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IS THE ECJ SOBER?

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Taxation of wine and beer has been the frequent subject of litigation before the European Court of Justice (ECJ) in the light of the second paragraph of Article 90.¹ The distinction between beer and wine is recognized as being of capital importance by the European legislator. Directives 92/83/EEC and 92/84/EEC apply different rules to beer and wine in terms of excise duties.² The popularity of these alcoholic beverages partially explains this interest, but it is their differences which are crucial to their tax treatment. In Case C-167/05, the Court was once again called to give answers to the question of taxation of wine and beer in the light of Article 90. Contrary to the Opinion of the Advocate General, the ECJ's judgment of April 8, 2008, dismissed as unfounded the Commission's action for infringement of Community law by Swedish law. According to the Commission's allegations, Swedish tax regulations on alcohol discriminated against wine (an imported beverage) in favor of beer (a widely nationally-produced product).

The Court's judgment is particularly interesting for it allows apprehension of the accuracy as well as the limits of the method applied. Also, the case concerned Sweden, a State that has a well-established anti-alcoholic public policy, mainly through its retail sale monopoly and the highest excise duties on alcohol in Europe.³ In the Rosengren Case,⁴ the Court examined the Swedish retail sale monopoly in the light of the free movement of goods (Article 28 of the EC Treaty). In Case C-167/05, anti-alcoholic objectives stayed very much in the background and the major issue was the consumer's attitude towards selling prices of alcoholic beverages.

The paper argues that the appreciation of the consumer's attitude in the ECJ's case – law on taxation of alcohol, especially wine and beer – is problematic and proposes a new approach to the question that puts consumers' sensibility towards tax

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¹ See A. Easson, "Cheaper Wine or Dearer Beer?" (1984) 9 *ELRev.* 57.

² Article 6 of Council Directive 92/84/EEC (October 19, 1992 on the approximation of the rates of excise duty on alcohol and alcoholic beverages, *OJ L 316, 31.10.1992, p. 29*) fixes a minimum rate on beer of 1.87 ECU per degree per hectoliter whereas Article 5 authorizes taxation of wine by reference solely to volume, with a minimum rate of 0%; see Case C-166/98, *Socridis* [ECR] I-3791.

³ See Katarina Nordblom, "The Complex Attitudes to Alcohol Taxation", Working Paper in Economics, no 207, Gothenburg University. School of Business, Economics and Law, May 2006, pp. 1-2.

⁴ Case C-170/04 *Rosengren and Others* [2007] ECR I-4071; see M. Bungenberg, "Das gemeinschaftsrechtswidrige schwedische Alkoholeinfuhrmonopol", *Europarecht* 2008, 232 *seq.*

arrangement at the centre of judicial control while it calls for a clearer apprehension of the anti-alcoholic claim which is often behind taxation of alcohol.

I. Article 90 EC and the consumers' attitude claim

The realization of the common market justifies legal action in order to control and neutralize the taxing power of the Member States.⁵ The taxing power of Member States stands as a potential protectionist instrument threatening the realization of the common market.⁶ Thus, neutrality of taxation regarding trade between the Member States is a key element of the economic Constitution of the European Union.⁷

In order to insure this tax neutrality towards European products, including alcoholic beverages, EC Law uses two methods: harmonization and negative integration through judicial control. On the basis of Article 93 EC, tax harmonization of excise duty on alcohol has been achieved to a certain extent. Although fixing tax rates remains a national competence, the structure of excise duties⁸ and the minimum rates to apply⁹ are set by Directives. This harmonization process is combined with the control on national tax systems exercised by national courts as well as by the ECJ on the basis of Article 90, whose scope is to insure that the national tax system does not protect national products to the detriment of those imported by another Member State.¹⁰

In order to cover discriminative tax arrangements in full, Article 90 EC introduces two distinctive but complementary levels of comparison.

