no reason to make a distinction in the interpretation of the basic freedoms since all of them are tested on the basis of the concept of the fully integrated internal market.

Power of taxation is essential to government authority, because there is no government without a budget:

In the next chapter various levels of taxing power will be discussed. Not all taxing power is necessary to raise revenue and to govern. There are many constitutional arrangements whereby governments have no legislative power at all in matters of taxation and still have a regular budget which allows them to function as a government. All systems in which certain levels of government receive unconditional grants are of that type. In a certain way the European Union itself, which is often accused of spawning too much regulation and too much bureaucracy, depends for it funding on a VAT, a system where the Member States control the total volume of taxation by setting the rates. From the analysis of the ECJ case law it follows that the power of the Member States to raise revenue for their government functions has not been impaired in any significant way.

The primary right of taxation

The last argument is based on the finding that the state which causes the restrictions is not always the state responsible for removing the obstacle. This problem should be solved by answering the question which state has the primary right

of taxation, or which of several competing tax jurisdiction prevails, which in accordance with international tax rules may be either the state of source or the state of residence.

The ECJ lays the responsibility for the infringement of the freedoms now with the state of residence and then with the state of source. The logic behind these decisions is not always clear and this may have to do with the fact in which territory the dispute arises. The primary right of taxation would then be a good criterion for solving the case, but I fail to see how this would justify a different treatment of the basic freedoms in tax cases. In Gilly for instance the Court did not find a violation of the freedoms, precisely because the country of residence had no obligation to refund to its taxpayers any excess tax credits they may receive in the country of source. The recognition of the primary right to tax may change the locus for the responsibility to redress violations of the basic freedoms, but would not change very much the criteria for establishing such violations.

VI. WHAT ARE THE MINIMAL CONDITIONS FOR A FUNCTIONING NATIONAL TAX SYSTEM?

1. Tax sovereignty as the power to spend

Tax sovereignty expresses itself in many ways. The most important element in the pyramid of sovereignty is the power to spend. The power to spend is generally not seen as the power to tax, but it is this power which keeps a government running. In this respect the European Union itself is a convincing example of this power to spend. A large part of its revenues consist of VAT transfers from the Member States. Although the power to determine the exact volume of VAT still lies largely with the Member States, the EU has the power to spend a sizeable part of it which allows the European bureaucracy to function. Looking at the relative spending volume of the Member States on the one hand and the spending volume of the E.U. on the other, it is clear that this aspect of the tax sovereignty of the Member States is not in any danger.

2. Tax sovereignty as a composite of various powers to lay and collect taxes

The concepts of coherence, cohesion and territoriality that have been used by the governments of the member States can be seen as the expression of a larger concept, e.g. the right to operate a functioning national tax system. From the outset it should be noted that this question is only raised with respect to income taxes. With respect to indirect taxes such as VAT and excises much more severe limitations have been set on the taxing power of the Member States. Yet most Member States still conduct themselves as if they still had full taxing power over these taxes too, and to a large extent that is indeed the case. The question then is what levers of taxing power does a state need to operate a functioning system of income taxation.

Tax theory makes a distinction between various aspects of the tax system, which taken all together constitute the full and sovereign taxing power of a particular government. Taxing power (Steuerhoheit) can be divided into several subdivisions: territorial taxing power and objective taxing power. The objective taxing power can be subdivided into legislative taxing power, spending power and the power of tax administration. Taxing power can be subdivided in several ways, but essential is the idea that taxing power is not a monolith, but rather a composite consisting of various building blocks, which are apt to function in many different ways.

Tax sovereignty as the power to spend has already been discussed. In view of the relative volume of tax revenue spent by the Member States on the one hand and the European Union on the other, it cannot be seriously contended that the case law of the EC encroaches upon the spending power of the Member States.

Tax sovereignty as the power to administer taxes is not in doubt either. The national tax administrations of the Member States retain complete independence of action and do not receive any instructions from any E.U. office in Brussels. The ECJ does not scrutinise administrative practices. Cases brought before the ECJ deal with substantive tax rules not with tax administration. The only area in which administrative practices as such are under scrutiny, is the domain of harmful tax competition. This is an area however on which individual Member States have unanimously agreed and which is hardly object of any litigation under the basic freedoms.

