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FISCAL BARRIERS TO TRADE WITHIN THE EU INTERNAL MARKET

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Abstract. The article deals with the EU rules on prohibition of fiscal barriers within the internal market, and the free movement of goods. Prohibition of fiscal barriers which form an obstacle to free movement of goods are regulated by prohibition of customs duties and prohibition of discriminatory taxation. Both these fiscal levies must follow the non-discrimination principle, i.e. the way these levies are applied must respect the principle of prohibition of discrimination based on nationality. It is also important to make difference between the prohibition of customs duties and prohibition of discriminatory taxation as they are subject to different legal regime.

Keywords: Internal market, anti-discrimination taxation, direct discrimination, indirect discrimination, taxes, similar product, competing product

INTRODUCTION

According to the Article 28 TFEU,[1] the European Union (EU) shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries. Customs union is a matter of exclusive competence of the EU (Article 3(1)(a) TFEU), i.e. only the EU may legislate and adopt legally binding acts and the Member States are able to do so only if they are empowered by the EU or if they implement the EU acts.

Single European Act[2] was the first significant amendment of the Treaties. It set an objective to establish the internal market by 31 December 1992. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capita is ensured.[3] The practical result of internal market is that the controls on the movement of goods within the internal market have been abolished and the EU is now a single territory without internal frontiers. The abolition of customs tariffs promotes trade between member states, which accounts for a large part of the total imports and exports of the member

[1] Treaty on the Functioning of the European Union, Official Journal of the European Union, C 202, 7 June 2016 [hereinafter: TFEU].
[2] Official Journal of the European Communities, L 169, 29 June 1987.
[3] Article 26(2) TFEU: "The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties."

states [Tichý, Arnold, and Zemánek 2009]. The Treaties specify the conditions under which these freedoms shall be realized. The free movement of goods is established on: a) customs union (Article 30 TFEU); b) prohibition of quantitative restrictions between member states (Articles 34 and 35 TFEU); c) prohibition of discriminatory taxation (Article 110 TFEU); d) competition policy, i.e. rules applicable to undertakings (Articles 101 to 109 TFEU).

1. NON-DISCRIMINATION PRINCIPLE

Article 18 TFEU[4] provides a general prohibition of any form of discrimination based in national origin. It is applied to goods or persons[5] and this concept is crucial for internal market functioning [Tridimas 2009]. Difference in treatment is not tolerated between the EU member states and within the internal market [Karas and Králik 2012]. Article 18 TFEU has a broad application and the Court of Justice insisted that the principle of non-discrimination has a direct effect.[6]

EU anti-discrimination legislation defines both direct and indirect discrimination [Varga 2011], whereby the direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation (Article 2(2)(a) of the Directive 2000/78/EC). Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (Article 2(2)(b) of the Directive 2000/78/EC). This means, that the indirect discrimination may be objectively justified, what may be described by the famous Cassis de Dijon[7] or Gebhard[8] case. The prohibition of discrimination is

[4] "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."

[5] See judgment of the Court of 2 February 1989 C–186/87, Ian William Cowan v Trésor public (ECLI:EU:C:1989:47), point 14: "Under Article 7 of the Treaty (now Article 18 TFEU) the prohibition of discrimination applies 'within the scope of application of this Treaty' and 'without prejudice to any special provisions contained therein'. This latter expression refers particularly to other provisions of the Treaty in which the application of the general principle set out in that article is given concrete form in respect of specific situations. Examples of that are the provisions concerning free movement of workers, the right of establishment and the freedom to provide services."

[6] See judgment of the Court of 21 June 1974 C–2/74, Jean Reyners v Belgian State (ECLI:EU:C:1974:68), point 14 and 30.

[7] See Case 120/78 Rewe–Zentral AG v Bundesmonopolverwaltung für Branntwein, Judgment of the Court of 20 February 1979 (ECLI: EU:C:1979:42): "Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer."