According to its first paragraph, “[n]o Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products”. As the Court explained in Case 168/78 this is the “basic rule” of Article 90 and is “based on a comparison of the tax burdens imposed on domestic products and on imported products which may be classified as “similar”.¹¹ Whereas *direct* discrimination is based on the origin of the (imported) product, it is the problem of indirect discrimination that necessitates a far more sophisticated analysis, for unequal treatment is not the result of a reference to the origin of the product but in fact imposes a specific burden on imported products.

As for the question of “similar products”, it is interpreted with flexibility in order to cover a wide range of products that share the same characteristics.¹² The ECJ fixes

⁵ See Case 243/84 *John Walker & Sons* [1986] ECR 875, para. 22.

⁶ In its first judgment on Case 170/78 *Commission v. United Kingdom I* [1980] ECR 417, paragraph 10, the Court emphasized the importance of the intensification of trade between Member States in order to achieve the objectives of economic integration.

⁷ V. M. Poiares Maduro, *We the Court: The European Court of Justice and the European economic constitution – A critical reading of Article 30 of the Treaty* (Hart Publishing 1998).

⁸ Council Directive 92/83/EEC of October 19, 1992 on the harmonization of the structures of excise duties on alcohol and alcoholic beverages, *OJ L 316, 31.10.1992, p. 21*.

⁹ Directive 92/84/EEC, cited above.

¹⁰ In this sense, prohibition of protectionism does not coincide with equal treatment, for reverse discrimination (that is unequal treatment to the detriment of national products) does not fall within the scope of Article 90EC; see Case 86/78 *Peureux* [1979] ECR 897.

¹¹ Case 168/78 *Commission v. France* [1980] ECR 347, para. 5.

¹² Case 148/77 *H. Hansen Jun. & O. C. Balle GmbH & Co.* [1978] ECR 1787.

two criteria in this context.¹³ According to its case law, domestic and imported products are “similar” when they “have similar characteristics and meet the same needs from the point of view of consumers”.¹⁴ As the Court explains, the idea is not to examine whether the concerned products are identical but to check “their similar and comparable use”.¹⁵ From this perspective, it is the social and economic use of the product that dictates its similarity with other products, rather than any formal and “objective” taxonomy. In other words, it is the context of consumption and the consumer’s attitude that come under consideration.¹⁶ Products are qualified as similar – actually or potentially – because consumers apprehend them as such.

This concern for the consumers’ perception is more important in the case of Article 90’s second paragraph, which provides that “[f]urthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products”. This provision covers the case of those domestic products which, though not “similar” in the sense of the first paragraph, are nevertheless in competition, partial, indirect or potential, with imported products.¹⁷ Delimitating the field of application between “similar” and “competitive” products is not a simple task. Though complementary to the first paragraph, this provision is based on a fundamentally different logic.

Here, equal treatment is not checked on the basis of tax burdens but calls for a deeper evaluation of the protective consequences of internal taxation on domestic products. Thus, the question is not to identify similar products and then check their tax treatment but rather appreciate how the tax system can favor internal products. This approach dictates a far deeper economic analysis of the effect of taxation on consumption than the arithmetical comparison of tax burdens.¹⁸ The competition criterion focuses on the economic uses to which the domestic products may be put and on the effect of taxation on these uses.¹⁹

Consequently, the importance of consumer attitude is twofold here. On the one hand, it is the major criterion for identifying which products enter into competition. It is the consumer’s potential choices and perceptions that make products an alternative to each other, even though they cannot be qualified as “similar”. On the other hand – and it is by far the most difficult element in this method – the consumer’s attitude is the critical element in affirming any indirect protection for domestic products. The impact of taxation on final selling price can be a decisive factor for the consumer’s choice of domestic rather than competing imported products. This protective nature is qualified as objective for there is no need to prove the Member State’s intention to fix a protective system through taxation. The control is based on the effects of national tax treatment on the consuming attitudes.

Applying this method is, however, a particularly difficult task. Despite this objective qualification of the protective nature of tax arrangements, the breach of Article 90’s

¹³ Catherine Barnard, *The Substantive Law of the EU* (Oxford University Press 2004) 49, refers to the “double test” applied by the Court in order to determine similarity.

¹⁴ Case 45/75 *Rewe* [1976] ECR 181.