3. Tax sovereignty as the power to legislate

The legislative taxing power can also be subdivided into several building blocks: (1) the power to set the tax rate, (2) the power to determine the rules of the tax base, (3) the power to determine the procedural rules for audits, assessment and penalties, (4) the power to regulate tax protests and tax procedures in courts, the power to organise the tax administration, (5) the power to negotiate and conclude tax treaties. The power to determine the rules of the tax base on its turn can be subdivided into (a) the power to set the essential structural rules for the tax base (definition of profit, depreciation, provisions etc.), (b) the power to steer taxpayer's behaviour by incentives or disincentives and (c) the power to determine the fundamental principles according to which tax law will be applied (equality, ability to pay, rules on tax avoidance and criminal rules on tax evasion).

The study issued by the European Commission in October 2002 on the effective burdens of business taxation in Europe has clearly established that the most decisive factor for determining the effective tax rate on corporations is the nominal tax rate. The structural rules determining the base for assessment were of less importance. However tax incentives and disincentives could cause substantial differences in tax burdens, in particular in the financial sector. The impact of procedural rules and rules of tax administration was not investigated but should be considered to be minimal on the effective tax burden. The same would apply to the rules setting the fundamental principles of taxation.

4. The impact of E.U. case law on the power to legislate in income tax matters

Over time the power of the Member States to legislate in income tax matters has been curtailed in several ways that are not connected with the ECJ case law on the fundamental freedoms. There are the provisions in the EC treaty against state aid which have an impact on the way tax incentives can be structured. It is clear that part of the tax policy making power of the Member States has been transferred to the Commission in the sense that the Commission has the negative power to object against certain forms of tax incentives. Until now the Commission has rather sparingly made use of this power in matters of income tax.

There is the Code of Conduct on Business Taxation. This Code has had a pervasive impact, not so much on the basic rate and base rules, but on the type of corporate income tax system that member States are allowed to operate. Many tax incentives designed to lure foreign investors have come under fire, have been abolished or amended beyond recognition.

There are the directives on cross-border mergers, dividends, interest, royalties and last but not least the about to be interest savings directive. These directives have changed fundamentally the tax rules of the Member States for cross-border reorganisations and cross-border flows of income. In particular with respect to the taxation of interest there has been a fundamental shift in international tax policy from the shared taxation between source and residence countries to the exclusive taxation in the country of residence.

And then there has also been the ECJ case law on the fundamental freedoms in taxation, which is in fact only part of a much wider movement of case law in general on the basic freedoms. The most important element of tax law making power, the determination of the tax rate, has rarely been the subject of ECJ case law. The ECJ has always respected differences in rates and left them untouched, except when a rate differential would discriminate against non-residents. That is not surprising however, since in the abundant case law on indirect taxes such rate differentials have always been struck down by the Court. The power to determine the nominal tax rate has been rarely touched by the ECJ.

With respect to the basic rules determining the tax base the ECJ has also been very cautious to intervene. Rules determining business profits, depreciation, stock valuation have hardly been touched by the ECJ. The ECJ did touch on rules regarding deduction of pension reserves, personal deductions and allowances definition of taxable event (Lasteyrie du Saillant) and deduction of expenses for business purposes . However in all these cases the ECJ did not interfere with the rate or the amount of the exemption or deduction. It has always left the Member States completely free to determine these elements of the tax base; in that sense it left the tax law making power of the Member State always intact. The only objection was always with respect to the restrictive or discriminatory effect of the specific provision on a cross-border situation.

The effect of these decisions very often was to reduce the effect of what the national tax administrations almost always perceived as a measure of defence keeping up revenue. So far however all these cumulative losses of revenue have not impaired the revenue raising capabilities of the Member States. The dramatic fall in revenue from corporate income tax in 2003 and 2004 in the Federal Republic of Germany was of the governments own making when it introduced

fundamental changes to its corporate income tax system. This had nothing to do with the case law of the ECJ. The steady decrease of revenue from corporate income tax in some Member States had its cause not in the ECJ case law but in the steady decline of nominal tax corporate income tax rates over de last decade. Not in all, but in many cases the measure struck down by the ECH was just a revenue raising device that went way beyond the anti-abusive effect for which it was officially intended.

