Fundamental freedoms and national sovereignty in the EU

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

A. Would it be possible for tax purposes to make a distinction in the application of the non-restriction principle between (i) rules that merely intend to regulate purely internal domestic tax situations, (ii) rules intended to regulate both internal domestic and cross-border tax situations and, finally, (iii) rules intended exclusively to regulate cross-border tax situations. Which approach is in your view necessary to establish a fully integrated market?

B. Would it be possible for the application of the basic freedoms to make a distinction between the application to non-tax issues and the application to tax issues thereby setting the tax system apart, or should in your view the basic freedoms as a matter of principle apply without any distinction related to the subject matter?

Preliminary remarks

The distinction between restrictions which are discriminatory and restrictions which are not discriminatory has to be set apart from the common differentiation of basic economic freedoms in their application as *either* principles of non-discrimination or principles of non-restriction. Insofar the report follows the convincing systematizations and clarifications given in report no. 1[1] by *A. Cordewener*.

The development of the fundamental freedoms from a concept of non-discrimination (national treatment) which is framed purely in terms of equality rights into a concept of non-restriction which reflects elements of liberty rights[2] is very important. However this „difference" must not be overemphasized. Report no. 1 clearly points out that the non-discrimination test has its original scope of application in inbound situations restricting the guarantee of national treatment to inbound situations[3]. But the report also points out, that the ECJ, in the large majority of outbound cases, although formally speaking of „restrictions" or „hindrances", in fact applies a *non-discrimination test* by comparing the outbound activity with a purely internal activity. Therefore *A. Cordewener* suggests to speak of „discriminatory restrictions" on the one hand and „restrictions in a closer sense" (or „real restrictions") as far as situations are concerned where national measures are non-discriminatory (in the sense that they treat cross-border activities and domestic activities alike) but nevertheless form an „obstacle", a „restriction" to cross-border situations „since they make it difficult for products and factors of production to leave one national market and / or enter another[4]." Another very important statement he makes is that the basic freedoms do not contain either a prohibition of discrimination or of (non discriminatory) restrictions, „but they comprise a non-discrimination component *and* a non-restriction component" although there are important differences between these two components[5].

A) Would it be possible for tax purposes to make a distinction in the application of the non-restriction principle between (i) rules that merely intend to regulate purely internal domestic tax situations, (ii) rules intended to regulate both internal domestic and cross-border tax situations and, finally, (iii) rules intended exclusively to regulate cross-border tax situations. Which approach is in your view necessary to establish a fully integrated market?

According to the preliminary remarks the question which refers to the "application of the non-restriction principle" is understood to include both aspects of non-restriction: the concept of „discriminatory restrictions" on the one hand and „restrictions in a closer sense" (or „real restrictions").

Rules that merely intend to regulate purely internal domestic tax situations (i) and rules intended exclusively to regulate cross-border tax situations (iii) tend to cause *discriminatory* restrictions whereas rules intended to regulate *both* (in a sense of not differentiating) internal domestic and cross-border tax situations (ii) may turn out to be *non discriminatory* restrictions or restrictions in a closer sense (real restrictions).

I) Systematization with reference to the scope of application

1) Rules that merely intend to regulate purely internal domestic tax situations (i)

Purely internal tax situations are considered to be *domestic* activities , investments or payments of *residents* only. Therefore rules that merely intend to regulate purely internal domestic tax situations are rules which are not or only by modifications applicable to cross-border situations (inbound or outbound). In other words: the personal and material scope of application of a rule has to be restricted to purely internal domestic tax situations in order to fit into this category.

a) Unlimited tax liability (*no* restriction to purely domestic tax situations)

Due to the fact that ordinary tax liability is unlimited tax liability which encompasses world wide income, national tax law, in its general outline and in its general scope of application is not restricted to purely domestic tax situations. However, there is an exception for countries (usually not within the EU[6]), which restrict taxation of residents to income from domestic sources only.

b) Exceptions (rules applicable to purely domestic tax situations)

The extensive scope of application which reflects a fundamental feature of unlimited tax liability is restricted to purely internal domestic tax situations in rare exceptions only as far as domestic tax law is concerned. Restrictions to the

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[1] *A. Cordewener,* report no. 1.
[2] See *Lehner,* EC Tax Review 2000, pp. 5 ff., 9.
[3] *A. Cordewener,* report no. 1 p. 7.
[4] *A. Cordewener,* loc. cit. p. 4 et seq.
[5] *A. Cordewener,* loc. cit. p. 5.
[6] An exception should be made here with regard to the traditional French corporate income tax. Cf. *IBFD,* European Taxation Database (3 April 2004), Corporate Taxation (summary) (= European Tax Handbook), France, chapter 1.3.1: "In contrast to rules prevailing in most OECD countries, the French corporate tax is based on a territoriality principle, whereby tax is only due on business income generated by enterprises (a permanent establishment, a dependent representative or a 'full commercial cycle') operating in France. Accordingly, business income realized through enterprises operating outside France is not taken into account for French tax purposes nor are losses pertaining to such enterprises. It should be noted, however, that worldwide tax liability applies in the case of passive investment income." For more details, cf. *IBFD,* Taxation of Companies in Europe, France, chapter 2.1., nos. 185 et seq.

broad scope of application caused by double taxation agreements are excluded from this category because they apply to cross-border tax situations[7].

Exceptions from the extensive scope of application of domestic law can be found

- whenever there are special cross-border rules (category (iii)[8]) which have the effect that, as a matter of fact, the general rule is restricted to merely internal situations. Examples taken from German income taxation are the unlimited loss compensation across different sources of income (given the restrictions established by virtue of Sec. 2 a ITA on foreign loss compensation), and Sec. 6(5), 1st sentence ITA as well as 12 CTA (both provisions restrict the preservation of hidden reserves to internal transactions but, as a rule, disallow the "export" of hidden reserves); or

- if the general rule is specifically restricted to purely domestic tax situations (e.g. Sec. 1 V Reorganizations Tax Act (RTA)which, to a very large extent restricts the scope of application of the RTA to companies which are subject to unlimited tax liability; rules granting personal allowances only under the condition that both the payer and the recipient are subject to unlimited tax liability[9]; the rules which govern group taxation are, according to Sec. 14 CTA, less restrictive to purely domestic tax situations than they where before the last German tax reform).