[8] See case C–55/94, Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano (ECLI: EU:C:1995:411); point 37: "It follows, however, from the Court's case-law that natio-

not limited to intentional discrimination, but also to unintentional provisions that have as their effect restrictions of imports or exports [Foster 2011]. The current case does not limit the restriction on free movement of goods to the prohibition of discrimination, but to any provisions that form an obstacle to the free movement of goods, including the prohibition covered by Article 110 TFEU.

2. METHODS OF INTEGRATION

Negative integration brings deregulation as it consists in outlawing the national laws that constitute an obstacle for the internal market.[9] Negative integration provisions are contained in the TFEU regulating each freedom of the internal market and have a form of ban of all national provisions that form a restriction [ibid.]. TFEU on the other hand, establishes statutory exceptions fulfilment of which does not constitute a restriction to the internal market functioning. The method of negative integration does not bring new legislation, but removes the obstructive laws to the free movement. Negative integration has been highly supported by the Court of Justice of the EU as it declared direct effect of the TFEU deregulatory provisions that prohibit the member states to adopt laws that constitute an obstacle for the internal market. The direct effect supports the individuals from private enforcement of their rights [Stehlík 2012] that are guaranteed by EU law against the member states [Bobek, Bříza, and Komárek 2011].

On the other hand, positive integration method brings new legislation on EU level. Its purpose is to regulate specific issues on EU level. It introduces new institutions, but also includes adoption of harmonization legislation and approximation of national laws by replacing the national divergent rules by common EU provisions [Foster 2011]. This is achieved by the Treaty provisions that enable to adopt a special legislation in specific areas of internal market[10] or by general legal bases provisions.[11]

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nal measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: 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."

[9] The Article 18 TFEU that prohibits discrimination on grounds of nationality is also considered as provision belonging to negative integration method.

[10] E.g. in the area of free movement of workers the Article 46 TFEU that "European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about freedom of movement for workers." In the area of free movement of services the Article 59(1) TFEU: "In order to achieve the liberalisation of a specific service, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall issue directives."

[11] Approximation of laws provision (Articles 114–118 TFEU) and the so called flexibility clause (Article 352 TFEU) that contains a provision allowing the EU to adopt an act necessary to attain objectives laid down by the treaties when the latter have not provided the powers of action necessary to attain them.

3. REGULATORY BARRIERS – PROHIBITION OF QUANTITATIVE RESTRICTIONS

Articles 34 and 35 TFEU prohibit quantitative restrictions on imports and exports and all measures having equivalent effect between member states [Craig and de Búrca 2011.]. Charge having equivalent effect is defined as 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.[12] Further case law developed the interpretation of the term quantitative restrictions, including the principle that any product legally manufactured and marketed in a one member state in accordance with its fair and traditional rules, and with the manufacturing processes of that country, must be allowed onto the market of any other member state.[13] This principle of mutual recognition is applied even in the absence of harmonisation measures on EU level.[14] The application of Article 34 TFEU is limited by the Keck judgment that concerns the selling arrangements which must be applied in a non-discriminatory way.[15]

4. FISCAL BARRIERS – PROHIBITION OF INTERNAL CUSTOMS

The EU shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between member states of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries (Article 28(1) TFEU). The provisions regulating the customs union shall apply to products originating in member states and to products coming from third countries which are in free circulation in member states (Article 28(2) TFEU). TFEU provides a general prohibition of customs duties and charges having equivalent effect. This prohibition is applied to goods which cross internal frontiers and from the settled

[12] Case 8/74, Procureur du Roi v Benoît and Gustave Dassonville, judgment of the Court of 11 July 1974 (ECLI:EU:C:1974:82), point 5.

[13] Case 120/78, Rewe–Zentral AG v Bundesmonopolverwaltung für Branntwein, judgment of the Court of 20 February 1979 (ECLI:EU:C:1979:42), point 15.

[14] Ibid., point 8: "Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer."

[15] Joined cases C–267/91 and C–268/91, Bernard Keck a Daniel Mithouard (ECLI:EU:C:1993:905), point 16: "By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment (Case 8/74 [1974] EC R 837), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States."

case law it is clear that the Court of Justice of the EU is concerned with the restrictive effect on trade between member states and not the purpose of the charge that must be paid.[16] Products coming from a third country shall be considered to be in free circulation in a member state if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that member state, and if they have not benefited from a total or partial drawback of such duties or charges.

