Tax Barriers to Intra-Union Trade:

American "Federalism", European "Internationalism"?

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I. Introduction

The task of creating a "common" market is one of the central tasks of every union. When the Philadelphia Convention drafted the 1787 US Constitution, there was little argument that the new Union had to become an economic union.[1] This objective to create a common market lay equally at the heart of the European Union: the 1957 Rome Treaty was to establish a European *Economic* Community, whose central aim was the creation of a European "common market".[2] This market was primarily a common market in goods, but the Rome Treaty was equally committed to 'the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital'.[3] In order to create that common market in goods, the European Treaties thereby made a fundamental distinction between *regulatory* barriers and *fiscal* barriers to intra-state trade. While the former were to be negatively removed by Article 34 TFEU,[4] fiscal barriers were subject to a different constitutional regime. And a closer look at the US constitutional order reveals that the Supreme Court, too, has "long subjected taxation to other limits and has long treated taxation differently from other kinds of regulation".[5] The reason for this differential treatment partly stemmed – like in the case of the European Union – from the text of the U.S. Constitution itself; yet, even for provisions that equally captured regulatory as well as fiscal charges, a fiscal "exceptionalism" soon developed.

What was the reason behind exceptionalism? Their peculiar constitutional and judicial treatment has been said to lie in the different nature of fiscal measures. The argument is that even when fiscal measures pursue regulatory interests, their primary function is to

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1 A. Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment, (1940-1) 25 Minnesota Law Review 432.

2 The central task of the 1957 Rome Treaty establishing the European Economic Community was thus as follows (cf. ex-Article 2 EEC): "The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it."

3 Ex-Article 3 (c) EEC.

4 Article 34 TFEU states: "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States." For an extensive analysis of the provision, see R. Schütze, From International to Federal Market: The Changing Structure of European Law (OUP, 2017 – forthcoming).

5 L. Tribe, American Constitutional Law (Foundation Press, 2000), 1105.

collect revenue for the States; and while States within the Union may benefit from the public interest regulation of one of its sisters, they will not directly benefit from the latter's fiscal coffers.[6] And yet: does the fiscal "double-burdening" of imported goods from other Member States not disadvantage them vis-à-vis domestic goods? Would the unlimited parallel imposition of fiscal burdens by each and every Member State not bring inter-state trade to an end? This article wishes to explore the tensions between the idea and practice of "parallel" fiscal sovereignties within a Union and the aim of creating a common market by exploring the different solutions to this dilemma in the United States and the European Union.[7] We shall see below that while both have indeed shown greater lenience to fiscal barriers (when compared to regulatory barriers), the US constitutional order has from an early point of time found a federal solution for fiscal measures under its (dormant) Commerce Clause whereas the European Union has – with one exception – remained loyal to the international solution offered by the GATT. This "conservative" solution is by no means dictated by the "genetic" structure of the European Treaties, and conclusion will therefore argue that the European Union should follow, mutatis mutandis, a federal solution.

II. Fiscal "Federalism" in the United States

What balance has the United States struck between the fiscal "sovereignty" of its States and the desire to create an American "common" market? Textually, the US Constitution not only mentioned the positive power of the Union "to lay and collect taxes, duties, imposts and excises",[8] it also contained two express limitations on the fiscal powers of the States to impose customs barriers.[9] Yet besides outlawing these "border measures",

[6] In this sense already: J. Snell, Non-discriminatory tax obstacles in Community law, (2007) 56 International and Comparative Law Quarterly 339.

[7] The article will not look at the different treatment with regard to customs duties in both legal orders. For an analysis of the latter, see: R. Schütze, From International to Federal Market: The Changing structure of European Law (in preparation).

[8] Article I – Section 8, Clause 1: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States[.]" This power is limited in Section 9 – Clause 5: "No tax or duty shall be laid on articles exported from any state."

[9] According to the "Import-Export Clause", States were generally prohibited to "lay any Imposts or Duties on Imports or Exports"; and this general prohibition was complemented by a second special clause that outlawed "any Duty of Tonnage" imposed by the States." Article I, Section 10 Clause 3

the States were said to be endowed with "an independent and uncontrollable authority to raise their own revenues… in the most absolute and unqualified sense".[10] This picture has dramatically changed over time; yet ironically, the development of significant limitations on States' fiscal powers was pushed by a third clause: the "Commerce Clause". According to the latter, the Union is entitled to "[t]o regulate Commerce … among the several States";[11] and the Supreme Court famously held that this power not only comprised a positive competence to adopt federal legislation but that it also contained a "dormant" negative power to outlaw any State legislation that either discriminated against imports from other Member States or excessively burden interstate commerce.[12]

But would the (dormant) commerce clause cover fiscal restrictions? Very early on, the inclusion of fiscal measures within the scope of the prohibition was indeed confirmed. In *Brown v Maryland*,[13] Chief Justice Marshall thus confirmed that the taxing powers of the States "cannot interfere with any regulation of commerce" and "[a]ny charge on the introduction and incorporation of the articles into and with the mass of property in the country must be hostile to the power given to Congress to regulate commerce".[14] The Commerce Clause would therefore cover regulatory as well as fiscal measures; and with regard to the latter it would go beyond *indirect* taxes on goods: "The distinction between a tax on the thing imported and on the person of the importer can have no influence on this part of the subject. It is too obvious for controversy that they interfere equally with the power to regulate commerce."[15] The Commerce Clause would consequently cover direct and indirect tax measures adopted by the States.