In both cases the general rule is only indirectly restricted to purely domestic tax situations. Rules establishing limited tax liability do not have the effect of limiting general rules to purely domestic tax situations. Although they restrict the application of many general rules to residents only, they do not (directly or indirectly) restrict these general rules to purely domestic tax situations.

c) Interim result

As a general rule or standard which is reflected in the principle of unlimited tax liability, the application of national tax law is not restricted to purely internal domestic tax situations. But there are few exceptions. These exceptions are not in favour of the resident taxpayer because
- they do not restrict the extent of tax liability as far as worldwide income taxation is concerned (although double taxation is alleviated by the credit method);
- they do restrict certain tax advantages to domestic activities of residents only.

2) Rules intended to regulate both internal domestic and cross-border tax situations (ii)

Rules intended to regulate *both* internal domestic and cross-border tax situations are considered to be rules which do not differentiate between domestic and cross-border tax situations. Insofar rules will be examined that regulate *both* internal domestic and outbound tax situations (a) as well as rules that regulate *both* internal domestic and inbound tax situations (b). Rules which differentiate between purely domestic and cross-border situations are discussed in groups (1) and (3).

The rules discussed in this group (a) and (b) form the major part of hindrances which may be caused due to equal treatment (non-discriminatory restrictions) in the state of residence as far as domestic and outbound activities are concerned or due to equal treatment (non-discriminatory restrictions) in the source state as far as domestic and inbound activities are concerned.

a) Rules that regulate both internal domestic and cross-border tax situations without differentiating between inbound and outbound activities

These rules do not differentiate according to the principles of unlimited and limited tax liability. They establish equal treatment of *domestic* and cross-border tax situations but nonetheless may cause hindrances from a *two* state perspective: either by burdening the cross-border activity with demands which do not exist in the state of origin or by cumulating demands i.e. by having the taxpayer cope with same, comparable, overlapping or different requirements in both states.

A main categorization of these rules which are equally applied to domestic and to cross-border situations can be made by differentiating between *substantive* and *procedural* law. As far as substantive law is concerned these are, e.g.
- double taxation
- rules relating to the determination of profits,
- rules establishing liability for taxes due,
- private law, especially company law requirements.

Procedural rules are more relevant than substantive rules in this context of hindrances, which might be caused by equal treatment in one state due to accumulation of same or comparable demands of the other state. Procedural rules in this context are e.g.
- obligations to cooperate with and to give information to the tax authorities,

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[7] *See* infra at B) II) 2) a) aa) = p. 24.
[8] *See* infra at 3) = p. 11.
[9] An example is Sec. 10 (1) no. 1 ITA, regarding the deduction of alimony payments to the taxpayer's divorced spouse; this restriction gave reason to the *Schempp* case pending before the ECJ (C-403/03; preliminary ruling requested by BFH decision of 22 July 2003, XI R 5/02, BStBl. II 2003, 851 = IStR 2003, 783).

- accounting duties, including obligations to use a certain language or certain book-keeping rules, to store the books and to deliver them to the tax authorities,
- obligations to produce and support documents (transfer pricing),
- rules governing investigation procedures of the tax authorities,
- matching or disparate assessment periods.

b) Rules that regulate both internal domestic and inbound tax situations

aa) Advantages

Advantages for persons who are subject to limited tax liability result from the application of rules which are not restricted to residents (however, some of them only if additional requirements are met like, e.g., granting personal allowances to frontier workers according to Sec. 1 III ITA; equal treatment of permanent establishments and resident companies; other advantages which result from the application of non-discrimination principles as far as national treatment is concerned).

bb) Hindrances

Taking into account taxation of non residents in their state of residence, taxation of inbound activities according to the rules of limited tax liability causes double taxation even if the source state would tax domestic activities of residents the same way (hindrances caused by equal treatment by the source State).

c) Rules that regulate both internal domestic and outbound tax situations

These are rules which materialize the general principle of worldwide taxation without being restricted to purely domestic tax situations[10].

aa) Advantages

The uniform application to both internal and cross-border situations is advantageous to the taxpayer where he is allowed to deduct expenses which are effectively connected to his income-generating activity, irrespective of whether he generates his income at home or abroad. Likewise, personal allowances and other advantages are generally granted without differentiations between internal domestic and outbound activities[11].

bb) Hindrances

The rules according to which worldwide income is taxed in the country of residence cause hindrances or obstacles to outbound activities due to the effect of double taxation although domestic activities are taxed the same way by the state of residence (hindrances caused by equal treatment in the State of residence).

3) Rules intended exclusively to regulate cross-border tax situations (iii)

As far as inbound *and* outbound cross-border situations are concerned, double taxation agreements represent the major part of this group[12].

Rules intended to regulate cross-border *outbound* tax situations exclusively are represented by CFC legislation, by rules on exit taxes including regimes of an extended limited tax liability (e.g., in Germany under Sec. 2 External Relations Tax Act, for nationals during a 10-years period after exit), by transfer pricing adjustment rules and by provisions which are exceptions from the extensive scope of application of domestic law[13].

Rules intended to regulate cross-border *inbound* tax situations are those which establish and specify (for Germany, cf. §§ 50 et seq. ITA) limited tax liability.

II) Distinctions in the application of the non-restriction principle

The core problem of *non-discriminatory* restrictions is addressed by rules intended to regulate *both* internal domestic and cross-border tax situations [2.a.(ii)]. These are non-discriminatory restrictions which block effective access to the market [2.(i)] or non-discriminatory restrictions which fall into the category of ‚internal selling arrangements' [2.(ii)].

The majority of rules which block effective access to the domestic or to a foreign market is represented by those which merely intend to regulate purely internal domestic tax situations [2.a.(i)] and by rules intended exclusively to regulate cross-border tax situations [2.a.(iii)]. These two categories have been comprehensively dealt with by the ECJ

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[10] *See* supra 1) = p. 4.
[11] *See* supra 2) b) aa) = p. 8; From the German perspective, one of these exceptions is the non-deductibility of school fees paid by resident taxpayers to a non-resident school. This rule has been targeted recently by the EC Commission (infringement procedure pending).
[12] *See* infra at II) 2) a) bb) = p. 24; B) II) 2) a) aa) = p. 24.
[13] *See* supra at 1) b) = p. 5.

and discussed in tax literature[14]. Therefore they will be discussed only briefly at the beginning of this chapter[15]. However, the core problem of non-discriminatory restrictions has not yet been comprehensively discussed in tax literature[16], although many ECJ decisions refer to this problem in other realms of market freedoms[17].