The EU law prohibits customs duties on imports and exports and charges having equivalent effect. This prohibition shall also apply to customs duties of a fiscal nature, i.e. a broad definition of customs is applied in EU law.[17] The Common Customs Tariff duties shall be fixed by the Council on a proposal from the Commission (Article 31 TFEU). When a tax is caught by EU law then it is *per se* unlawful and there are no exemptions in EU law.[18]

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[16] Case 24/68, Commission of the European Communities v Italian Republic, judgment of the Court of 1 July 1969 (ECLI:EU:C:1969:29): "6. In prohibiting the imposition of customs duties, the Treaty does not distinguish between goods according to whether or not they enter into competition with the products of the importing country. Thus, the purpose of the abolition of customs barriers is not merely to eliminate their protective nature, as the Treaty sought on the contrary to give general scope and effect to the rule on the elimination of customs duties and charges having equivalent effect, in order to ensure the free movement of goods. 7. It follows from the system as a whole and from the general and absolute nature of the prohibition of any customs duty applicable to goods moving between Member States that customs duties are prohibited independently of any consideration of the purpose for which they were introduced and the destination of the revenue obtained therefrom. The justification for this prohibition is based on the fact that any pecuniary charge, however small, imposed on goods by reason of the fact that they cross a frontier constitutes an obstacle to the movement of such goods. 8. The extension of the prohibition of customs duties to charges having equivalent effect is intended to supplement the prohibition against obstacles to trade created by such duties by increasing its efficiency. The use of these two complementary concepts thus tends, in trade between Member States, to avoid the imposition of any pecuniary charge on goods circulating within the Community by virtue of the fact that they cross a national frontier."

[17] In judgment of the Court of 5 February 1976, case 87/75, Conceria Daniele Bresciani v Amministrazione Italiana delle Finanze (ECLI:EU:C:1976:18), point 9, the Court of Justice defined broadly any charge having an effect equivalent to a customs duty: "Consequently, any pecuniary charge, whatever its designation and mode of application, which is unilaterally imposed on goods imported from another Member State by reason of the fact that they cross a frontier, constitutes a charge having an effect equivalent to a customs duty."

[18] In judgment of the Court of 10 December 1968, case 7/68, Commission of the European Communities v Italian Republic (ECLI:EU:C:1968:51) the Court of Justice rejected the argumentation of Italy on justification based in Article 36 TFEU which is unavailable in case of fiscal barriers: "The defendant relies on Article 36 of the Treaty as authorizing export restrictions which, as in this case, are claimed to be justified on grounds of the protection of national treasures possessing artistic, historic or archaeological value. By reason of its object, scope and effects, the tax in dispute is claimed to fall less within the provisions of the Treaty relating to charges having an effect equivalent to customs duties on exports than within the restrictive measures permitted by Article 36. Consequently, in view of the difference between the measures referred to in Article 16 and Article 36, it is not possible to apply the exception laid down in the latter provision to measures which fall outside the scope of the prohibitions referred to in the chapter relating to the elimination of quantitative restrictions between Member States. Finally, the fact that the provisions of Article 36 which have been mentioned do not relate to customs duties and charges having equivalent effect is explained by the fact that such measures have the sole effect of rendering more onerous the exportation of the pro-

5. FISCAL BARRIERS – PROHIBITION OF DISCRIMINATORY TAXATION

Article 110 TFEU respects tax regimes of EU member states. However, it applies in situations when foreign goods are subject to internal taxation and a different tax regime is applied for foreign and domestic products. Article 110 TFEU is not absolute and the restriction applies to indirect taxation of competing foreign products.

From the text of Article 110 TFEU it is clear, that it recognizes two categories: 1) discrimination against similar foreign products (Article 110(1) TFEU) and 2) discrimination against competing foreign products (Article 110(2) TFEU).

Article 110(1) TFEU stipulates that no Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. This provision prohibits taxation that would protect similar local products. Article 110(2) TFEU stipulates that, 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 prohibits taxation that would indirectly protect other products.