As for the other rules determining the tax base, tax incentives normally do not fall within the fundamental freedoms and are rarely struck down by the ECJ. Only when they are discriminatory, the discriminatory effect will be exposed.

As stated above the ECJ has been most active in striking down restrictive or discriminatory provisions, that have been justified repeatedly by national tax administrations as anti-abuse rules. In many cases however it was clear that the measure went far beyond what reasonably could be constructed to be an abuse. In many cases the mere fact that a particular transaction or flow of income would escape national taxation would be considered tantamount to abuse, even when the same transaction or a comparable amount of taxable income would be taxed in another Member State.

5. Conclusion: impact of the ECJ case law on the capability to raise revenue is weak

The general conclusion is that, if the impact of the case law of the ECJ on the capability of the member States to operate a functioning national tax system is not negligible, it certainly has not impaired the capability of the Member States to operate a functioning national tax system. The control of the Member States on the nominal tax rates, and on the rules determining the essential structure of the tax base has not been eroded. The control of the rules determining audits, assessment and litigation procedures remains unchallenged. Only in the area of tax incentives and disincentives the discretionary power of the Member States has been considerably reduced. This is the result however not of the action of the ECJ under the basic freedoms, but of the rules with respect to state aid and harmful tax competition.

The only area in which the ECJ has been restricting the discretionary power of the Member States is in the restrictive and discriminatory cross-border effects of more and more national tax rules. These decisions have irked national tax administrations for several reasons. One important reason is the presumption that due to these decision Member States are losing revenue. So far there have been no accurate estimations of the revenue lost to the Member States. Taking into account the actual volume of revenue raised by the Member States these charges seem for the time being unfounded or at least inadequately documented. It should be noted that the role assigned to the ECJ under the EC treaty, inevitable obliges the Court to play a negative role vis à vis national tax systems. Member States could considerably raise revenue on cross-border operations in the E.U. and enhance the effectiveness of their national tax systems, if they would agree to take positive legislative action.

The second reason is that the ECJ has consistently rejected anti-abuse measures of a general nature, that would have a restrictive or discriminatory effect beyond the actual cases of abuse. One important factor in these decisions has been the implicit position of the ECJ that, when a transaction or a particular category of income would escape taxation under the jurisdiction of Member State A, such escape should not be considered as an abuse, if the same transaction or category of income would be subject to tax in another Member State B. These decisions implicitly seem to suggest that the relevant jurisdiction to judge whether there has been an abuse is the European internal market as a whole, and not just the national tax jurisdictions , like national tax administrations almost naturally are inclined to assume. In any case, it cannot be denied that the ECJ has made the work of national tax administrations much more difficult, because it is always much easier to fight abuses by way of general rules that operate as a machine gun killing anyone in sight, than by specific decisions made on a case by case basis, needing a sniper who is not allowed to make a mistake. However this increasing difficulty in fighting abuses cannot by any stretch of imagination be considered to impair the operations of national tax systems as a whole.

VII. PROPOSALS TO IMPROVE THE FUNCTIONING OF NATIONAL TAX SYSTEMS IN THE LIGHT OF THE ECJ CASE LAW

1. The remaining unresolved questions

The conclusion from the foregoing analysis is that the case law of the ECJ does not (yet) seriously impair the capacity of Member States to operate effective national tax systems. However this answer does not resolve the basic questions raised in the sub reports:

(1) Is it necessary, as stated in the conclusions of Lehner to continue to make distinctions in the application of the non-restriction principle?

(2) How do we find or do we need to find a criterion of substance that allows Member States to make a distinction between non restrictive and restrictive tax rules that are non discriminatory, other than de minimis rules?

(3) Should we accept wider justifications for infringements on discriminatory provisions with restrictive effect under a more general use of the rule of reason and if so which justifications should we accept?