1) Application of the non-restriction principle to rules that merely intend to regulate purely internal domestic tax situations (i)

Disadvantages which are (indirectly) caused by these regulations[18] to outbound cross-border activities by restricting advantageous taxation to purely domestic tax situations only[19], trigger the non-restriction principle as a prohibition of discrimination. This is true for many provisions which where treated by the ECJ to be restrictive without further specification as described by *A. Cordewener* in report no. 1[20].

According to the differentiation in the questionnaire rules that merely intend to regulate purely internal domestic tax situations indirectly are discriminatory restrictions which block effective access to a foreign market.

2) Application of the non-restriction principle to rules intended exclusively to regulate cross-border tax situations (iii)[21]

aa) Rules intended to regulate exclusively outbound cross-border situations tend to block access to a foreign market and trigger the non-restriction principle as a prohibition of discrimination (discriminatory restriction)[22] whereas rules intended to regulate exclusively inbound cross-border situations have to comply with the *classic* impact of non-discrimination in terms of national treatment.

bb) Double taxation is the major effect of restrictions caused by *double burdens* in terms of general ECJ adjudication[23]. National rules, which contribute to double taxation are non-discriminatory from a strict unilateral perspective as long as domestic and outbound cross-border activities as well as domestic and inbound cross-border activities are, in terms of the *extent* (range) of tax liability, taxed the same way. However, there are important differences, as far as unlimited tax liability compared to limited tax liability of individuals is concerned. But these differences are in the process of being eliminated in the field of company taxation.

Although double taxation conventions are designed to prevent th*ese double burdens,* distributive rules might as well be discriminatory with respect to inbound and to outbound cros-border situations[24]. In this case they might either block access to the domestic market (non-discrimination in terms of national treatment) or to the foreign market (discriminatory restrictions).

3) Application of the non-restriction principle to rules intended to regulate both internal domestic and cross-border situations *in general*.

Rules that do not differentiate between purely domestic and cross-border tax situations[25] do not discriminate but they might cause hindrances by equal treatment of domestic and cross-border inbound tax situations as well as by equal treatment of domestic and cross-border outbound tax situations[26].

The development of the fundamental freedoms from a concept of non-discrimination into a concept of non-restriction makes it necessary to differentiate between „discriminatory restrictions" and „restrictions in a closer sense" or „real restrictions" which, although they are „non-discriminatory restrictions", may cause hindrances by treating cross-border situations and domestic activities alike[27].

There is only one ECJ judgment relating to a non-discriminatory restriction caused by equal treatment in the field of direct taxes: in *Futura Participations*[28] a procedural rule was at stake which made the carrying forward of previous losses of a branch subject to the condition that the non-resident taxpayer should have kept in the source State, relating to his activities there, accounting records which comply with the relevant national rules. Although the non-resident taxpayer was treated by this national rule the same way as a resident taxpayer the ECJ held that this was a restric-

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[14] *See A. Cordewener,* Europäische Grundfreiheiten und nationales Steuerrecht, Cologne 2002; *E. Reimer,* Die Auswirkungen der Grundfreiheiten des EG-Vertrages auf das Ertragsteuerrecht der Bundesrepublik Deutschland, in: Lehner (ed.), Grundfreiheiten im Steuerrecht der EU Staaten, München 2002, pp. 39 et seq.

[15] *See* infra 1) = p. 10 and 2) = p. 11.

[16] *See A. Cordewener,* loc. cit. (footnote 14), pp. 280 et seq.; *E. Reimer,* loc. cit. (footnote 14) pp. 57 et seq.

[17] *See* infra 3) = p. 11.

[18] *See* supra at I) 1) c) = p. 6.

[19] *See* supra at I) 1) b) = p. 5.

[20] *A. Cordewener,* report no. 1 pp. 9 et seq. refering to ECJ, 81/87, *Daily Mail*, [1988] ECR 5483 at 16 et seq.; C-175/88, *Biehl*, [1990] ECR I-1779 at 13 et seq; C-264/96, *ICI*, [1998] ECR I-4695 at 23 et seq.; C-251/98, *Baars*, [2000] ECR I-2787 at 30 et seq.; C-35/98, *Verkooijen*, [2000] ECR I-4071 at 34 et seq.; C-431/01, *Mertens*, [2002] ECR I-7073 at 26 et seq.; C-168/01, *Bosal Holding*, n.y.r. at 27; C-9/02, *de Lasteyrie du Saillant*, n.y.r. at 45 et seq.

[21] For rules intended to regulate both internal domestic and cross-border tax situations (ii) *see* infra 3) = p. 11 and B) = p. 20.

[22] *See* preliminary remarks = p. 3.

[23] *See* infra at B) II) 2) a) aa) = p. 24.

[24] *See M. Lehner,* in: Vogel/Lehner, Doppelbesteuerungsabkommen[4], Einleitung at m. no. 265 et seq.

[25] *See* supra at I) 1) = p. 6.

[26] See *supra* at I) 2) c) = p. 8.

[27] See *supra* at I) 2) = p. 6.

[28] ECJ, C-250/95, *Futura Participations*, [1997] ECR I-2471 at 25 et seq.

tion under Art. 43 EC Treaty because the non-resident taxpayer had to fulfill accounting obligations in two Member States. However, from a perspective comprising the source State and the State of residence the accumulation of two national obligations (each of them being a non-discriminatory restriction) would amount to the effect of a discrimination[29].