("Tonnage Clause"): "No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." The "Tonnage Clause" specifically targeted port dues, and was designed to disallow maritime states to burden commerce through this old-fashioned fiscal instrument.

[10] J. Hamilton et al, The Federalist (ed. T. Ball, Cambridge University Press, 2003), 145.

[11] 1787 US Constitution, Article I – Section 8: Clause 1 and 3. This federal power was limited by Section 9, Clause 5: "No Tax or Duty shall be laid on Articles exported from any State"; as well as Clause 6: "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another."

[12] Pike v. Bruce Church, 397 U.S. 137 (1970).

[13] Brown v. Maryland, 25 U.S. 419 (1827).

[14] Ibid., 448.

[15] Ibid.,

But would the Supreme Court apply the ordinary constitutional principles governing "regulatory barriers" under the Commerce Clause here; or would it develop a special set of doctrinal rules for fiscal measures? The answer has changed over time, and we can thereby distinguish between a "classic" and a "modern" doctrine; yet both doctrines, as we shall see below, are "federal" doctrines that have insisted that the fiscal "sovereignties" of the States are curbed by the federal Constitution.

A. Classic Doctrine: Interstate Commerce as a Tax-Free Zone

Classic commerce clause doctrine started out by considering the power over interstate commerce (partially) exclusive;[16] and this meant that all State laws falling within its scope would be void. This dual federal vision strictly distinguished between "interstate commerce" and "internal commerce"; and while the States had the "sovereign" power to tax the latter, they were constitutionally prohibited from taxing the former.

This vision is clearly presented in the *State Freight Tax Case.*[17] The legislature of Pennsylvania had imposed a tax for the use of the State's transportation systems. This tax was not discriminatory, since it was imposed regardless of whether the transportation occurred within the State or crossed State lines; and yet the Court still quick in its condemnation. Because the it was "of national importance that over that subject there should be but one regulating power, for if one state can directly tax persons or property passing through it or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between states remote from each other may be destroyed".[18] The tax on freight thus violated the Commerce Clause;[19] and while the Court recognized "fully the power of each state to tax at its

[16] See: R. Schütze, From Dual to Cooperative Federalism: The Changing structure of European Law (OUP, 2009), Chapter 2.

[17] Case of the State Freight Tax, 82 U.S. 232 (1872).

[18] Ibid., 280.

[19] Ibid., 279: "If, then, this is a tax upon freight carried between states and a tax because of its transportation, and if such a tax is in effect a regulation of interstate commerce, the conclusion seems to be inevitable that it is in conflict with the Constitution of the United States." And later (ibid., 276): "It would hardly be maintained, we think, that had the state established custom houses on her borders wherever a railroad or canal comes to the state line and demanded at these houses a duty for allowing merchandise to enter or to leave the state upon one of those railroads or canals, such an imposition would

discretion its own internal commerce", interstate commence however "must remain free". [20]

The doctrine of interstate commerce as a tax-free zone was confirmed in *Robbins v. Shelby County Taxing District*.[21] The case involved a tax on wandering salesmen, who were without a licensed business premise in the county in which they sold their goods. Robbins, a dealer of paper and stationary articles, had taken neither a license nor paid the tax and was consequently sentenced to pay a fine. When the case came up to the US Supreme Court, the Court – having dutifully paid homage to the philosophical principles underlying dual federalism – firmly held: "[N]o regulations can be made directly affecting interstate commerce. Any taxation or regulation of the latter character would be an unauthorized interference with the power give to Congress over the subject."[22] The non-discriminatory character of a State tax thus did not matter, since "[i]nterstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce or that which is carried on solely within the state".[23]

The tax immunity for interstate commerce was a strong federal solution that followed the ordinary constitutional principles for regulatory barriers under the Commerce Clause. It was inspired by the idea of dual federalism; yet once the latter was under attack, the old fiscal federalism rule would give way to a new one.[24]

B. Modern Doctrine: "Interstate Business Must Pay its Way"

not have been a regulation of commerce with her sister states. Yet it is difficult to see any substantial difference between the supposed case and the one we have in hand."

[20] Ibid., 282.

[21] Robbins v. Shelby County Taxing District, 120 U.S. 489 (1887).

[22] Ibid., 494.

[23] Ibid., 497; and the Court continued (ibid., 498): "A New Orleans merchant cannot be taxed there for ordering goods from London or New York, because, in the one case, it is an act of foreign, and, in the other, of interstate, commerce, both of which are subject to regulation by Congress alone."

[24] For an excellent account of this transition, see: W. Hellerstein, State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication, (1987-88) 41 Tax Law 37.