(4) Is it true, as Lehner seems to imply in his conclusions, that the ECJ decides political questions and does not apply community law in accordance with the EC treaty?

(5) Is it necessary to achieve the internal market that the ECJ case law be supplemented by legislative action in the area of "tax harmonisation"

(6) What is the relevant jurisdiction for the application of the four freedoms: is it the national tax jurisdiction or should the internal market be considered as one system?

2. The necessity to continue to make the distinctions in the application of the non-restriction principle:

The systematisation undertaken by Lehner making a distinction in the application of the basic freedoms is a very useful exercise, which refines the application of the fundamental freedoms. The restrictions and discriminations operate indeed differently with respect to (a) rules that regulate exclusively internal domestic situations, (b) rules regulating exclusively cross-border situations and (c) rules regulating at the same time internal domestic and cross-border situations. These distinction, may give additional guidance in resolving specific cases. However the over-arching concept for testing whether there has been a violation remains the concept of the fully integrated internal market and what is necessary to achieve it. Finally these distinctions, although helpful to decide specific cases, do not resolve the basic questions of where to draw the line on non-discriminatory restrictions in taxation and which public interests to accept as justification for certain infringements.

3. The criteria of substance to make the distinction in the field of non-discriminatory tax restrictions:

Until now and in spite of all the sub reports we have not been able to come up with a distinctive criterion to make the difference in non-discriminatory restrictions resulting from tax rules. This is the privileged domain of double tax burdens, e.g. the combination of non-discriminatory rules that are applied cumulatively in two different tax systems ( )(The only tax example so far has been Futura Participations). The only criterion that has been found outside the area of taxation has been the Keck doctrine. This doctrine however does not so much provide for a criterion between rules with a restrictive and a non-restrictive effect, but excludes some rules, the internal selling arrangements, from the application of the basic freedoms, because they are deemed not to have an effect on cross-border operations that is significant for the establishment of the internal market.

As far as taxation is concerned we should remember, that tax in itself is always a restriction on freedom of transactions, including cross-border transactions, but that does not mean that any tax rule can be considered as a restriction on access to the market. In order for a tax measure to be qualified as a prohibited restriction the tax rule must have the effect "of splitting up the internal market into several domestic markets, and the factors determining the answer must be primarily economic ones". This may not be a very practical criterion, but at least it is theoretically a correct one to draw the line somewhere. It is also a criterion that is less remote than the "rule of remoteness". It could be argued for instance that the rules for deduction of business expenses for non-resident artists in the Gerritse case did not effectively split the European market into a German and a Dutch market for artists. I.e. the concept of splitting the market into separate markets for particular transactions gives more substance to the concept of market access and the restrictions inhibiting such access. Contrary to product markets it is much more difficult to measure market penetration of foreign workers and foreign establishments, but it is entirely consistent with the idea of a fully integrated market to make a reasonable attempt to calculate the impact of some obstacles on market access and competition. In doing so the concept of "splitting the market" could exclude a number of cases which in the past have considered to be infringements of the freedoms.

4. Widening the justifications of infringements

The other side of the coin in making a distinction between violations and non-violations of the EC treaty is of course the side of justification in case a violation has been established. If the proposition of Cordewener is to be taken seriously, that all freedoms should be tested on the basis of the over-arching concept of the fully integrated internal market, the way in which violations of the basic freedoms could be justified should also be the same for all freedoms, regardless of whether they find their origin in a discrimination or in a non-discriminatory restriction. This would mean prima facie mean that the differences in grounds for justification between discrimination and restriction should be lifted, i.e. that all infringements of the basic freedoms could be justified either by public policy goals specifically mentioned in the EC treaty, or by justifications that are to be constructed under the rule of reason.

The analysis of the earlier ECJ case law in indirect tax cases has made it clear that the rule of reason doctrine could not apply and has never been applied to rules of internal indirect taxation, that were also applicable to cross-border operations. Only those tax rules that were exclusively intended to tax cross-border movements of goods came within the scope of art. 28 EC treaty. As a consequence the justification of the rule of reason was as a matter of principle never be applicable to litigation under art. 90 dealing exclusively with discrimination cases. We have criticised this sharp distinction however and one of the consequences of this criticism is that the rule of reason may also spill over in indirect discrimination cases.