Article 110 TFEU regulates two situations. The Article 110(1) TFEU applies if there is a discrimination of similar foreign product and Article 110(2) TFEU applies to imported products that are in competition with domestic products [Weatherill 2010].

5.1. Similar foreign products

The breach according to the Article 110(1) TFEU covers direct or indirect discrimination of similar foreign products. The prohibition of discrimination applies to domestic taxation that may cover different situations, e.g. different rates for tax for foreign and domestic products, different basis for assessment or different rules or regimes for tax payments for foreign or domestic products.

Article 110(1) TFEU requires that the taxation is equal for foreign products and domestic products. The key question is which products are "similar." Over the years, the Court of Justice has used to tests to determine similarity [Barnard 2010, 55]. Firstly, a formal test is applied which examines whether the product falls within the same fiscal, customs or statistical classification. Subsequently, the Court of Justice adopted a broader test which is a combination of factual comparison of the products with an economic analyses of their use [ibid., 56].

In judgment 106/84[19] the Court of Justice was dealing with the question what constitutes a similar product (fruit wines and wines made from grapes in this case). From the judgment it is clear that the similarity of products does not mean

ducts in question, without ensuring the attainment of the object referred to in that article, which is to protect the artistic, historic or archaeological heritage."

[19] Judgment of the Court of 4 March 1986, Commission of the European Communities v Kingdom of Denmark (ECLI: EU:C:1986:99).

that the products are strictly identical, but also include similar products that have a comparable use. The Court continued: In order to determine whether products are similar within the terms of the prohibition laid down in the first paragraph of Article 95 (now Article 110 TFEU) it is necessary to consider, whether they have similar characteristics and meet the same needs from the point of view of consumers. The Court endorsed a broad interpretation of the concept of similarity and assessed the similarity of the products not according to whether they were strictly identical, but according to whether their use was similar and comparable. Consequently, in order to determine whether products are similar it is necessary first to consider certain objective characteristics of both categories of beverages, such as their origin, the method of manufacture and their organoleptic properties, in particular taste and alcohol content, and secondly to consider whether or not both categories of beverages are capable of meeting the same need from the point of view of consumers.[20]

However, if the products are produced from the same ingredients, that does not mean, that they are similar. The Court of Justice was of opinion that the raw materials must be presented in the product in more or less equal proportion in order to be considered as similar. In case 243/84 (Johnnie Walker case) the Court of Justice had to deal with similarity of whisky and fruit wine of the liqueur type. It stated that the two categories of beverages exhibit manifestly different characteristics. Fruit wine of the liqueur type is a fruit-based product obtained by natural fermentation, whereas Scotch whisky is a cereal-based product obtained by distillation. The organoleptic properties of the two products are also different. The fact that the same raw material, for example alcohol, is to be found in the two products is not sufficient reason to apply the prohibition contained in the first paragraph of Article 95 (now Article 110 TFEU). For the products to be regarded as similar that raw material must also be present in more or less equal proportions in both products. In that regard, it must be pointed out that the alcoholic strength of Scotch whisky is 40% by volume, whereas the alcoholic strength of fruit wine of the liqueur type, to which the Danish tax legislation applies, does not exceed 20% by volume.[21] The contention that Scotch whisky may be consumed in the same way as fruit wine of the liqueur type, as an aperitif diluted with water or with fruit juice, even if it were established, would not be sufficient to render Scotch whisky similar to fruit wine of the liqueur type, whose intrinsic characteristics are fundamentally different.[22] The answer must therefore be that products such as Scotch whisky and fruit wine of the liqueur type may not be regarded as similar products.[23]

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[20] Case 106/84, Commission of the European Communities v Ireland, judgment of the Court of 4 March 1986 (ECLI:EU:C:1986:99), point 12.
[21] Case 243/84, John Walker & Sons Ltd v Ministeriet for Skatter og Afgifter, judgment of the Court of 4 March 1986 (ECLI:EU:C:1986:100), point 12.
[22] Ibid., para. 13.
[23] Ibid., para. 14.