The decline of the classic doctrine and the rise of the modern doctrine took place at the time when American federalism transformed from a dual to cooperative federalism.[25] In the wake of that transition, the Supreme Court replaced the (old) idea of interstate commerce as a tax-free zone with the new rule that "interstate business must pay its way".[26] Interstate commerce could henceforth be taxed by the States; yet the Court immediately limited this power by insisting that State taxes must be "fairly apportioned".[27] Under the modern doctrine, the protection of interstate commerce against "cumulative burdens not imposed on local commerce" would indeed become the primary task of the Commerce Clause.[28] For once States were allowed to tax interstate commerce, the danger existed that "[t]he multiplication of state taxes… would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove".[29]

How has the Supreme Court dealt with multiple taxation within the American "common" market? For forty years, the modern doctrine would erratically established diverse casuistic solutions until the Supreme Court offered an analytical framework in *Complete Auto Transit v. Brady*.[30] The case has come to represents the crown jewel of the modern doctrine – thanks to the fact that the Supreme Court here "codified" the diverse elements within its modern jurisprudence into four basic principles. These four principles are: " the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state".[31]

This four-part test has become well-established jurisprudence. According to the first criterion, a State tax must have a "substantial nexus" with the taxable activity. In the past, the Court has interpreted this "jurisdictional" criterion in such a way that even minimal connections to a taxable event would suffice.[32] This minimalism has also been

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25 For a discussion of this transition, see: R. Schütze, From Dual to Cooperative Federalism: The Changing Structure of European Law (Oxford University Press, 2009), Chapter 2.

26 Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938), 254.

27 Ibid., 255.

28 Ibid., 256.

29 Ibid.

30 *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

31 Ibid., 279.

32 See only: Exxon Corp. v. Department of Rev. of Wisconsin, 447 U.S. 207 (1980), 219: "'minimal connection' or 'nexus' between the interstate activities and the taxing State". For a general analysis of the case law, see: W. Hellerstein, State Taxation of Interstate Business (supra n.24) 56.

applied to the fourth criterion: the fair relation between a State's jurisdiction and its "service" for interstate commerce. For not only is this criterion very closely related to the first one; in the course of time, the Court has emasculated it to such an extent that it has lost much if its independent meaning.[33] Criterion two and three, on the other hand, have proven to be the very heart of the *Complete Auto* test. Once a State is regarded as having a legitimate jurisdictional competence– and a States will normally do if there is some commercial "presence" within the State, these two substantive criteria insist that a State must not fiscally discriminate against out-of-state commerce;[34] and even when it adopts a non-discriminatory tax, the latter must be "fairly apportioned".

The – third – *Complete Auto* criterion is, without doubt, the most interesting one. The Court's jurisprudence has thereby clarified that "fair apportionment" did not imply that that all double taxation was constitutionally prohibited. In *Moorman*,[35] the Court thus dealt with a challenge to Iowa's single-factor sales formula that had been adopted by the State to determine income tax on interstate business. The appellant argued that the formula was unconstitutional because most of the other States used a three-factor criterion; and consequently, "Iowa's longstanding single factor formula must be held responsible for the alleged [income tax] duplication".[36] Yet the Court clearly rejected this view. Insisting that the duplication was not the result of Iowa's law but followed from the disparity in state laws on the issue,[37] it held:

> "If the Constitution were read to mandate such precision in interstate taxation, the consequences would extend far beyond this particular case. For some risk of duplicative taxation exists whenever the States in which a corporation does business do not follow identical rules for the division of income. Accepting appellant's view of the Constitution, therefore, would require extensive judicial lawmaking. Its logic is not limited to a prohibition on use of a single factor apportionment formula. The asserted constitutional flaw in that formula is that it is different

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[33] *Exxon Corp. v. Wisconsin Dept. of Revenue* (supra n.32), 220: "a rational relationship between the income attributed to the State and the intrastate values of the enterprise". The Court has interpreted this criterion in Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981), where it held that this criterion is closely related to the nexus requirement but that "the fourth prong of the *Complete Auto Transit* test imposes the additional limitation that the measure of the tax must be reasonably related to the extent of the contact" (ibid., 626). According to Tribe, American Constitutional Law (supra n.5), 1125-26 "the Court has transformed this prong of *Complete Auto Transit* into the fairly trivial requirement that a state provide *some* services to all who are its taxpayers"; the fourth Complete Auto prong has therefore "little independent significance as a restraint on state tax power".

[34] Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984).

[35] Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978).

[36] Ibid., 276.

[37] Ibid., 277.

from that presently employed by a majority of States, and that difference creates a risk of duplicative taxation. (…)

The prevention of duplicative taxation, therefore, would require national uniform rules for the division of income. Although the adoption of a uniform code would undeniably advance the policies that underlie the Commerce Clause, it would require a policy decision based on political and economic considerations that vary from State to State. The Constitution, however, is neutral with respect to the content of any uniform rule. (…) It is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all States to adhere to uniform rules for the division of income. It is to that body, and not this Court, that the Constitution has committed such policy decisions."[38]

The complete removal of fiscal barriers created by the diversity of State legislation was thus not the task of the Supreme Court – but that of the Union legislature. Until Congress had acted, States were *not* constitutionally prohibited from levying an even-handed tax – as long as the latter did not produce arbitrary results. This last qualification was further elaborated in *Container Corporation.*[39] The Court here held that the fair apportionment criterion would only be violated, where there was "no rational relationship" between the tax and the interstate value, that is: where a State tax was "out of all appropriate proportion to the business transacted by the appellant in that State".[40] This was an extremely deferential review standard.