In the Cassis de Dijon case establishing the rule of reason it was explicitly stated that a measure could only be accepted on the condition that it is applicable without distinction to domestic and imported products. A measure which makes a distinction between domestic and imported products, even under the rule of reason in Cassis de Dijon, can only be justified on grounds mentioned in art. 30 of the EC treaty. The analysis of the ECJ case law has abundantly shown that many cases of restrictions are cases in which a distinction is made between resident and non-resident taxpayers, which is precisely the distinction targeted in Cassis de Dijon. In cases of indirect discrimination however justification under the rule of reason have been accepted, including items of public policy interest not specified in the EC treaty.

In allowing the rule of reason to justify restrictions based on indirect discrimination one should be aware however that, such justification of indirect discrimination goes against the heart of the economic concept of the internal market,

because it justifies de facto unequal economic treatment. Not without reason does Cordewener emphasize that the criteria of judgement must be “primarily economic ones”. Allowing for tax purposes factual different economic treatment under the cover of a single non-discriminatory legal rule threatens to empty the non-discrimination principle of its economic substance. Therefore in elevating items of public policy to justifications for the infringement of the basic freedoms, the choice should be made very carefully.

This can be illustrated with the reactions of the Dutch and German government to the decisions of the ECJ in Bosal and Lankhorst Hohorst. In both cases the difference in tax treatment was based on a rule which de facto put the non-resident taxpayers from other member States at a disadvantage. Both were cases of discrimination resulting in a restriction of the right of establishment. The effect of the measures were indeed to split the internal market into a domestic market on the one hand and a foreign market on the other, which goes against the heart of the concept of the internal market. The justifications brought forward by the Member States were mainly: loss of revenue, over-all economic coherence of the national tax system and fighting abuse.

If the loss of revenue or the support of the over-all economic coherence of the tax system (balancing plusses and minuses) had been legitimate justifications, the Court would have been obliged to accept the justifications and allow the infringements to take place. In most cases which have been lost by the Member States, these arguments were real. There has been some loss of revenue and there has been some impairment of what could be called the economic coherence of the tax system. However with, very few exceptions, the restriction of foreign taxpayers in their access to the market of a particular Member States has also been very real. Accepting these grounds of public policy would defer for a very long period or even indefinitely full integration of the internal market in matters of direct taxation..

With respect to the argument of abuse the Court has been willing to accept this justification, but in most cases the argument has failed, because the measure did not meet the requirement of proportionality. As already indicated these decisions have made life more difficult for national tax administrations but not totally impossible.

The dangers of allowing too many new justifications on public policy grounds are illustrated by the negative reactions of the Member States to their defeats in Luxemburg. Member States have maintained the non-deduction of interest and the thin capitalisation rules by extending them to all domestic taxpayers. In one stroke we now have restrictive measures that are non-discriminatory. This illustrates very well that the measures are in the first place designed to raise revenue and not to punish defrauding taxpayers. Although it could be argued that the anti-abuse argument would most likely provide the public policy justification for these measures, it is also almost certain that the extension of the measure would not stand the proportionality test.

The argumentation of the Member States used in the most recent case law shows that these Member States do not have the slightest interest in the conditions necessary for the achievement of the internal market. Their only interest is balancing deductions, exemptions and income within the sphere of their national tax jurisdiction, keeping up revenue in general, and fighting what they qualify as abuse and tax evasion. These are all very legitimate interests for a national tax administration to pursue, but as the case law has abundantly shown, many times the pursuit of these interests results into double taxation, obstacles for access to a national market or unequal terms of competition between foreign and domestic taxpayers. Allowing a decline of revenue or the over-all economic coherence of a tax system to justify restrictions would be tantamount to permit almost any national tax measure resulting in such restrictions. The only brake on the cross-border taxing power of the Member States would then be the proportionality principle. This brake is to weak to keep the fundamental freedoms in robust condition.