All other judgments rendered by the ECJ refer to non-discriminatory restrictions in other realms of the basic freedoms. The development of these adjudications[30] has its origin in the *Dassonville*[31] case dealing with the free movement of goods. In this adjudication the ECJ rendered its famous formula, stating 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 as measures having an effect equivalent to quantitative restrictions" (on imports of goods) and are therefore, in principle, prohibited. First limitations of this very broad formula where given in *Cassis de Dijon*[32] with reference to justifications of restrictions relating to "obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of ... products". Restrictions of that kind "must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements...". Another cornerstone of ECJ adjudications in the realm of freedom of goods is presented in *Keck*[33] bringing up the important differentiation between "product requirements" which are not allowed even if those requirements "apply without distinction to all products" and, on the other hand, the application of national provisions which restrict or prohibit certain "selling arrangements". According to this differentiation the application of national provisions restricting or prohibiting certain "selling arrangements" does not as such hinder directly or indirectly, actually or potentially trade between Member States, as long as these provisions apply to "all relevant traders operating within the national territory and as long as they affect in law and in fact, the marketing of domestic products and of those from other Member States" in the same manner. *A. Cordewener* has described this "somewhat blurry distinction" in his report[34] to be nothing else than a "fine tuning" of the range of the *"Dassonville"* formula. However, untill now no clear criteria have been found according to which non-discriminatory measures which are restrictive could be set apart from non-discriminatory restrictions which are not restrictive. Insofar it is important to point out, that the ECJ drew a wide borderline to the application of market freedoms in *Gebhard*[35] stating that all "national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty" must be justified. This is to say that all market freedoms also apply as prohibitions of non-discriminatory restrictions[36]. Accordingly it is agreed that the "market access" test which had been developed by the ECJ in the scope of Art. 28 EC Treaty is relevant for all market freedoms[37]. This test was developed and first applied to inbound cross-border situations but it gained importance for outbound situations as well[38]. Thus, restrictions or hindrances caused by measures of direct taxation although not relevant in the scope of Art. 28 EC Treaty, must not be excluded from the requirements established by the ECJ in this area. A short overview of attempts to clarify and specify this test is necessary[39] irrespective of peculiarities which have to be considered in the field of direct taxation in a cross-border context[40].

a) Qualification of non-discriminatory restrictions

According to the very fundamental "market access" test, a non-discriminatory restriction affects the scope of the fundamental freedoms if the measure to be examined "*directly affects access to the market* in services in the other Member States and is thus capable of hindering intra-Community trade in services"[41]. "Measures of *entirely general character*" are excluded from the scope of Art. 28 EC Treaty[42]. Rather, e.g. in a context of free movement of capital (Art. 56 EC Treaty), the non-discriminatory measures must *"affect* the position of a person *as such"* and, consequently, *affect access to the market"*[43]. As far as the right of establishment is at stake, non-discriminatory rules violate this guarantee if they prevent the nationals of a Member State from "exercising properly" this position[44]. Other ECJ judgements refer to the question whether the "purpose" of a measure is to regulate the conditions regulating the establishment of an undertaking. Violations of market freedoms are denied if restrictive effects are "too uncertain and indirect"[45]. Advocate General *Jacobs* concludes in *Leclerc*[46] that Art. 28 EC-Treaty should apply to non-discriminatory measures which are *"liable substantially* to restrict access to the market". According to Advocate General *Fennely* in *Graf*[47] "the formal distinction between product rules and selling arrangements is less important than the *motivation*

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[29] *See* infra at C) = p. 27.
[30] See report no. 1 by *A. Cordewener* B.I. with more details.
[31] ECJ, 8/74, *Dassonville*, [1974] ECR 837 at 5.
[32] ECJ, *Cassis de Dijon,* [1979] ECR 649 at 8.
[33] ECJ, C-267/91 & C-268/91, *Keck and Mithouard*, [1993] ECR I-6097.
[34] *A. Cordewener,* report no. 1, p. 18.
[35] ECJ, C-55/94, *Gebhard*, [1995] ECR I-4165 at 37.
[36] *A. Cordewener,* report no. 1, p. 18 with further ref.
[37] *A. Cordewener,* loc. cit.
[38] ECJ, C-415/93, *Bosman*, [1995] ECR I-4921 at 103.
[39] For details *see A. Cordewener,* report no. 1 pp. 18 et seq. from whom many of my examples are taken with further ref.
[40] See *infra* at B) = p. 20.
[41] ECJ, C-384/93, *Alpine Investments* , [1995] ECR I-1141 at 33 et seq.; C-415/93, *Bosman*, [1995] ECR I-4921 at 98 et seq.; C-190/98, *Graf*, [2000] ECR I-493 at 22 et seq.
[42] Advocate General *Jacobs* in ECJ, C-412/93 *Leclerc*, [1985] ECR 1 at 34.
[43] ECJ, C-463/00, *Commission v. Spain*, [2003] ECR I-4581 at 58 et seq.; C-98/01, *Commission v. UK*, [2003] ECR I-4641 at 45 et seq.
[44] ECJ, 107/83, *Klopp*, [1984] ECR 2971 at 20.
[45] ECJ, C-418/93, *Semeraro et al.* [1996] ECR I-2975 at 32.; C-190/98, *Graf*, [2000] ECR I-493 at 22 et seq.
[46] Advocate General *Jacobs* in ECJ, C-412/93 *Leclerc*, [1985] ECR 1 at 49.
[47] ECJ, C-190/98, *Graf*, [2000] ECR I-495 at 19.

which led to its adoption", and, referring to Advocate General *Lenz* in *Bosman*[48], *Fennely*[49] emphasizes the distinction between "national rules regarding access to the market and those merely *governing the exercise* of an economic activity".

Summing up the different attempts of the ECJ to draw the line between "product requirements" which violate the market freedoms even if those requirements "apply without distinction to all products" and national provisions, which restrict or prohibit certain "selling arrangements" without impeding the guarantee of market freedoms, the "market access" test is supplemented by a "rule of remoteness"[50] which excludes minor hindrances from the realm of the market freedoms. So the question to be answered is whether non-discriminatory regulations "*specifically* place a burden" on actions which fall within the scope of market freedoms and whether such national measures have the effect of splitting up the internal market into several domestic markets by constituting a "barrier to entry" or to exit[51].

b) Classification of non-discriminatory restrictions

Corresponding to, and in coordination with report no. 1 there are two groups of non-discriminatory measures, one of them comprising „absolute burdens" and the other one consisting of national measures which impose „dual regulations (or ‚double burdens')" on a specific cross-border activity[52]. In both cases the measures can be relevant for inbound and for outbound cross-border situations. The common denominator of „absolute burdens" is that a national measure which is designed to regulate a purely domestic situation, without being restricted to this domestic situation, is applied to a cross-border activity, e. g. national rules which prevent professionals (lawyers in *Klopp*[53]) from having more than one professional establishment or prohibitions of certain activities („cold calling" in *Alpine Investments*[54]). Another common denominator of absolute burdens is that the restriction is caused without any interaction between the national measure and a (corresponding) measure of another Member State, although such an interaction, which characterizes the second group, is possible. Summing up, „absolute burdens" hinder (inbound or outbound) market access „unilaterally" i.e. by imposing non-discriminatory restrictions which are designed for inbound situations but are also applicable in cross-border situations.