Yet the Court subsequently restricted its tolerance towards even-handed fiscal measures; and it did so by introducing a new subtest under the fair apportionment criterion: a dual consistency test. This doctrinal substructure is best expressed in *Jefferson Lines*.[41] Could Oklahoma impose a sales tax on the full price of a bus ticket from Oklahoma to another State? The Court explored the multiple-taxation-problem in the following manner:

The difficult question in this case is whether the tax is properly apportioned within the meaning of the second prong of *Complete Auto's* test, "the central purpose [of which] is to ensure that each State taxes only its fair share of an interstate transaction." *(…)* For over a decade now, we have assessed any threat of mal-apportionment by asking whether the tax is "internally consistent" and, if so, whether it is "externally consistent" as well.

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38 Ibid., 278-80.

39 Container Corp. v. Franchise Tax Bd., 463 U.S. 159 (1983).

40 Ibid., 180-181.

41 Oklahoma Tax Comm'n v. Jefferson Lines (93-1677), 514 U.S. 175 (1995).

> Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. (…) A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax. (…) External consistency, on the other hand, looks not to the logical consequences of cloning, but to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State. Here, the threat of real multiple taxation (though not by literally identical statutes) may indicate a State's impermissible overreaching."[42]

Finding the Oklahoma law internally consistent,[43] the Court spent much of its time on the external consistency principle; yet it ultimately confirmed its low review standard with regard to particular (State) apportionment formulas. A non-discriminatory state tax would consequently only violate the dormant Commerce Clause, where "the income attributed to the State is in fact *out of all appropriate proportions* to the business transacted ... in that State, or has led to a *grossly distorted result*".[44] This result comes substantially very close to the doctrinal test developed for regulatory measures: State taxes that indistinctly apply to domestic and out-of-state goods may violate the Commerce Clause where the portion charged by the State is grossly excessive. With regard to fiscal restrictions, the American legal order has thus again adopted a federal solution to fiscal barriers to intra-Union trade, and thus abandoned the "international" idea of parallel fiscal "sovereigns" within the Union. This contrasts with the solution that still exists within the European Union.

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[42] Ibid., 184-185.

[43] Ibid., 185: "If every State were to impose a tax identical to Oklahoma's, that is, a tax on ticket sales within the State for travel originating there, no sale would be subject to more than one State's tax." For a critical analysis of the internal consistency rule, see: W. Hellerstein, Is "Internal Consistency" Foolish?: Reflections on en Emerging Commerce Clause Restraint on State Taxation, (1988) 87 Michigan Law Review 138.

[44] Jefferson Lines, 195.

III. Fiscal "Internationalism" in the European Union

From the very beginning, the European Treaties made, at least with regard to goods,[45] a fundamental distinction between *regulatory* barriers and *fiscal* barriers to intra-Union trade. The former were to be removed by Article 34 TFEU,[46] while fiscal barriers were subject to a different legal regime. This regime thereby distinguished between (external) customs and (internal) taxes. And while customs duties were completely outlawed by Article 30 TFEU, internal tax measures were only subject to a relative prohibition on *discriminatory* internal taxes. Article 110 TFEU here stated:

> [1] 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.
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> [2] Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature to afford *indirect protection* to other products.

Unlike the US Commerce Clause, the provision only applied to taxes on *goods*, that is: indirect taxes.[47] Paragraph 1 thereby declares illegal all national taxes that *discriminate* between foreign and domestic goods, while paragraph 2 subsequently covers a second variant of fiscal protectionism. What is the scope of both paragraphs; and would they also cover non-discriminatory measures that excessively burden intra-Union trade? Let us explore these question in turn.

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[45] The distinction between regulatory and fiscal measures had only been expressly made with regard to goods. For the other three freedoms, the Treaty did not textually provide for two regimes, and it therefore seemed that if fiscal measures were included, they would be prohibited to the same extent as regulatory measures. For a discussion of fiscal measures within the three "other" freedoms see Section II (2/b) below.

[46] For the text of the provision, see supra n.4

[47] *Schöttle & Söhne OHG v Finanzamt Freudenstadt*, Case 20/76, EU:C:1977:26.

A. Discriminatory Taxation under Article 110 TFEU[48]

(i) Variant No.1: Discrimination Against "Similar" Foreign Goods

Article 110 (1) prohibits foreign goods to be taxed "in excess of" similar domestic goods. This outlaws internal taxes that fiscally disadvantage imported products.[49] This might occur through direct or indirect means;[50] and it may take place through direct or indirect discrimination. Direct discrimination takes place where national taxes *legally* disadvantage foreign goods by – for example – imposing a higher tax rate than that for similar domestic goods.[51] Indirect discrimination occurs where the same national tax formally applies to both foreign and domestic goods, but materially imposes a *heavier* fiscal burden on the former.[52]

An excellent illustration of an *indirectly* discriminatory tax thereby can be seen in *Commission v France.*[53] The Commission had brought enforcement proceedings against France on the ground that its differential tax on light-tobacco and dark-tobacco cigarettes violated Article 110. Having found that the two types of cigarettes were "similar",[54] the Court moved on to address the issue of discrimination and here found as follows:

> "Although [the French tax] does not establish any formal distinction according to the origin of the products, it adjusts the system of taxation in such a way that the cigarettes falling within the

[48] This Section is an updated version from my "European Union Law" (Cambridge University Press, 2015), Chapter 13 – Section 2(b).