Yet there is one anti-abuse concept that could be developed to shore up the defences of the Member States and that is the concept of abuse of Community law. This concept has been established in several non-tax cases, but has rather sparingly been mentioned in taxation. In the Daily Mail case however it was stated clearly by the advocate general: “that Community law offers no assistance where “objective factors” show that a particular activity was carried out “in order to circumvent” national legislation. The fact that the essential activities of a company take place on the territory of a Member State, other than that to which it intends to transfer its central management may not be ignored. Such circumstances may in certain cases, constitute an indication that what is involved is not a genuine establishment”. Although the Daily Mail decision on primary establishment may be outdated, the remarks of advocate general Darmon on the effect of tax panning, certainly are not. It is intriguing that the Member States have not tried more often this anti-abuse doctrine, which the ECJ itself has developed, rather than their national anti-abuse views.

5. Does the ECJ take political decisions which should be left to the legislator

The preceding discussion on widening the grounds for justification implicitly also settles the question on whether the ECJ is playing politics and transgressing its judicial role under the EC treaty. There is indeed a growing number of tax authors who claim that the ECJ is acting as a legislator, often this proposition is linked to the claim for a wider grounds of justification such as the economic coherence of the tax system and a wide concept of abuse, which would take more into account the legitimate national tax interests of the Member States.

My position is that on the basis of the texts of the EC treaty the ECJ is exactly fulfilling the role which the founding fathers intended it to fulfil. On the contrary, if the ECJ would create a growing number of new grounds for justification, widening the discretionary power of the Member States for "justified" infringements of the EC treaty, then indeed it would play the role of a political court.

With hindsight there can be no doubt that there are a considerable number of national tax rules in the Member States that constitute effective obstacles on the way to a fully integrated market. So the Court had not choice but to cut down some of the national tax rules. The ECJ certainly did not rush into the area of income taxation. Its first decision came when it was in business for over a quarter of a century, and its principles were already well established in other areas of law. Its first decisions may have been surprising to the tax community, but this had certainly more to do with the fact that the tax community did not know very much about community law, than that the ECJ did not know any tax law.

For its guidance in tax matters it had the text of the EC treaty, which is not a text of tax law at all. It rather resembles a text containing broad principles which need a lot of interpretation and the application of which may change, like constitutional principles, with time and changing opinions. These are not the texts of a Tax Code, which in many Member States are traditionally applied rather strictly. The only texts to deal directly with tax law are rather precise and do not leave very much discretion to the Court: all customs duties should be abolished as well as all quantitative restrictions and measures having the same effect. All discriminatory taxation on products was prohibited. These texts on taxation are clear and precise and do not leave very much to the imagination. They are also quite radical and restrictive with respect to what was still left to the Member States in matters of indirect taxation.

The mandate of the Court with respect to the fundamental freedoms is to apply the EC treaty. That treaty contains also some exceptions to these freedoms. It does not contain any indication that the ECJ itself would have the power to enlarge these exceptions. It has to work with the tools put at its disposal in the EC treaty. With respect to direct taxation there is also the commonly accepted position that the European Union does not have any power with respect to direct taxation, except for the possibility to legislate in what is necessary for the achievement of the internal market. However, in the area of indirect taxation, in which art. 93 provides for an explicit mandate to harmonise tax systems, the basic principles guiding the ECJ in its decisions have not been different from the principles applied in direct taxation. The reason of this similarity in Court action is that the achievement of the fully integrated internal market through the implementation of the basic freedoms requires two movements, one negative and another positive. In the structure of the treaty the negative movement, e.g. abolishing the restrictions and discriminations has been left primarily to the Court, although legislation has not been excluded, while the positive movement is the exclusive domain of the legislator. The fact that so far the European legislator has not played its role as an engine of positive integration in the treaty set up, does not justify the ECJ stop playing its role in the process of integrating the market. This is all the more so because it is precisely this absence of legislative action by the Council of Ministers, which, to a large extent, is responsible for the present uncomfortable position of the national tax administrations. The ECJ referred to this explicitly in de Groot, when it stated that "Community law lays down no specific requirements with regard to the way the State of residence must take account of the personal and family circumstances of a worker, who, during a particular tax year, received income in that State and in another Member State" However these circumstances must not constitute a discrimination or an obstacle. Obliging the Court to accept wider "passe-partout" justifications to take account of the national tax interests of the Member States, is tantamount to ask the Court to remedy the absence of necessary legislation that could solve most of the problems confronting national tax systems, i.e. asking the Court to play a political role that the treaty does not provide for it. The conclusion is that the ECJ is not transgressing its mandate under the treaty by continuing to eliminate restrictions and discriminations. The problem is that the legislator has not been doing its job, which Lehner has said is essential to achieve the internal market. It is not for the Court however to stop doing its job because the legislator is not doing his.