Report no. 1 describes the second group[55] which is characterized by „dual regulations (or ‚double burdens')" imposed by national measures of two Member States. It gives examples of (diverging) national provisions which apply to one and the same cross-border transaction thus preventing or impeding outbound or inbound cross-border activities. These are mainly cases where different product requirements (*Cassis de Dijon*[56]) or requirements concerning qualifications of professionals (*Vlassopoulo*[57]) hinder cross-border activities. But a very clear example, illustrating this group of non-discriminatory hindrances, is represented by ECJ decisions on the double levy of social security contributions[58]. This group of dual burdens deserves to be looked at closer because it seems that attempts to solve the general problems in the realm of „dual regulations (or ‚double burdens')" could be helpful as far as dual (procedural) requirements in the field of taxation[59] are concerned. In *Vlassopoulou*[60] the ECJ declared in an inbound case that the refusal of an application for admission to the bar, based on national requirements concerning qualifications, "may have the effect of hindering" nationals of other Member States in their right of establishment "if the national rules in question *took no account of the knowledge and qualifications already acquired* by the person concerned in another Member State". Following this line the ECJ interprets Art. 43 EC Treaty as "requiring the national authorities... to examine to what extent the knowledge and qualifications (of the applicant) correspond to those, required by the rules of the host State"[61]. If the comparison reveals that the knowledge and qualification correspond only partially, the host State "is entitled to *require* the person concerned to show that he has acquired the knowledge and qualifications which are lacking"[62]. Although the national of another Member State must "in principle comply" with such requirements in the host Member State, national measures "liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EC Treaty must fulfil four conditions in order to be justified: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it"[63]. The ECJ has confirmed this adjudication in the realm of other market freedoms[64]. In *Hocsman*[65] the Court dealt with the prerequisites according to which a diploma has to be "accepted as equivalent", declaring that "those judgements are merely the expression in individual cases of a *principle* which is inherent in the fundamental freedoms of the treaty".

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[48] ECJ, C-415/93, *Bosman*, [1995] ECR I-4921 at 99.
[49] Loc. cit. at 33.
[50] *See A. Corewener,* report no. 1 at 19 with further ref.
[51] *A. Cordewener,* loc. cit.
[52] *A. Cordewener,* loc. cit. p. 20.
[53] ECJ, C-107/83, *Klopp*, [1984] ECR 2971 at 19.
[54] ECJ, C-384/93, *Alpine Investments* , [1995] ECR I-1141 at 35 and seq.
[55] *A. Cordewener,* report no. 1 pp. 20 et seq.
[56] ECJ, *Cassis de Dijon,* [1979] ECR 649 at 8 ?; for further ref. *see* report. no. 1 at footnote 127.
[57] ECJ, C-340/89, *Vlassopoulou*, [1991] ECR I-2357 at 15 ?
[58] *See* report no. 1 at 21 with ref. in footnote 133.
[59] *See* supra at I) 2) a) = p. 7.
[60] ECJ, C-340/89, *Vlassopoulou*, [1991] ECR I-2357 at 15.
[61] ECJ,C-340/89, *Vlassopoulou*, [1991] ECR I-2357 at 23.
[62] ECJ, C-340/89, *Vlassopoulou*, [1991] ECR I-2357 at 20 et seq.
[63] ECJ, C-55/94, *Gebhard*, [1995] ECR I-4165 at 35 et seq.
[64] ECJ, C-234/97, *Bobadilla,* [1999] ECR I 4773 at 19 et seq. (Art. 39).
[65] ECJ, C-238/98, *Hocsman,* [2000] ECR I 6640 at 24.

aa) Substantive law

As far as non-discriminatory restrictions by *substantive* law are concerned, decisions which deal with the double levy of social security contributions are important from a perspective of cross-border taxation. In *Kemmler*[66] the ECJ ruled that legislation of a Member State, which requires social security contributions to be made by persons who are affiliated to a social security scheme in another Member State „inhibits the pursuit of occupational activities outside the territory of that Member State" which is precluded by Art. 43 EC Treaty. Due to the fact that legislation of this kind „affords no *additional* social protection" to the persons concerned, „the impediment to the pursuit of occupational activities in more than one Member State may not in any event be justified on that basis." This was repeated in *Guiot*[67], and further specified by the statement that an employer who has to pay additional social security contributions in the host State is not on an equal footing with employers established in the host State as far as competition is concerned.

bb) Procedural law

Relating to the problem of *procedural* requirements concerning the inspection of imported goods, the ECJ does not dispute the Member State's authority to ask for and check necessary documentation[68]. But, in order to justify these measures, the Member States have to find out, "whether this objective can-not be equally well achieved, and, instead of waiting passively for the desired evidence adopt a more active policy" e.g. by "simple co-operation on a reciprocal basis[69]". Member States are not entitled to unnecessarily require tests where those tests have already been carried out in another Member State[70]. Member States may not cause unnecessary control expense[71]. As far as procedural problems in taxation are concerned[72], it is important to point out, that the problem dealt with in these decisions are not caused by "absolute burdens" but by „dual regulations (or ‚*double* burdens')" on a specific cross-border activity[73].

c) The problem of disparities

In *Peralta*[74] the ECJ points out, that the freedom of establishment is not affected by technical rules which are specific to a Member State and which are „not necessarily to be found in the other Member State. Rather the „difficulties which might arise" for cross-border undertakings having to comply with these rules „are no different in nature from those, which may originate in *disparities* between national laws governing, for example, labour costs, social security costs or the tax system"[75]. According to *A. Cordewener*[76] disparities, although they might influence entrepreneurial decisions to chose a market, are unrelated and unconnected regulations which, without constituting specific obstacles to market access, do not trigger EC law protection. As far as legal subsystems are concerned, which only exist in the host Member State, e.g. the German business trade tax or a wealth tax which are applied in a non-discriminatory way, it is quite clear that this constitutes an important disparity which might influence entrepreneurial decisions and hinder investments in that State. However, disparities of that kind do not constitute *specific obstacles to market access*[77]. Therefore *Cordewener*[78] with good reason approves the decision of the German Federal Tax Court[79] which came to the conclusion, that the (non-discriminatory) imposition of Business Trade Tax does not in itself violate the fundamental freedoms even though no other EC Member State had a similar tax.