[49] The Court has clarified that, in line with the clear wording of Article 110, the latter does not capture reverse discrimination, that is: where a Member States fiscally disadvantages its own products. See only: SA des grandes distilleries Peureux v directeur des Services fiscaux de la Haute-Saône et du territoire de Belfort, Case 86/78, EU:C:1979:64, para.32: "Although Article [110] prohibits any Member State from imposing internal taxation on products imported from other Member States in excess of that on national products, it does not prohibit the imposition on national products of internal taxation in excess of that on imported products."

[50] The reference to goods being "directly or indirectly" taxed was to clarify that the provision catches taxes on the finished product as well as taxation imposed on prior manufacturing stages. This was established, albeit in the context of Article 111 TFEU, in Commission v Italy, Case 45/64, EU:C:1965:116 = (1965) ECR 857 at 866: "As used in Article [111], the expression 'directly' must be understood to refer to taxation imposed on the finished product, whilst the expression 'indirectly' refers to taxation imposed during the various stages of production on the raw materials or semi-finished products used in the manufacture of the product."

[51] See *Lütticke GmbH* v. *Hauptzollamt Sarrelouis,* Case 57/65, EU:C:1966:34; as well as *Hansen & Balle* v. *Hauptzollamt de Flensburg,* Case 148/77, EU:C:1978:173.

[52] On this point, see my discussion of *Humblot* v. *Directeur des services fiscaux,* Case 112/84 in infra n.? below.

[53] Commission v France (Dark tobacco), Case C-302/00, EU:C:2002:123.

[54] Ibid., paras.22 et seq.

> most favourable tax category come almost exclusively from domestic production whereas almost all imported products come within the least advantageous category. Those features of the system are not nullified by the fact that a very small fraction of imported cigarettes come within the most favourable category whereas, conversely, a certain proportion of domestic production comes within the same tax category as imported cigarettes. It appears, therefore, that the system of taxation is designed in such a way as to benefit a typical domestic product and handicaps imported cigarettes to the same extent."[55]

The judgment brilliantly explicates the concept of indirect discrimination: were similar goods were treated dissimilarly, a violation of Article 110 had occurred. The central key to Article 110 (1) thus lies in the concept of "similarity". For only where imported and domestic goods are similar, will the provision require equal fiscal treatment. But when are domestic and foreign goods *similar?* Early on, the Court clarified that similarity is wider than identity;[56] and that similarity relates to comparability.[57] Comparability here means that two goods "have similar characteristics and meet the same needs from the point of view of consumers".[58] However: are "whisky" and "cognac" comparable drinks?[59] In a series of cases, the Court thus needed to established criteria to determine when two products are "similar" – and when they are not. The Court has thereby endorsed a "broad interpretation of the concept of similarity" that will nonetheless take account of "objective" differences between two seemingly similar products.[60]

This approach is well illustrated in *Humblot.*[61] Monsieur Humblot had acquired a (German) Mercedes car in France. The car possessed 36 CV (fiscal horsepower) and he had to pay a special tax imposed by the French Revenue Code, which distinguished

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[55] Ibid., para.30.

[56] See *Hansen & Balle,* Case 148/77 (supra n.51), para. 19: "The application of that provision is based not on a strict requirement that the products should be identical but on their 'similarity'."

[57] See *Commission* v. *France (Whisky v Cognac),* Case 168/78, EU:C:1980:51,para. 5.

[58] *Rewe-Zentrale des Lebensmittel-GroBhandels GmbH* v. *Hauptzollamt Landau/Pfalz,* Case 45/75, EU:C:1976:22.

[59] *Commission* v. *France (Whisky* v *Cognac),* Case 168/78 (supra n.57).

[60] *John Walker* v. *Ministeriet for Skatter og Afgifter,* Case 243/84, EU:C:1986:100, para. 11. "The Court endorsed a broad interpretation of the concept of similarity in its judgments … 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 needs from the point of view of consumers."

[61] *Humblot* v. *Directeur des services fiscaux,* Case 112/84, EU:C:1985:185.

between a progressive annual tax for cars up to 16 CV and a single special tax for cars above this rate. The special tax was nearly five times higher than the highest rate of the general progressive tax. And as France did not produce any cars above 16 CV, the question arose whether the special tax was "in excess of" the national tax on domestic goods. But are small (French) cars comparable to big (German) cars? The French government defended its internal tax regime by arguing that "the special tax is charged solely on luxury vehicles, which are *not similar,* within the meaning of the first paragraph of Article [110] to cars liable to the differential tax".[62] The Court disagreed. For while it acknowledged the power of the Member States to "subject products such as cars to a system of road tax which increases progressively in amount depending on an *objective criterion,* such as the power rating",[63] the French tax system did not do so and thus (indirectly) discriminated against foreign cars.[64]