¹⁵ Case 168/78 cited above; Case 106/84, *Commission v. Denmark* [1986] ECR 833, para. 12.

¹⁶ See for instance Case C-230/89 *Commission v. Greece* [1991] ECR I-1909.

¹⁷ Case 27/67, *Firma Fink-Frucht GmbH* [1968] ECR 327, 342.

¹⁸ Case 356/85, *Commission v. Belgium* [1987] ECR 3299, para. 7

¹⁹ Case 27/67, cited above.

second paragraph necessitates an appreciation of consumer attitude as a result of these arrangements. Although the introduction of the second paragraph was supposed to facilitate the control of national tax rules whenever similarity between products was hard to establish, it appears in practice that the enforcement of this provision is subject to difficult economic evaluations. Of course, in Case C-167/05, the Advocate General P. Mengozzi emphasized that according to the Court's case-law,²⁰ for the application of Article 90's second paragraph it is sufficient that the national tax system is "likely" to bring the protective effect referred to by the Treaty.²¹ It is precisely, however, the potential character of protective effect that calls for an evaluation of such a complex question as the consumer's potential attitude towards products. Indeed, a heavier taxation of imported products cannot explain by itself the consumer's choice of domestic competing ones. This is why it is necessary to establish case by case the role of different taxation in the final choice of consumers.

II. The ECJ's method

In order to apply Article 90 EC under workable conditions, the ECJ had to establish a precise method of analysis of national tax systems. This method contains several different steps.

First, the Court determines which paragraph of Article 90 is applicable. As we have previously mentioned, the analysis is appreciably different in each case. Thus, the ECJ examines whether the relevant national and imported products are "similar" according to the criteria we have already mentioned. If they were classed as similar because of their production characteristics or their economic use, then tax burdens would be compared in terms of the rate, the mode of assessment or other tax rules applicable.²²

Second, if similarity between products is not proved, it is still possible to water down national tax rules on the basis of the second paragraph of Article 90.²³ In this sense, a competitive relationship should be established between domestic and imported products.²⁴ This relationship should be lasting and characteristic but nonetheless it can be only partial, indirect or potential.²⁵ In other words, there is a competitive relationship whenever national and imported products are "mutually substitutable" in the sense that they are capable of meeting identical needs.

Third, should this competitive relationship be established, the Court compares tax arrangements in order to identify differences in tax treatment. This comparison proves to be far less difficult than the comparison of tax burdens in the case of the

²⁰ Case 170/78, *Commission v. United Kingdom II* [1983] ECR 2265, paragraph 10; Case 356/85, cited above, para. 11.

²¹ Case C-167/05, cited above, Opinion of the Advocate General, para. 60.

²² Case 168/78, cited above.

²³ Catherine Barnard, *The Substantive Law of the EU*, cited above, p. 57 underlines that "*as the Beer and Wine Cases show, the tests applied to both provisions do overlap*".

²⁴ See Opinion of the Advocate General, Case C-167/05, cited above, para. 42.

²⁵ The Advocate General Mengozzi (case C-167/05, cited above, footnote 15) is absolutely right when he underlines the confusing case law of the ECJ that tends to assimilate "similar" and "competitive" products. This confusion was, however, unavoidable since the Court decided to apprehend "similarity" in terms of economic use rather than simple product characteristics and, thus permit the "intrusion" of the first paragraph of Article 90 to the cases that should initially be ruled by the second more "economics-related" second paragraph.

first paragraph of Article 90, because here compared products are largely dissimilar. This is obvious in the case of alcohol taxation for, as we will see, tax rates apply to beverages with structural differences, such as alcohol strength.

Finally, in case tax arrangements are found to differ, it is necessary to examine whether these arrangements are “discriminatory in nature”. That means that the Court needs to check the protectionist consequences (even indirect and potential) of these different tax arrangements. This last condition is by far the most difficult to satisfy, in terms of burden of proof. As we will see, it is the consumer’s attitude that renders this element particularly complex.