Relating to outbound situations the ECJ, apart from *Bosman*[80], has ruled in *Sandoz*[81] that the levy of a stamp duty on loans taken up abroad by a domestic borrower constituted a violation of Art. 56(1) EC Treaty even though the Austrian legislation applied this regulation in a non-discriminatory manner. The ECJ held this regulation to constitute an obstacle to the free movement of capital because the Austrian provision "deprives residents of a Member State of the possibility of benefiting from the absence of taxation which may be associated with loans obtained outside the national territory"[82]. I agree with *Cordewener* who questions this result, arguing that this might be a case of mere disparity between Member States´ legal systems. But this might be different if the stamp duty reached an amount which would qualify for a reasonable distortion of competition.

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[66] ECJ, C-53/93, *Kemmler*, [1996] ECR I-703 at 12 et seq.
[67] ECJ, C-272/94, *Guiot*, [1996] ECR I-1905 at 14 et seq., C-369/96 & C-376/96, *Arblade*, [1999] ECR I-8453 at 50 et seq.; C-302/98, *Sehrer*, [2000] ECR I-4585 at 34 et seq.; C-62/81& 63/81, *Seco*, [1982] ECR 223 at 8 et seq.; C-43/93, *Vander Elst*, [1994] ECR I-3803 at 15.
[68] ECJ, C-104/75, *Peijper,* [1976] ECR 613 at 23.
[69] ECJ, loc. cit. at 24, 27; C-251/78, *Denkavit,* [1979] ECR 3396 at 23.
[70] ECJ, C-272/80, *Maatschappij,* [1981] ECR 3277 at 14; C-293/94, *Brandsma,* [1996] ECR I-3171 at 12; C-400/96, *Harpegenis,* [1998], ECR I-5121 at 35.
[71] ECJ, loc. cit.
[72] *See* supra at I) 2) a) = p. 7; infra at B) II) 2) b) = p. 25.
[73] *See A. Cordewener,* report no. 1, p. 20
[74] ECJ, C-379/92, *Peralta*, [1994] ECR I-3453 at 34.
[75] ECJ, loc. cit.
[76] *A. Cordewener*, Europäische Grundfreiheiten und nationales Steuerrecht, Cologne 2002, at 299 et seq. with further ref.; report no. 1 p. 22.
[77] *See* supra at a) = p. 14.
[78] *A. Cordewener,* report no. 1, p. 22.
[79] Bundesfinanzhof, judgment of 18 September 2003 – X R 2/00, Finanz-Rundschau 2004, 82 et seq.
[80] ECJ, C-415/93, *Bosman*, [1995] ECR I-4921 at 99 et seq.
[81] ECJ, C-439/97, *Sandoz*, [1999] ECR I-7041 at 17 et seq.
[82] ECJ, loc. cit. at 16.

B) Would it be possible for the application of the basic freedoms to make a distinction between the application to non-tax issues and the application to tax issues thereby setting the tax system apart, or should in your view the basic freedoms as a matter of principle apply without any distinction related to the subject matter? Would a distinction be compatible with a fully integrated market?

The solutions of the ECJ to problems caused by non-discriminatory restrictions might lead to the assumption that problems in the field of taxation, which are caused by the obligation of a taxpayer to meet same or different procedural and substantive law requirements in two Member States, could be solved accordingly. However there are important peculiarities of direct taxes which must be taken into account.

I) Peculiarities of direct taxes

In 1976 *Klaus Vogel* gave a talk on „Die Besonderheit des Steuerrechts"[83]. He pointed out that taxation very directly („unvermittelt") poses the question of justice. This refers to the position of the individual taxpayer and constitutes an important difference of constitutional requirements necessary to justify differentiations between regulations in the field of direct taxation on one side and rules which regulate trading with goods or rendering services on the other. Although tax policy allows the realization of far reaching economic and social programs, the individual burden, due to strict constitutional requirements in terms of equality and personal freedom, has to be justified according to highest constitutional standards. This is different in the other fields mentioned. Trade policy is much less bound to comparable constitutional requirements. Moreover, statutory law in the field of taxation addresses the individual directly (in terms of *Klaus Vogel:* „unmittelbar"), whereas trade law primarily refers to the subject matter. This important difference is clearly reflected in the EC Treaty provisions. Art. 28, 29 EC Treaty which deal with free movements of goods do not directly address persons but prohibit *restrictions* on imports and on exports. Differing from these provisions, the freedoms guaranteed in Art. 39 et seq. EC Treaty directly address persons, primarily protecting them against non-discrimination, which is a constitutional right in terms of national legal systems. This different approach is also reflected in the ECJ adjudications which on the one hand deal with the free movement of goods, emphasizing the aspect of *market access*[84] and, on the other hand deal with personal freedoms, focusing on *non-discrimination* even though this distinction is sometimes hidden by the concept of restriction[85].

There are other peculiarities of taxation compared to regulations in the field of trade. A state's power to tax is part of its power of the purse, and in turn comprises legislative power in the field of taxation, administrative power in tax matters, entitlement to tax revenue and judicial authority in tax matters[86]. The special significance of the power of taxation is that governmental authority is inconceivable without public funds[87]. Hence the power of taxation is not an end in itself: it ensures the sovereignty of the state, understood domestically as supreme authority and abroad as independence under international law[88]. Moreover tax law is linked in many ways to other fields of law, especially to social law and private law.