In case 184/85[24] (Commission v Italy) the Court of Justice was dealing with similarity between bananas and peaches and pears. It was taking into account the characteristics of the product on one hand and the consumer needs on the other hand. It stated that whether bananas and other table fruit typically produced in Italy have similar characteristics and meet the same consumer needs. Consequently, in order to assess similarity, account must be taken, on the one hand, of a set of objective characteristics of the two categories of product in question, such as their organoleptic characteristics[25] and their water content, and, on the other hand, whether or not the two categories of fruit can satisfy the same consumer needs.[26]

5.2. Competing foreign products

The breach according to the Article 110(2) TFEU covers the protectionist effect of domestic taxation. This provision also applies to situations where the level of taxation is the same, but the difference is in applying tax provisions to the effect of which is to grant as regards excise duty on spirits, beer and made wine, benefits to Irish producers in respect of deferment of payment which are refused to importers of the same products from other Member States.[27] Article 110(2) TFEU covers a situation if the goods are not sufficiently similar but are in competition with each other, even if indirectly or potentially. It is applied if the tax provision of a member state has a protectionist effect to the detriment of imported goods that may be in competition with domestic goods. The key question is if the products are substitutable or interchangeable by each other. The aim of Article 110(2) TFEU is to prove that the tax has protectionist effect to the detriment of imported competing products. If the domestic goods benefit from some kind of indirect fiscal protectionism, the prohibition of Article 110(2) TFEU applies.

The Court of Justice of the EU has used several tests to discover whether the goods are in competition. Elasticity in demand is also reflected, especially in case if specific product is substituted by another product, e.g. if there is an increase in

[24] Judgment of the Court of 7 May 1987, Commission of the European Communities v Italian Republic (ECLI:EU:C:1987:207).

[25] I.e. sensory characteristics of food or other substances that create an individual experience via the senses – including taste, sight, smell, and touch. With respect to bananas on one hand and other fruits on the other hand the Court of Justice stated: "It must be observed in this case that the two categories of fruit in question, that is to say, on the one hand, bananas, and, on the other, table fruit typically produced in Italy mentioned above have different characteristics. As the Commission has conceded, the organoleptic characteristics and the water content of the two categories of product differ. By way of example, the higher water content of pears and other fruit typically grown in Italy give them thirst-quenching properties which bananas do not possess. Moreover, the observation of the Italian Government, which has not been challenged by the Commission, that the banana is regarded, at least on the Italian market, as a foodstuff which is particularly nutritious, of a high energy content and well-suited for infants must be accepted."

[26] Case 184/85, Commission of the European Communities v Italian Republic, judgment of the Court of 7 May 1987 (ECLI:EU:C:1987:207), point 9.

[27] Case 55/79, Commission of the European Communities v Ireland, judgment of the Court of 27 February 1980 (ECLI:EU:C:1980:56), point 14.

price. Other factors, like manufacture, composition of the product, consumer preference are also taken into account.

Probably the most famous and most important was the case 170/78[28] (wine and beer) in which the Court of Justice considered imposing higher duties on imported wines as a protectionist measure. This measure indirectly protected beer which was a domestic product over imported still light wines. The Court of Justice was considering the nature of the competitive relationship between wine and beer and, secondly, the selection of a basis for comparison and the determination of an appropriate tax ratio between the two products.

The Court of Justice emphasized that Article 110(2) TFEU applies to the treatment for, tax purposes of products which, without fulfilling the criterion of similarity laid down in Article 110(1) TFEU, are nevertheless in competition, either partially or potentially, with certain products of the importing country. In order to determine the existence of a competitive relationship it is necessary to consider not only the present state of the market but also possible developments regarding the free movement of goods within the EU and the further potential for the substitution of products for one another which might be revealed by intensification of trade, so as fully to develop the complementary features of the economies of the Member States.[29] As regards the question of competition between wine and beer, the Court considered that, to a certain extent at least, the two beverages in question were capable of meeting identical needs, so that it had to be acknowledged that there was a degree of substitution for one another. It 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, which were essentially variable in time and space, 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.[30] In view of the substantial differences in the quality and, therefore, in the price of wines, the decisive competitive relationship between beer, a popular and widely consumed beverage, and wine must be established by reference to those wines which are the most accessible to the public at large, that is to say, generally speaking, the lightest and cheapest varieties. Accordingly, that is the appropriate basis for making fiscal comparisons by reference to the alcoholic strength or to the price of the two beverages in question.[31]