III. Beer v. Wine: the application of the Court’s method

The recurring interest in comparing wine and beer taxation is not explained solely by the popularity of these alcoholic beverages. Their geographical origin and the consuming attitudes related to these origins shape a very interesting context of competition and potential national protectionism. In fact, behind the dilemma of wine or beer, is a “clash of civilizations” in alcoholic drinking. Wine is produced in few Member States, mainly in the South (though Champagne, German and Austrian wine need to be mentioned), whereas beer is manufactured in Northern countries. It is all but coincidence that ECJ’s relevant case law concerns actions introduced by the Commission against Member States like the United Kingdom, Belgium or Sweden, suspected of tax discrimination against wine. It goes without saying that, inversely, wine-producing Member States may discriminate against beer. If statistically there are more cases of discrimination against wine, it is basically because wine’s structural features facilitate indirect tax discrimination compared with beer.

Indeed, beer and wine are not “similar” products in the sense of the first paragraph of Article 90, at least when it is read literally. In terms of production conditions and characteristics, whilst wine is an agricultural product, with an elevated cost of production and subject to climate vicissitudes, beer is an industrial product.²⁶ Owing to these capital differences, the Court constantly examines the question of tax treatment of these products in the light of the second paragraph of Article 90.

“Mutual substitutability” is also seriously questioned in the case of wine and beer comparison. The great variety of wines in terms of characteristics, quality or price is not equivalent to the far narrower variety of beers. Thus, isolating “competitive” products dictates a sophisticated delimitation of those beverages, especially wines coming into competition with “strong” beer, meaning beer with an alcohol strength around 5% that is widely consumed. The Court holds that the wines which are comparable to beer are the ones that are more accessible to the public, which means lighter and less expensive wines.²⁷ In fact, this comparison is based on the consumer’s attitude in front of the shelves of a store that faces the dilemma “beer or wine?”. Conversely, different tax rules may legally apply to alcoholic beverages that are not in the same category (e.g. expensive wines) leaving therefore an important margin of appreciation to Member States.

²⁶ See the Opinion of the Advocate General, cited above, para. 45; it should be recalled that this was the point of view of the Italian Government which intervened in Case 170/78, *Commission v. United Kingdom*, cited above, para. 15.

²⁷ Case C-167/05, *Commission v. Sweden*, cited above, para. 43, referring to Case 356/85, *Commission v. Belgium*, cited above, para. 10.

The next step in the ECJ's method is also subject to difficulties in the case of wine and beer comparison. Directive 92/83/EEC proceeds to harmonization of the structure of excise duties but leaves an important margin of appreciation to Member States which can not merely fix the rate of duties but also choose different methods of applying these duties. The ECJ identifies three different factors verify if tax burdens on wine and beer are unequal: volume, alcoholic burdens and product price.²⁸

Choosing the most relevant factor for assessing the taxation relationship between wine and beer depends largely on the method applied by the national tax system. In Case C-167/05 the Court compared tax burdens on the basis of alcohol strength by volume of the beverage, as this factor was used by Swedish Law as the tax base for determining excise duty. The accuracy of this approach can be seriously questioned, for the Court applies the criterion chosen by a national tax system that is "accused" of protectionism. In any case, the Court's additional justification of its choice seems far more convincing, as it underscored the "objective" character of this criterion. Indeed, as we will see, it appears that it can be a reliable criterion for assessment especially when it comes to using taxation as a public policy instrument for anti-alcoholic action. The problem is that this objectivity is limited and should not have an axiomatic character that eventually excludes any cross-checking through other, more sophisticated, methods.

The Court's position at the final step of its method is the most problematic. In order to determine whether higher taxation of imported products has an effect on their potential consumption to the benefit of national competitive alcoholic beverages, the Court has regard to the difference between the selling prices of the competitive products and the impact of that difference on the consumer's choices.²⁹

From this perspective, the Court examines the impact of taxation on consumption at levels of individual consuming attitude and collective consumption tendencies.