These important differences have to be taken into account in order to properly answer the question whether the solutions, which the ECJ had found in order to remove hindrances relating to the free movement of goods, could be transferred to the realm of direct taxes. Thus, in the field of taxation, it is not necessarily the State which causes the (additional) burden that is also responsible for and obliged to remove the obstacle. Moreover we have to ask which State has the „better right" to tax a cross-border activity. According to this answer it has to be decided whether the State of residence or the source State may tax a certain item of income and correspondingly: which State has a „better right" to determine the procedural law which is related to cross-border activities and which causes hindrances due to double or accumulated requirements of two States[89]. As a generally accepted rule procedural law does not have an aim in itself. Rather it serves the enforcement of substantive law. There are however, principles of substantive law, reflected in the distributive rules of the double taxation conventions which answer the question whether the State of residence or the source State has a better right to tax a cross-border activity. Although these distributive rules are disputed as far as source rules and tax jurisdiction are concerned, they reflect an orientation along the principle of equivalence, which justifies a States' authority to tax a cross-border activity according to the territorial grounding of tax liability[90]. This territorial grounding of tax liability rests on the fact that the territorial link of tax liability, as established by residence or the location of the source of income, is an essential precondition for realizing income in a State and thus it is also an essential precondition for the taxpayers economic productivity in that State. The concept of market income takes account of these preconditions by defining income in relation to what is derived by market activities and justifies taxation in principle only insofar as it is related to market-dependent earnings.[91] This approach,

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[83] *K. Vogel*, Die Besonderheit des Steuerrechts, DStZA 1976, at 5 et seq. reprinted in: *K. Vogel*, Der offene Finanz und Steuerstaat, Heidelberg 1991, at 509 et. seq.
[84] *See* supra at A) II) 3) a) = p. 14.
[85] *See A. Cordewener,* report no. 1 p.
[86] *Vogel/Waldhoff* in: Dolzer/Vogel (ed.), Bonner Kommentar zum Grundgesetz, Introduct. to Art. 104 a - 115, m.no. 42 (= id., Grundlagen des Finanzverfassungsrechts, 1999, m.no. 42); *S. Korioth*, Der Finanzausgleich zwischen Bund und Ländern 1997, p. 267.
[87] *K. Vogel*, Grundzüge des Finanzrechts des Grundgesetzes, in: Hdb. des Staatsrechts, vol. IV, § 87, m.no. 1.
[88] For fundamental remarks on the concept of sovereignty see: *A. Randelzhofer*, Staatsgewalt und Souveränität, in: Hdb. des Staatsrechts, vol. I, § 15, m.no. 16; particularly concerning the function of the constitutional provisions governing public finance and internal sovereignty: *P. Kirchhof*, Staatliche Einnahmen, in: Hdb. des Staatsrechts, vol. IV § 88, m.no. 6.
[89] *See* supra at A) II) 3) a) = p. 14.
[90] *See M. Lehner, EC Tax Review* 2002/1, pp. 5 et. seq.
[91] *P. Kirchhof* in: Kirchhof/Söhn (ed.), Einkommensteuergesetz, Sec. 2 m.nos. A. 364 et seq.

which reflects reality and its legal consequences, is not consistent with the concept of an internal market. So there is no doubt that the basic freedoms have to be interpreted and applied in a way which furthers the internal market aim. Last but not least this important aim must not be impeded by taxation which (still) is and (still) has to be related to the national markets in terms of territoriality and equivalence. But there is no reason that this internal market could not be achieved, if responsibilities for obstacles in the field of direct taxation are assigned to the Member States according to their authority to tax, given that this authority is based on a "better right to tax test". This would solve the problem that obstacles are very often caused by national regulations of two different national tax systems, which is true not only in cases of accumulated procedural regulations but first of all in the application of substantive law to cross-border situations. Last but not least this approach would not interfere with the function of the basic freedoms, moreover the ECJ in *Gilly*[92], relating to Art. 39 and 293 EC Treaty has expressively confirmed the Member States' "competence to define the criteria for allocating their powers of taxation as between themselves".

II) Consequences

As the ECJ has pointed out in *Gebhard*[93] all "national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty" must be justified. This is to say that all market freedoms also apply as prohibitions of non-discriminatory restrictions. Consequently they also apply in the field of taxation.

1) Basic systematization

Recalling the requirements of the market freedoms as far as non-discriminatory restrictions are concerned, the ECJ adjudication can be summarized as follows: the non discriminatory-restrictions violate the basic freedoms if they "affect access to the market"[94]. But if, according to *a* "rule of remoteness"[95], which allows to disregard minor hindrances, market access is not "specifically burdened"[96], non-discriminatory restrictions are classified as mere "selling arrangements"[97]. Another domain of non-discriminatory restrictions which do not violate the market freedoms is represented by "mere disparities" between national law subsystems[98]. As far as non-discriminatory restrictions violate the basic freedoms, they might qualify" as absolute burdens" or as "dual regulations" ("dual burdens")[99]. While "dual burdens" are triggered by (diverging) national provisions which apply to one and the same cross-border transaction, „absolute burdens" hinder (inbound or outbound) market access „unilaterally" i.e. independent of (comparable) measures taken by the other State.

2) Application of non-discriminatory restrictions in the realm of direct taxes

Non-discriminatory restrictions in the field of direct taxes[100] might violate the basic freedoms not only as far as substantive law is concerned but also with respect to procedural law prerequisites which have to be fulfilled both in the State of residence and again in the source State.

a) Substantive law

aa) Double taxation

In a very fundamental way, taxation as such hinders investors from performing economic activities in other countries. Consequently, as far as double taxation is concerned, we have the constellation of *dual burdens* caused by the cumulative effect of unlimited and limited tax liability in cross-border situations. Double taxation clearly *hinders market access* and is specifically addressed in Art. 293 EC Treaty. But the double taxation conventions provide rules which avoid or alleviate double taxation according to standards which have been approved by the ECJ[101].

bb) Rules relating to the determination of profits

Profit determination according to national law might cause *dual burdens* (double taxation) in cross-border situations due to different methods of profit determination and profit attribution. According to the basic rules of allocating responsibilities for and obligations to avoid hindrances in the field of direct taxes this problem is solved by double taxation conventions as well as by the EC Arbitration Convention. These sets of rules leave profit determination to the internal law of the treaty partners but offer methods for profit attribution for purposes of company taxation in a cross-border context[102].

Thin capitalization according to Sec.8 a CTA:

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[92] ECJ, C-336/96, *Gilly*, [1998] ECR I-2793 at 30; C-307/97, *Compagnie de Saint-Gobain*, [1999] ECR I-6161 at 56 et seq.
[93] ECJ, C-55/94, *Gebhard*, [1995] ECR I-4165 at 37; and supra at 3).
[94] *See* supra at A) II) 3) a) = p. 14.
[95] *See* supra at A) II) 3) b) = p. 15.
[96] *See* supra at loc. cit.
[97] *See* supra at A) II) 3) = p. 11.
[98] *See* supra at A) II) 3) c) = p. 18.
[99] *See* supra at A) II) 3) b) = p. 15.
[100] *See* supra at A) I) 3) = p. 9.
[101] *See* ref. in footnote 92.
[102] Art. 7 para 2 and in Art. 9 OECD MC.