If the Court of Justice finds that the tax law of a member state has a protectionnist effect to the detriment of imported goods that may be in competition with domestic goods, the member state may either lower the tax on imported product or

[28] Case 170/78, Commission of the European Communities v United Kingdom, judgment of the Court of 12 July 1983.
[29] Ibid., point 7.
[30] Ibid., point 8.
[31] Ibid., point 9.

raise the tax on domestic product, in order to eliminate the protection of domestic product.

6. DISTINCTION BETWEEN FISCAL BARRIERS AND REGULATORY BARRIERS

From a legal assessment it is necessary to make difference between charges having equivalent effect and taxes. In case Reprographic Machines[32] the Court of Justice was considering the levy charged on copy machines in order to compensate the breaches of copyright. The levy was charged on copy machines because they are often used for breach of copyright. Only very few copy machines were produced in France and the levy seemed to be thus discriminatory. However, the Court of Justice held the levy to be a genuine non-discriminatory tax.

The charge having equivalent effect covers any charge exacted at the time of or on account of importation which, being borne specifically by an imported product to the exclusion of the similar domestic product, has the result of altering the cost price of the imported product thereby producing the same restrictive effect on the free movement of goods as a customs duty.[33] The essential feature of a charge having an effect equivalent to a customs duty which distinguishes it from an internal tax therefore resides in the fact that the former is borne solely by an imported product as such whilst the latter is borne both by imported and domestic products.[34] The Court has however recognized that even a charge which is borne by a product imported from another Member State, when there is no identical or similar domestic product, does not constitute a charge having equivalent effect but internal taxation within the meaning it relates to a general system of internal dues applied systematically to categories of products in accordance with objective criteria irrespective of the origin of the products.[35] Those considerations demonstrate that even if it were necessary in some cases, for the purpose of classifying a charge borne by imported products, to equate extremely low domestic production with its non-existence, that would not mean that the levy in question would necessarily have to be regarded as a charge having an effect equivalent to a customs duty. In particular, that will not be so if the levy is part of a general system on internal dues applying systematically to categories of products according to the criteria indicated above.[36]

The Court of Justice accepted that the levy in issue forms part of a general system of internal dues and the levy in issue forms a single entity with the levy imposed on book publishers by the same internal legislation and from the fact, too,

[32] Case 120/78, Rewe–Zentral AG v Bundesmonopolverwaltung für Branntwein, judgment of the Court of 20 February 1979 (ECLI:EU:C:1979:42).
[33] Case 90/79, European Commission v France, judgment of the Court of 3 February 1981 (ECLI: EU:C:1981:27), point 12.
[34] Ibid., point 13.
[35] Ibid., point 14.
[36] Ibid., point 15.

that it is borne by a range of very different machines which are moreover classified under various customs headings but which have in common the fact that they are all intended to be used for reprographic purposes in addition to more specific uses.

If a charge is imposed on imported or exported goods by a member state and that charge is a non-discriminatory tax levy, it cannot be a charge having equivalent effect. Such charge is caught by Article 110 TFEU and as a tax underlies a different regime in comparison to the regime of prohibition of quantitative restriction under Articles 34 and 35 TFEU. The member states are free in establishing their own system of taxation which they consider to be most suitable for them. However, such system of taxation must be non-discriminatory to similar foreign products or competing foreign product according to Article 110 TFEU.