Concerning the first level, the Court applied in Case C-167/05 the method of relationship (ratio) of final selling prices between a liter of strong beer and a liter of wine in competition and compared this relationship with the one that would apply if tax rates of beer were applied to wine. Thus, the Court found that the relationship between final selling prices of beer and wine would be 1 : 2.1 instead of the actual 1 : 2 .3. In this sense, the ECJ considered that the impact of higher taxation on wine would be "virtually the same". According to the Court's reasoning, given the important difference of the final selling prices the fluctuation of the ratio is not likely to change the consumer's attitude.

As for large-scale consuming tendencies, the Court found that previous change of taxation on wine and beer proves, at the most, a certain sensitivity of Swedes to prices and even though variations in prices seemed to have impact on consumption over a short period, no long-term changes in consumer habits in favor of beer have been established.³⁰

²⁸ Case 170/78, cited above, para. 18.

²⁹ Case C-367/93 *Roders and Others*, [1995] ECR I-2229, para 39.

³⁰ Case C-167/05 *Commission v. Sweden*, cited above, para. 59.

The ECJ's approach in this final step of its control method should, however, be seriously questioned for a number of reasons.

First, the Court examines the question of the consumer's attitude in terms of sales prices in an excessively mechanical manner. The method of comparing the final selling price applied to a liter of wine and a liter of beer is not convincing, since it neglects selling and marketing policies. These competitive products are usually sold in other units of quantity (bottles, cans, plastic or paper packages), an element that should not be underestimated when the impact of selling price and taxation on the consumer's choice is investigated. One does not need to be an expert in marketing to understand that it is impossible to see the impact of taxation in terms of price per liter when wine is sold in 0.75 liter bottles and beer in 0.33 liter cans.

The argument about the relationship between final selling prices of wine and beer is also problematic. Fixing such a ratio and comparing it with the hypothetical relationship of prices if beer tax rates were applied to wine in order to conclude that "the difference in price between those two products is virtually the same before taxation and after taxation"³¹ is an incomplete and inexact statement. In order to obtain a relatively credible result, one should also follow the inverse method, that is, check the difference in the relationship if tax rates on wine were applied to beer. "Higher taxation" results not only when one product is taxed more heavily but also when its competitors enjoy lighter tax burdens.

Also, the argument based on the difference of final selling prices introduces a "fatal" presumption to the detriment of wine owing to its inevitably higher cost price.³² Difference in final selling prices will always exist between the two products. This means, following the Court's method, that there is always a margin to apply heavier tax rules to wine, as the starting difference will "absorb" discrimination. Of course, one could argue that as long as unequal tax treatment does not have any impact on consumption, there is no breach of Article 90's second paragraph. This, however, undermines that scope of the Treaty's provision to fight against all forms of tax discrimination including potential and indirect discrimination.

This statement leads us to the most important criticism leveled against the ECJ's method. The Court considers that the slight difference in the relationship of selling prices before and after taxation should not have any impact on consumer choice. Nevertheless, the Court does not justify why the established difference is too slight to potentially affect imported products. In the same Case (C-167/05), the Advocate General found that this difference was sufficient evidence of the breach by the Swedish tax system of the second paragraph of Article 90. These divergent points of view demonstrate that a far more sophisticated approach should have been applied.

For similar reasons, the argument regarding statistical data is far from convincing. The Court itself recognized that changes in the tax treatment of wine and beer had a short-term impact on consumption. This should normally suffice to prove that heavier taxation has an impact on wine consumption. The extent of this impact cannot be evaluated through a simple comparison of sales data of competitive

³¹ Case C-167/05 *Commission v. Sweden*, cited above, para. 57.

³² This approach has already been applied in Case 356/85 *Commission v. Belgium*, cited above, para. 18.

products. Taxation fixes the final selling prices. This is only one factor among several that shape consuming tendencies. These other factors – habits is the first one should mention – are probably stronger than slight price fluctuations owing to tax reform. Article 90 does not, however, guarantee equal treatment of products on behalf of consumers; it only prohibits the potential influence – albeit slight – of tax discrimination on consumption. In this sense, one should not ask – as the Court indirectly does – why Swedish consumers stay loyal to beer but rather what the consumer reaction would have been, had tax arrangements been the same for the competitive products.