6.The necessity to supplement court action by legislative action

The discussion on the role of the Court has made it clear that I fully agree with Lehner's proposition that "in order to achieve this aim (the fully integrated internal market) the basic freedoms have to complemented and supported by measures of harmonisation in the field of direct taxation". The question is what type of harmonisation is needed in direct taxation to achieve the fundamental freedoms.

Harmonisation has a bad reputation in the European Union. Partly this is because originally harmonisation was considered to mean making all national legislation uniform, partly also because some people oppose any "harmonisation" in the field of direct taxation. It should be made clear from the outset that harmonisation to achieve the fully integrated market does not require that all or most tax rules determining the tax base should be made uniform. In fact most recent cases illustrate that harmonisation in the sense of making rules uniform in all Member States does not resolve the questions of integration. If all Member States were to adopt the same rules with respect to the deduction of interest charges as the Netherlands in Bosal, or the same rules with respect to thin capitalisation as the German Federal Republic in Lankhorst-Hohorst, or the same rules with respect to exit taxes as France in Lasteyrie du Saillant, all problems of discrimination and restriction would remain.

The harmonisation that is needed relates to new rules between Member States eliminating the incompatibility of national tax systems with respect to cross-border transactions and determining how far the national tax jurisdiction will reach and where the jurisdiction of the other Member State will begin, so as to eliminate the obstacles and at the same time to allow Member States to maintain control over the tax situation. In many cases these rules will imply a new distribution of revenue among Member States. This can be illustrated by the three examples mentioned above. In Bosal the economic question was whether it was justified that dividends were taxed in one Member States, while interest charges are deducted in another Member State. Some Member States like Belgium do allow such deduction, other Member States like the Netherlands do not. Member States have to agree on the solution. Maybe interest should be deductible in the Member State in which the dividends have been taxed, maybe not. Whatever the solution should be it should not result in de facto double taxation on cross-border dividends, because that is the imperative dictated by the internal market.

The same reasoning applies to thin capitalisation rules. Here the solution is a little bit different, because it turns on the question whether Member States will accept the equivalence of each other's tax systems. Automatic thin capitalisation rules start from the proposition that all foreign tax systems are bad, regardless how heavy they tax interest income. This proposition is clearly a violation of the concept of the fully integrated internal market, which presupposes the equivalence of national tax systems. Between Member States general and automatic thin capitalisation rules should not be needed. That equivalence in tax systems may not yet be realised, with the new entry of several Member States with very low tax rates. But again it is up to the Member States to decide what to do about this. Restricting the action of the ECJ until the Member States decide unanimously to agree on this question would be tantamount to ask the ECJ to allow for the time being most restrictions and discriminations in taxation, without any other justification than that the Member States cannot agree on a common solution by legislation.

One last example is the exit tax. Here too the underlying question is one of tax jurisdiction. Several solutions are possible including one in which a Member State reserves the right to tax for a limited period of time, when there would be no tax in the new country of residence, so as to exclude any possibility of abuse. Each solution however has to respect the fundamental freedoms and should exclude any double taxation, or any significant burden at the time of crossing the border.

These examples show that the harmonisation needed is not so much uniformity of rate and base rules, but common rules on dividing the tax base in cross-border situations and common rules accepting that taxation in another Member State is equivalent to taxation in the state of residence with all consequences for credits and exemptions for the taxpayer. Recommendations for this type of harmonisation were already made in the Ruding report in March 1992: "removing those discriminatory and distortionary features of countries' tax arrangements that impede cross-border business investments and shareholdings". In twelve years the Member States have managed to put into place one single directive on interest and royalties.