It is necessary to make difference between a charge having equivalent effect and taxation. These different charges underlie a different regime and different legal bases is applied on charges having equivalent effect (Articles 34 and 35 TFEU) and on taxes (Article 110 TFEU), i.e. they are mutually exclusive categories. It is not possible, that both articles may be applied on one and the same charge. The Court of Justice held that the essential characteristic of a charge having an effect equivalent to a customs duty, which distinguishes it from internal taxation, is that the first is imposed exclusively on the imported product whilst the second is imposed on both imported and domestic products. A charge affecting both imported products and similar products could however constitute a charge having an effect equivalent to a customs duty if such a duty, which is limited to particular products, had the sole purpose of financing activities for the specific advantage of the taxed domestic products, so as to make good, wholly or in part, the fiscal charge imposed upon them.[37] Where the conditions which distinguish a charge having an effect equivalent to a customs duty are fulfilled, the fact that it is applied at the stage of marketing or processing of the product subsequent to its crossing the frontier is irrelevant when the product is charged solely by reason of its crossing the frontier, which factor excludes the domestic product from similar taxation.[38] Financial charges within a general system of internal taxation applying systematically to domestic and imported products according to the same criteria are not to be considered as charges having equivalent effect. This could be the case even where there is no domestic product similar to the imported product providing that the charge applies to whole classes of domestic or foreign products which are all in the same position no matter what their origin. The objective of Article 110 TFEU is to abolish direct or indirect discrimination against imported products but not to place them in a privileged tax position in relation to domestic products. There is generally no discrimination such as is prohibited by Article 110 TFEU where internal taxation applies to domestic products and to previously imported products on their being processed into more elaborate pro-

[37] Case 78/76, Steinike & Weinlig v république fédérale d'Allemagne, judgment of the Court of 22 March 1977 (ECLI:EU:C:1977:52), point 28.
[38] Ibid., point 29.

ducts without any distinctions of rate, basis of assessment or detailed rules for the levying thereof being made between them by reason of their origin.[39]

In another case, the Court of Justice was also dealing with the necessity to make the distinction between a charge having equivalent effect and internal taxation. The Court of Justice confirmed its case law and stated that any pecuniary charge, whatever its designation and mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a frontier and which is not a customs duty in the strict sense, constitutes a charge having an equivalent effect and such a charge escapes that classification if it constitutes the consideration for a benefit provided in fact for the importer or exporter representing an amount proportionate to the said benefit. It also escapes that classification if it relates to a general system of internal dues supplied systematically and in accordance with the same criteria to domestic products and imported products alike.[40] The Court continued that it is appropriate to emphasize that in order to relate to a general system of internal dues, the charge to which an imported product is subject must: a) impose the same duty on national products and identical imported products, b) impose the duty at the same marketing stage and c) the chargeable event giving rise to the duty must also be identical in the case of both products.

To exempt a charge levied at the frontier from the classification of a charge having equivalent effect when it is not imposed on similar national products or is imposed on them at different marketing stages or, again, on the basis of a different chargeable event giving rise to duty, because that charge aims to compensate for a domestic fiscal charge applying to the same products – apart from the fact that this would not take into account fiscal charges which had been imposed on imported products in the originating Member State – would make the prohibition on charges having an effect equivalent to customs duties empty and meaningless.[41]

CONCLUSIONS

Internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. Effective functioning is based on the prohibition of discrimination based on nationality [Mazák and Jánošíková 2011]. The prohibition of discrimination based on nationality is applied both to fiscal barriers (prohibition of discriminatory taxation and prohibition of customs) and regulatory barriers (prohibition of quantitative restrictions between member states). The article analyses the Article 110 TFEU and the two situations it covers: 1) discrimination against similar foreign products (Article 110(1) TFEU); 2) discrimination against competing foreign products (Article 110(2) TFEU).

[39] Ibid.
[40] Case 132/78, SARL Denkavit Loire v France, administration des douanes, judgment of the Court of 31 May 1979 (ECLI:EU:C:1979:139), point 7.
[41] Ibid., point 8.

The Court of Justice makes difference between those goods that are similar and those goods that are in competition. From the cases law it is clear that the Court of Justice adopted a globalized approach to Article 110 TFEU considering both paragraphs of Article 110 TFEU together. It may happen that the Court considers the products not to be similar within the meaning of Article 110(1) TFEU, but these products still may be regarded as being in partial competition within the meaning of Article 110(2) TFEU. The article explains the difference between prohibition of charges having equivalent effect (Articles 34 and 35 TFEU) and prohibition of discriminatory internal taxation (Article 110 TFEU).

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