IV. Taxation of alcohol revisited

In Case C-167/05, Advocate General Mengozzi proposed a far simpler method of comparison, whose basic characteristic is the search for a maximum of objectivity in comparison of tax burdens.

In fact, this method consists of uniting the second and third steps of the Court's method regarding Article 90's second paragraph. This method supposes that consumers are sensible of significant differences in final selling prices. The central element of "significant difference" is not only a matter of getting different results by applying one method of comparison. In order to insure credible results, the judge should combine assessment of tax arrangements by applying all possible criteria (volume, alcohol strength and selling prices). Important differences can only be justified for public interest purposes, such as anti-alcoholic policy, with respect to the usual limits imposed by the Court's case law (mainly the proportionality principle).

The fact that a potential effect of discrimination suffices for a breach of the second paragraph of Article 90 gives credit to this method. Also, in order to avoid dogmatic and therefore unfair results, this method only establishes a presumption of potential discrimination. Advocate General Mengozzi stated that the Swedish Government "has not made it possible to rule out the possibility that the difference in the taxation of beverages may affect competition".³³

The problem with this method is that objectivity may lead to rather inflexible results that do not take into account the complexity of consumer attitude. What about those cases where the comparison of different criteria gave contradictory results? Should the possibility of significant difference be excluded without further analysis? It can also be argued that in the case of infringement procedures – which are the most frequent procedures – the burden of proof fixed by procedural law is reversed.³⁴ It should be up to the Commission to prove a definite violation of Article 90 and not simply demonstrate difference in taxation.

In fact, the Court is not to blame for the uncertainty that rules over alcohol taxation. The margin of decision left to Member States by the European legislator is

³³ Opinion in Case C-167/05, cited above, para. 85.

³⁴ K. Lenaerts, D. Arts, I. Maselis, *Procedural Law of the European Union* (2006² Thomson/Sweet & Maxwell) 162.

particularly important.³⁵ This is a result of the rule of unanimous vote in taxation matters which prevents the European Union from making sufficiently precise choices on the balance between national tax autonomy and European integration. As Case C-167/05 shows, however, the Court can still fix clearer criteria that should apply in order to check the conformity of a tax system with the demands of Article 90. Two distinct, but not incompatible, pathways seem accessible to the Court in order to insure compromise while gaining precision.

Checking consumers' effective sensibility towards taxation

The ECJ is absolutely right to focus on consumer sensibility regarding prices. This is key to checking the conformity of alcohol taxation in the light of 90 EC (its second as well as its first paragraph). It would have been preferable, however, had consumers' attitude and consuming tendencies not been invoked as marginal elements that help understanding of tax arrangements or, eventually, reverse presumption of non-discrimination, but rather had been at the centre of judicial appreciation.

Both quantitative and qualitative research should try specifically to identify to what degree there is a direct causal link between consumers' attitude towards imported products on the one hand and the structure of taxation, the final tax burdens and difference in selling prices on the other. Social sciences as well as economics provide sophisticated survey tools (questionnaire, observation, interview, statistical analysis, etc.) whose overlap insures reliable results. Therefore, there would be no need to proceed to artificial comparison of schemes ("a litre of wine and a litre of beer") or to unproven statements ("the difference before and after taxation is not significant enough to influence consumers' choice"). In the case of the "consumers' sensibility" method, the respect of methodological demands is a guarantee of the accuracy of the results obtained.

Furthermore, this approach is coherent with the identification of "competitive" products of the second paragraph of Article 90.³⁶ Given that the comparison of the effects of tax arrangements concerns products selected on the basis of consumer habits and perceptions, it is understandable that this comparison takes these consumer habits into consideration. After all, this approach is the closest to the intent of the second paragraph which tries to cover discriminative tax systems on the basis of their effect on consumption.

This method would present another advantage that Court seems to have forgotten over the years.³⁷ Taxation does not solely have an effect on consumption of interchangeable products, it can also establish – or, conversely, dislocate – "mutual substitutability" of products. Tax burdens and consequent final selling taxes help to

³⁵ It has been almost 30 years (1980, in Case 168/78, cited above, para. 15) since the Commission affirmed before the Court "its intention to propose the introduction, at least in principle, of a single rate of tax in future Community regulations..."