What "objective" criteria may however be used fiscally to distinguish between seemingly similar products? This question is – misleadingly – called the question of "objective justification".[65] What stands behind this misnomer is the idea that whereas a national tax system must be neutral towards foreign goods, it can nevertheless discriminate between goods "on the basis of objective criteria".[66] Thus, where a Member State discriminates on the basis of a social or regional policy objective, such a public policy objective will not amount to protectionist discrimination. The discrimination is here "justified" by "objective" criteria that distinguish two products. The Court has thus held in the context of a differential tax system for alcoholic beverages:

> "[I]n the absence of any unification or harmonization of the relevant provisions, [European] law does not prohibit Member States from granting tax advantages, in the form of exemption from or reduction of duties, to certain types of spirits or to certain classes of producers. Indeed, tax advantages of this kind may serve legitimate economic or social purposes, such as the use of certain raw materials by the distilling industry, the continued production of particular spirits of high quality, or the continuance of certain classes of undertakings such as agricultural distilleries. However, according to the requirements of Article [110], such preferential systems must be

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[62] *Ibid.,* para. 9.

[63] *Ibid.,* para. 12.

[64] While the Court was coy with regard to the exact violation, the case appears to acknowledge a partial violation of Article 110 (1) in para. 14. For a subsequent case on the – reformed – French car tax system, see *Feldain* v. *Directeur des services fiscaux du département du Haut-Rhin,* Case 433/85, EU:C:1987:371.

[65] *Commission* v. *Italy (Regenerated Oil),* Case 21/79, EU:C:1980:1. The term is used in *ibid,* para. 16: "objectively justified".

[66] *John Walker* v. *Ministeriet for Skatter og Afgifter,* Case 243/84 (supra n.60), para. 23.

> extended without discrimination to spirits coming from other Member States."[67]

This position was confirmed in *Commission* v. *France (Natural Sweet Wines).*[68] The Commission had brought proceedings against a French tax scheme that exempted naturally sweet wines from the higher consumption duty on liqueur wines. The French Government defended this differential treatment by pointing to the fact that "natural sweet wines are made in regions characterized by low rainfall and relatively poor soil, in which the difficulty of growing other crops means that the local economy depends heavily on their production".[69] This regional policy objective gave preferential treatment to a "traditional and customary production" over similar goods resulting from industrial production. And this "objective" criterion was not discriminating against foreign goods.[70] For the differential treatment is here not related to the "nationality" of the good but to objective factors independent of the domestic or foreign origin of the products concerned. These objective factors must however be perfectly projected onto imported goods.[71] If this is not the case or where the Court finds that behind seemingly "objective" factors hides a "national dimension", it will hold the national tax to be materially discriminatory.[72]

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[67] Hansen & Balle, Case 148/77 (supra n.56), paras.16-17

[68] *Commission* v. *France (Natural Sweet Wines),* Case 196/85, EU:C:1987:182.

[69] *Ibid.*, para. 9.

[70] *Ibid.*, para. 10.

[71] Bobie Getränkevertrieb GmbH v Hauptzollamt Aachen-Nord, Case 127/75, EU:C:1976:95. If a Member State thus affords special advantages to some products, such as: beer produced in small breweries, it needs to extend them to imported beers, see ibid, para.10: "If therefore a Member State has elected to apply to home-produced beer a graduated tax calculated on the basis of the quantity which each brewery produces in one year, the first paragraph of Article [110] is only fully complied with if the foreign beer is also taxed at a rate, the same or lower, applied to the quantities of beer produced by each brewery during the period of one year." However, Member States are not obliged to apply the most favourable tax rate, within a differentiated tax system, to all imports. Only imports that fulfil the "objective" criteria of the lowest tax band will benefit from it.

[72] In the words of A. Easson, Fiscal Discrimination: New Perspectives on Article [110] of the EEC Treaty, (1981) 18 C.M.L. Rev. 521 at 544: "What was found offensive, in the „spirits" cases, was not that vodka was taxed more heavily than aquavit, or whisky more heavily than brandy, but that the tax systems in question were characterised by the fact that those products of essentially domestic manufacture came within the most favourable tax categories and almost all of those which were imported were subject to higher taxation, that is to say there existed an effective discrimination which possessed a „national dimension"."

(ii) Variant No.2: Protection Against "Competing" Foreign Goods

Even if an internal tax does not discriminate against "similar" domestic products, it might still fall foul of the second paragraph of Article 110. In the words of the Court:

> "The second paragraph of Article [110] is complementary to the first. It prohibits the imposition of any internal taxation which imposes a higher charge on an imported than a domestic product which competes with the imported product, although it is not similar to it within the meaning of the first paragraph of Article [110]. The prohibition also applies in the absence of direct competition where the internal taxation subjects the imported product to a specific fiscal charge in such a way as to protect certain activities distinct from those used in the manufacture of the imported product. However, the said second paragraph is only applicable when the various economic relationships envisaged by it are not merely fortuitous, but lasting and characteristic."[73]

Strictly speaking, the rationale behind Article 110 (2) is thereby not a prohibition on discriminatory taxation. (For the idea of discrimination implies treating similar goods dissimilarly; and where there are no similar domestic products, there cannot be discrimination.[74]) The best way to see Article 110 (2) is however to view it as an extension of the discrimination rationale in Article 110 (1). For its reach is simply wider in outlawing all internal taxes that grant indirect "protection" to domestic goods.[75] Unlike national taxes that are specifically discriminatory, the provision targets national taxes that *generally* disadvantage foreign goods; yet the Court has held that such general protection can only occur when domestic goods are *in competition* with imported goods.[76]

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[73] *Fink-Frucht GmbH* v. *Hauptzollamt München-Landsbergerstrasse,* Case 27/67, EU:C:1968:22, Summary Point 5.