A clear example for a non-discriminatory restriction which represents an *absolute burden to market access* in terms of general ECJ adjudication[103] is represented by the new German thin capitalization rule. In *Lankhorst Hohorst*[104] the ECJ declared that Sec. 8 a CTA in its original version constituted an obstacle to the freedom of establishment (Art. 43 EC Treaty) because it caused disadvantages for shareholder financing by non-resident shareholders. The German legislator drew the consequence from this decision by expanding the scope of application of Sec. 8 a CTA to domestic shareholders as well. But Sec. 8 a CTA, although not discriminating any more, is still applicable to foreign shareholders and causes a *specific burden to market access* which is completely independent from comparable provisions in other Member States.

cc) Rules establishing liability for taxes due

Double burdens might be caused as a result of double taxation if both States (unilaterally) demand or want to enforce their claims. Notwithstanding their obligation to solve the underlying double taxation problem, the States involved, according to the principles established by the ECJ in double burden situations, should be obliged to suspend their claims. At least one of the States should be obliged this way if the claim had been already enforced by the other State. The procedural basis for necessary consultation and coordination as required by the ECJ in double burden situations[105] is provided by the mutual agreement procedures of the double taxation conventions according Art. 25 OECD MC as well as by the EC Arbitration Convention.

b) Procedural law

As a general rule, the State which is entitled to tax the cross-border-activity according to the double taxation agreement may also set the procedural law standards which are necessary in order to enforce this authority to tax. But, according to the ECJ adjudications rendered in general cases of non-discriminatory restrictions[106], the national authorities of the State which is entitled to tax are obliged to examine to what extent procedural law requirements[107] of the other State serve the same purpose and whether they have been fulfilled by the taxpayer. Only to the extent that the standards of the authorized State are not met after due comparison by the tax authorities, this State might require the taxpayer to comply with the procedural requirements according to its own standards, e.g. meet accounting rules, supply further information or present documentation. Again the mutual agreement procedure of the double taxation conventions as well as the 1977 Council Directive on Mutual Assistance for the Exchange of Information provide the procedural basis for necessary consultation and coordination as required by the ECJ in double burden situations[108].

Documentation requirements in transfer pricing cases:
Although the national rules do not apply to purely internal tax situations they apply to inbound and to outbound situations in a non-discriminatory way but they do not as such, as far as their general outline is concerned, *specifically hinder market access.*

3) „Selling arrangements" and „disparities"

According to general ECJ adjudication „selling arrangements" do not trigger the market freedoms; they do not burden specific cross-border activity and they do not impede market access as long as they are non-discriminatory. Market freedoms are not triggered either by „disparities"[109] between national laws which, although they might influence entrepreneurial decisions, represent characteristic features of national law systems. As far as direct taxation is concerned the category of „selling arrangements" does not seem important. It might be helpful, however, to describe e.g. *tax-disincentives* which are applied in a non-discriminatory way.

Disparities have already been described as differences of legal subsystems like a wealth tax or the German business trade tax which does not exist in other countries. But there are other areas or sectors of national tax systems which constitute comparable disparities like special features of procedural law or peculiarities of legal protection. Another realm of disparities might be constituted by the method according to which double taxation is avoided or eliminated.

C) Final remark

By focusing on „non-discriminatory restrictions" the report has shown the importance which has to be given to the differentiation between „discriminatory restrictions" and „non-discriminatory restrictions". However, what is usually described as *non-discriminatory* is discussed under the (silent) presumption of a „one State" or „one market" perspective. But if non-discriminatory restrictions are examined from a „two State" perspective or from an „internal market" perspective they are discriminatory. This has been pointed out very clearly by *Ekkehart Reimer*[110]*.* Referring to ECJ

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[103] *See* supra at A) II) 3) = p. 11.
[104] ECJ, C-324/00, *Lankhorst-Hohorst*, [2002] ECR I-11779 at 32.
[105] *See* supra at A) II) 3) b) = p. 15.
[106] *See* supra at A) II) 3) = p. 11.
[107] *See* supra at A) II) 3) b) bb) = p. 18.
[108] *See* supra at loc. cit.
[109] *See* supra at A) II) 3) c) = p. 18.
[110] *E. Reimer,* Die Auswirkungen der Grundfreiheiten des EG-Vertrages auf das Ertragsteuerrecht der Bundesrepublik Deutschland, in: Lehner (ed.), Grundfreiheiten im Steuerrecht der EU Staaten, München 2002, at 57 et seq.

in *Futura Participations*[111] the double burden to comply with the accounting requirements of the source State and of the State of residence represents a non-discriminatory restriction from the source State's perspective, because resident companies have to comply with exactly the same requirements. But from a two State perspective this requirement is discriminatory because this requirement is doubled in the cross-border situation, whereas taxpayers who perform their activities only in the source State have to keep their books only once.. This leaves us with the question which is evoked by *Dieter Birk*[112] when he emphasized that equal treatment has always been understood as equal treatment within the realms of „one legal system" in terms of „Kästchengleichheit"[113] (*equality in boxes*). The question is, whether the internal market is deemed to be only *a market*, or if it also represents „one consolidated legal system". My answer is „no(t yet)".

After all my answers to the questions are as follows:

Questions 2.a.:
The distinctions in the application of the non-restriction principle are possible and necessary as long as the common market is not fully integrated. In order to achieve this aim the basic freedoms have to be complemented and supported by measures of harmonization in the field of direct taxation. This is due to the fact tat the ECJ must not decide political questions but apply community law according to the EC Treaty. The ECJ must respect the fact that the treaty does not provide a specific community competence in the field of direct taxation.

Questions 2.b.:,
It is still 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. However, this distinction would not be compatible with a fully integrated market.

[111] ECJ, C-250/95, *Futura Participations*, [1997] ECR I-2471 at 25 et seq.
[112] *D. Birk,* in: Lehner (ed.), Steuerrecht im Europäischen Binnenmarkt, DStJG Vol. 19, Cologne 1996, p. 63 at 65
[113] *D. Birk,* loc. cit. p. 77; *E. Reimer,* loc. cit. p. 58.