³⁶ The same goes for the first paragraph's "similar" products as long as similarity is based on the economic use of products.

³⁷ In Case 170/78, cited above, the Court pointed out that, "for the purpose of measuring the possible degree of substitution, attention should not be confined to consumer habits in a member state or in a given region. Those habits, *could not be considered to be immutable*; the tax policy of a member state *must not therefore crystallize given consumer habits so as to consolidate an advantage acquired by national industries concerned to respond to them*" (para. 8). In C-167/05, cited above, the Commission referred to this crystallization effect of taxation (para. 23).

form consumers' belief about interchangeable beverages. From this perspective, instead of trying to fix in advance criteria for comparison, rules for tax arrangements and methods for evaluating statistical or accounting data, it is necessary to focus directly on the impact of tax arrangements on consumers' perceptions and choices.

To sum up, the control of consumers' sensibility goes far beyond the interpretation of statistical information and even allows checking the tools of comparison. Thus, analyzing consumers' reaction towards different alcoholic beverages in which different tax rules are applied answers the most crucial – from a legal standpoint – question: if the same tax treatment applied to certain imported and national products, would a significant number of consumers choose the former instead of the latter?

Introducing the anti-alcoholic quest

Alcohol has an impact both on the drinker (internal cost) and society (external cost) in terms of harmful effects (car accident, violence, illness...)³⁸ Alcohol taxation has therefore both a fiscal and a paternalistic function. Thus, it insures that “each drinker takes into account all the external costs when making his drinking decision”.³⁹ This is especially important for heavy drinking, in terms of consumption of significant quantities of alcoholic beverages or in terms of preference for beverages with significant alcohol strength. Also, taxation of heavy drinking responds to the need to compensate for the reduction of low-risk moderate drinking and the subsequent loss of revenue by the welfare services. On the other hand, taxation has an impact on selling prices, an element that deters consumers from heavy drinking, unless there is already an addiction problem. Taxation stands as an instrument for prevention in the field of public health policy.

EU Law does not remain indifferent to the anti-alcoholic claim. Since the “Cassis de Dijon” Case,⁴⁰ the relationship between alcohol taxation and protection of public health is apprehended in terms of an exception to free movement of goods. From a teleological perspective, the same approach could apply in the case of internal taxation for impediment in cross-border movement of goods is also at stake. Contrary, however, to Article 28 EC, which remains inapplicable on the basis of the defenses of public interest provided by Article 30, the provisions of Article 90 do not contain any exception clauses. The demands for equal treatment and tax neutrality seem absolute in the sense that public purposes cannot justify any discriminative tax measures.

Nevertheless, ECJ's case law recognizes that public interest can totally exclude any breach of Article 90 whenever objective justifications permit it. In Case 196/85, the Court stated that “in the present state of Community Law, Article 95 of the EEC Treaty does not prohibit Member States, in the pursuit of *legitimate economic or social aims*, from granting tax advantages, in the form of exemptions from or

³⁸ Sijbren Cnossen, “Do drinkers pay their way to the European Union?”, in S. Cnossen (ed.), D. Forrest, S. Smith, *Taxation and Regulation of Smoking, Drinking and Gambling in the European Union* (CPB Netherlands Bureau for Economic Policy Analysis 2009), 43 *seq.*

³⁹ Sijbren Cnossen, cited above, 44.

⁴⁰ Case 120/78, *Rewe-Zentral*, ECR [1979] 649.

reduction of taxes, to *certain types of spirits* or to certain classes of producers, provided that such preferential systems are extended *without discrimination to imported products conforming to the same conditions as preferred domestic products*" (emphasis added).⁴¹ Protection of morality,⁴² regional development and – why not? – public health⁴³ can justify tax arrangements that otherwise would have constituted a breach of Article 90 (first or second paragraph).