[74] *Commission* v. *Italy (Bananas),* Case 184/85, EU:C:1987:207. Article 110 (2) thus solves the problem of – exotic – products, where there may be no similar domestic products.

[75] Co-Frutta Srl v Amministrazione delle finanze dello Stato, Case 193/85. EU:C:1987:210, para.19: "[W]here the requirement of similarity prescribed by the first paragraph of Article [110] is not fulfilled, the second paragraph of that article is intended to cover all forms of indirect tax protection in the case of products which, without being similar within the meaning of the first paragraph of Article [110], are nevertheless in competition, even partial, indirect or potential competition, with each other."

[76] Fink-Frucht, Case 27/67 (supra n.73), 232: "In addition to the prohibition imposed in the first paragraph of Article [110], the second paragraph of the same article forbid the imposition on imported products of any form of taxation 'of such a nature as to afford indirect protection to other products'.

When will two goods be in competition? Within Article 110 (2), the Court has generally adopted a flexible approach. This can be seen in *Commission* v. *United Kingdom (Beer & Wine)*.[77] The Commission had brought infringement proceedings against Great Britain in the belief that its tax regime for wine granted indirect protection to British beer. The excise tax on wine was indeed significantly higher than that on beer, and as Britain produced very little wine but a lot of beer, the suspicion of indirect protectionism arose. Britain counterclaimed that there was no competitive relationship between beer and wine, and that there could thus be no such protectionist effect. Not only were the two products "entirely different" with regard to their production and price structure,[78] the goods would hardly ever be substituted by consumers.[79] The Court was not impressed with this line of argument, and espoused its dynamic understanding of product substitution:

> "In order to determine the existence of a competitive relationship under the second paragraph of Article [110], it is necessary to consider not only the present state of the market but also the possibilities for development within the context of the free movement of goods at the [Union] level and the further potential for the substitution of products for one another which may be revealed by intensification of trade, so as fully to develop the complementary features of the economies of the Member States in accordance with the objectives laid down by Article [3] of the [EU] Treaty. . . For the purpose of measuring the degree of substitution, it is impossible to restrict oneself to consumer habits in a Member State or in a given region. In fact, those habits, which are essentially variable in time and space, cannot be considered to be a fixed rule; 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 comply with them."[80]

Such protection would occur in particular if internal taxation were to impose a heavier burden on an imported product than on a domestic product with which the imported product is, by reason of one or more economic uses to which it may be put, in competition, even though the condition of similarity for the purposes of the first paragraph of [110] is not fulfilled." Where this is not the case, Article 110 (2) will indeed not apply; see *Commission* v. *Denmark,* Case 47/88, EU:C:1990:449; as well as *DeDanskeBilimportører* v *Skatteministeriet, Toldog Skattestyrelsen,* Case C-383/01, EU:C:2003:352.

[77] *Commission* v. *United Kingdom (Beer & Wine, Interim Judgment),* Case 170/78, EU:C:1980:53.

[78] *Ibid.,* para. 13.

[79] *Ibid.:* "As regards consumer habits, the Government of the United Kingdom states that in accordance with long-established tradition in the United Kingdom, beer is a popular drink consumed preferably in public-houses or in connexion with work; domestic consumption and consumption with meals is negligible. In contrast, the consumption of wine is more unusual and special from the point of view of social custom."

[80] *Ibid.,* paras. 6 and 14.

The Court here brilliantly attacked the chicken-and-egg-problem within Article 110(2). For two goods might not presently be in competition *because* of the artificial price differences created by internal taxation. The British argument that its tax policy only reflected a social habit in which beer was mass-consumed, while wine was an "elitist" drink, disregarded the fact that the social habit might itself – at least partly – be the product of its – national – fiscal policy. And once this fiscal policy disappeared, beer and wine *could* be in competition. This *dynamic* understanding of product substitutability acknowledges the ability of fiscal regimes to *dynamically* shape consumer preferences. And in stepping out of a purely national frame, the Court here also added a federal "flavour" to Article 110.

Once a foreign product has been found to be in competition with a domestic product, the Court will then investigate whether the national tax regime generates a protectionist effect. In the above case, the Court indeed found that the significantly higher tax burden on wine would afford protection to domestic beer production.[81] (Importantly: Article 110(2) will here not demand fiscal equality between competition products. It only demands that the fiscal difference is not inspired by national protectionism.[82]) And in another case involving "drinks in Luxembourg",[83] the Court considered a clear protectionist effect to exist where "an essential part of domestic production" came within the most favourable tax category whereas competing products – "almost all of which [were] imported from other Member States" – were subject to higher taxation.[84] In its subsequent jurisprudence, the Court has nonetheless tried to establish a more nuance economic analysis to determine when a protectionist effect is present and when not.[85]

In conclusion: the Court's jurisprudence on Article 110 has remained firmly rooted in an (international) paradigm. For instead of assuming a – federal – bird's eye view of the fiscal powers of all the Member States within the Union, the Court's analysis focuses on the discriminatory or protectionist nature of the – unilateral – State measure; and this view is unable to tackle multiple tax burdens that – while not discriminatory in

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[81] *Commission* v. *United Kingdom (Beer & Wine, Final Judgment),* Case 170/78, EU:C:1983:202, para. 27.