7. Which market is the relevant market for the application of the basic freedoms?

Finally we come to the core question of which market is the relevant market for the application of the freedoms: is it the national market of each Member State, or is it the internal market seen as one economic and legal territory. It is the question of the Kästchengleichkeit raised by Dieter Birk or the question whether we play snooker on different national tables or on one single European table. The suggestions made in the previous paragraph to establish new rules

eliminating the incompatibilities of national tax systems and establishing new rules clarifying the tax jurisdiction on cross-border operations would go a long way of merging the many national snooker boards into a single European one.

However with respect to the economic coherence of national tax systems and the fight against abuses there is one other important step that needs to be taken. In order to apply the fundamental freedoms correctly in a fully integrated internal market Member States have to abandon the perimeter of their national territories and to look what happens to the taxpayer elsewhere in the European market and Member States have to accept his tax treatment in other Member States as equivalent of the tax treatment in the other Member States. A similar move has been made in the liberalisation of the freedom to provide financial services, where it has been impossible to achieve full legislative uniformity through harmonisation. Member States have accepted the rule of equivalence. This means that the standard to use for the fundamental freedoms as they are applied to national tax rules on cross-border operations is the fully integrated internal market as a whole and not each of the national markets.

Most tax expert will agree that to this day national income tax systems are far from equivalent in particular with respect to the nominal rates, which have the biggest impact of the effective tax burden. It should be noted that in 1992 the Ruding report also recommended a minimal tax rate as one of the conditions for a internal market. At the time it made the mistake to propose an absolute minimum rate of 35%, but today a relative rate differential from the average weighted tax rate of all Member States would go a long way to establish such equivalence. However again and again it is for the Member States to take such action.

VIII. GENERAL CONCLUSION

The whole discussion with respect to the case law of the ECJ in income tax matters can be summarised as follows: should the ECJ slow down its drive for integration of the national tax systems through the application of the basic freedoms by developing new principles similar to the Keck doctrine, whereby certain national tax rules would escape from the application of these freedoms, or by widening the justification for infringements by accepting an economic concept of coherence of national tax systems or by widening the concept of abuse?

The answer to this question should be a firm no, for several reasons. Lehner's analysis has made it clear that it is very difficult to find domestic tax rules that operate in the same way as internal selling arrangements, so that the Keck solution cannot be applied in the area of taxation.

Equal application of justifications to all freedoms can be accepted, because Cordewener has demonstrated that the controlling concept in the basic freedoms is the fully integrated internal market, which means that these freedoms should be interpreted along the same lines also for justification purposes.

Widening the justifications by allowing concepts such as economic coherence of national tax systems or a wider and automatic concept of abuse to take more into account "the legitimate national tax interests of the Member States" are unacceptable, because of three reasons: (1) it has been demonstrated that many of the national rules struck down by the ECJ were effective obstacles and discriminations splitting the European market into separate national markets, (2) most of the problems resulting from these decisions as well as other legitimate national tax interests can be taken care of by the Member States themselves, on the condition that they agree on certain new rules that would allow their national tax systems to function in the internal market, (3) asking the ECJ to accept new wide and general justifications would in fact boil down to either stopping the ECJ from reaching any further decisions, or to allow it to some decisions in favour and some against the Member States on the basis of the new grounds for justification, whereby the criteria for such decisions would be totally unclear, thereby forcing the ECJ in the role of taking the discretionary decisions which are precisely the privilege of the legislator.

The only way for the ECJ to act is to act as a court that is on the basis of the existing treaty rules making a close analysis of the impact of certain measures on effective access or on competition in the market. In making a closer analysis of the real effect on access and competition the Court would certainly achieve a more realistic approach to certain forms of restriction or discrimination that hardly split the single European market into separate national markets.

Finally the concept of abuse of community law should be revived in the area of income taxation. This is a concept which the Court itself has developed in other areas than taxation, but which also could be put to good use in income taxation. This concept will not give protection however to cases of double burdens and cases where the taxpayer has been subject to an equivalent tax burden inn another Member State.