Therefore, as long as the European Union has not regulated the question of alcohol taxation in the light of public health objectives (despite the overlapping of the two questions), Member States can conduct their own anti-alcoholic policies by all possible means, including taxation.

Hence, tax arrangements can apply either on the basis of alcohol strength or of volume. In the first case, taxation is based on a uniform tax rate applied to alcoholic strength by volume. It is by far the most objective method that reflects the social cost claim. The second case rests upon consumption and calls for a flat tax rate on the quantity of alcoholic beverages consumed.

Of course, tax rates should take into account the social context of drinking. The same tax rates would apply at least to "similar" and "competitive" products. Consuming tendencies and habits are important in order to delimitate the relevant market in the light of the second paragraph of Article 90, whereas the first paragraph will rediscover its initial function, related to products with similar production characteristics. From the moment the similarity or mutual substitutability of beverages is established, however, there is in principle no place either for consuming attitudes towards prices to enter the equation or for the Member State to apply different tax rates or different tax arrangements according to the beverage type.

In fact, the method proves to be less promising for the Member States than one might think. Of course, the social cost claim (the protection of public interest) can justify different tax burdens for beer and wine that may affect imported products. The Court should, however, check anti-alcoholic policy claims according to its classic standards and verify that tax arrangements do not dissimulate protective measures against imported products.

The major problem with this public policy argument is its inflexibility. Applying taxation purely on the basis of anti-alcoholic objectives neglects the fact that both the social and legal contexts of drinking are far more complex. To stay within the limits of EC Law, it would be quite difficult for a Member State applying this method and producing mainly low-alcohol beverages to avoid infringement of Article 90 EC, especially with regard to proportionality. There are other ways to fight heavy drinking and addiction without drastically affecting sales of imported drinks. Therefore, the social cost method should be applied in a moderate way and be combined with other public policy instruments.

These difficulties demonstrate that the social cost method suggests the intervention of the European Union through harmonization measures in order to fix the possible

⁴¹ Case 196/85 *Commission v. France* [1997] ECR 1597, para. 7.

⁴² Case 252/86 *Bergandi* [1988] ECR 1343, para. 32.

⁴³ See Case 140/79 *Chemical Farmaceutici* [1981] ECR 1, para. 12, concerning alcohol production; cf. Catherine Barnard, *The Substantive Law*, cited above, p. 54.

applications and the limits of this approach, since the actual structure remains too elusive.

V. Concluding remarks: sharing the burden of proof

These suggestions call for a clear as well as a fair division of the burden of proof before the ECJ.

Regarding the effect of taxation on consumers' attitude, with respect to EU procedural law,⁴⁴ the burden of proof should remain with the European Commission. This means in practice that the EU institution would be responsible for preparing or asking for such specific quantitative and qualitative studies. As for the Member States, they should always be legally authorized either to contest the accuracy of the specific results or to invoke reasons of public interest justifying derogation.

In order to organize its work better and, most of all, insure a minimum of uniformity in its approach, the Commission should establish and disseminate standards and guidelines concerning the criteria of this economic analysis. This should also serve as a warning or at least a compass for national tax systems that would have acknowledge of eventual discriminative measures and at the risk of legal proceedings either before the ECJ or national courts could progressively erase protective tax arrangements on alcohol. Finally, this would permit the Commission to explore possible ways of conciliation between the demands of Article 90 and anti-alcoholic demands. In this context, EU action would seem much more coherent, and therefore convincing, to Member States, and such a process could lead in the future to concrete EU legislative measures on the question.

On the other hand, the anti-alcoholic claim through tax regulations calls for an important effort on behalf of the Member State in order to prove the conformity of its tax regulations with regard to the demands of Article 90 EC. Here a presumption of violation is (or should be) already established by the plaintiff and the argument of public policy objectives justifying tax arrangement appears like a "last minute" chance for national authorities before the final affirmation of a breach of Article 90. Therefore, it is up to the Member State to persuade the Court as to the accuracy of tax arrangements and, above all, the element of proportionality.

⁴⁴ K. Lenaerts, D. Arts, I. Maselis, *Procedural Law of the European Union*, cited above.