[82] A fiscal relation between beer and wine of 1:5 was thus held to be "protective".

[83] G. Rodrigues Iglesias, "Drinks in Luxembourg: Alcoholic Beverages and the Case Law of the European Court of Justice", in D. O'Keeffe (ed.), *Judicial Review in European Union Law: Liber Amicorum in Honour of Lord Slynn of Hadley* (Kluwer, 2000), 523.

[84] *Commission* v. *France (Whisky* v *Cognac),* Case 168/78 (supra n.57), para. 41.

[85] Commission v. Sweden (Beer & Wine), Case 167/05, EU:C:2008:202.

themselves - may nevertheless excessively burden inter-Union trade. But let us look at this in closer detail in the next subsection.

B. Multiple Taxation and the "Fiscal Sovereignty" of the Member States

Despite endeavours of international coordination,[86] the classic international law solution allows each State to disregard all "external" fiscal events. While internal taxation must not discriminate against imports, the jurisdictional frame within which discrimination is assessed is always a "national" one; and from inside this domestic frame, a "double burden" resulting from a second State's taxing powers simply cannot be perceived. The fiscal provisions of the European Treaties had clearly been drafted in line with this international taxation model. For Article 110 TFEU was clearly inspired by the discrimination rationale in Article III GATT, while Article 111 TFEU only *permitted* each Member State to reimburse internal taxes for exports – yet it did *not compel* them to do so.[87] With regard to fiscal matters, the Union legal order therefore appeared to respect the (internal) "fiscal sovereignty" of the Member States and in particular their choice of "all connecting factors for tax jurisdiction".[88]

But should this international solution apply within a Union of States? Should the EU's internal market not confront double taxation in the same way as it has controlled double regulation? Famously, the Court had here – ever since *Cassis de Dijon* – insisted on the principle of mutual recognition according to which the regulatory measures of the home state had to be taken into account with the effect that the (additional) imposition of the regulatory regime of the host state needed to be justified.[89] Should that logic not also apply to fiscal barriers, as the – parallel – imposition of twenty-eight fiscal sovereignties

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[86] International coordination efforts have propagated the "destination" principle for indirect taxes, according to which only the country of destination should impose consumer taxes. However, this is choice left to each State. Fore direct taxation, see: OECD Model Convention with Respect to Taxes on Income and on Capital available at: https://www.oecd.org/ctp/treaties/2014-model-tax-convention-articles.pdf.

[87] This was expressly confirmed by the Court in Demag AG v Finanzamt Duisburg-Süd, Case 27/74, EU:C:1974:104, where the Court held that a Member State is not obliged to exonerate internal taxes under Article 111 – thus giving rise to the possibility of double taxation.

[88] B.J.M. Terra & P.J. Wattel, European Tax Law (Kluwer, 2012), 884: "EU law contains no legal basis for choosing connecting factors for defining taxing jurisdiction".

could potentially spell the end of intra-Union trade?[90] And yet: despite this danger, the Court has generally held that double taxation on goods falls outside the prohibitive sphere of the internal market. In *Larsen*,[91] it thus expressly held that the EU Treaties contained no provision prohibiting double taxation, and "[a]lthough the abolition of such effects is doubtless[ly] desirable in the interests of the freedom of movement of goods, it can however only result from the harmonization of the national systems under Article [113] or possibly Article [115] of the Treaty".[92]

This solution has been confirmed for direct taxes too; yet, as we shall see below, there exists an – important – exception for indirect taxes to which we shall return.

(i) Beyond Goods: The Rise and Fall of the Federal Model

Unlike the case of the free movement of goods, there was no special constitutional regime for direct taxation. Not only did the Treaties not contained a special positive competence for the harmonization of direct taxes, the other free movement provisions were simply silent on their application to fiscal measures. Early on, the Court nonetheless clarified that direct taxation could fall within the scope of the free movement of workers provisions;[93] and this was subsequently extended to all remaining fundamental freedoms.[94] Yet the central question here still was whether the general

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[89] For a discussion of Cassis and the "federal" model it introduces, see: R. Schütze, From International to Federal Market (supra n.4), Chapters 3 and 4.

[90] In the question of double taxation in the European Union generally, see: A. Rust (ed.), Double Taxation within the European Union (Kluwer, 2011), D. Gutmann, How to avoid Double Taxation in the European Union?, in: I. Richelle (et al, eds.), Allocating Taxing Powers within the European Union (Springer, 2013), 63; as well as G. Kofler & R. Mason, Double Taxation: A European 'Switch in Time', (2007) 14 Columbia Journal of European Law 63.

[91] Statens Kontrol med ædle Metaller v Larsen, Case 142/77, EU:C:1978:144.

[92] Ibid., para.34. This has become established jurisprudence, see only: Koornstra & Zn. vof v Productschap Vis, Case C-517/04, EU:C:2006:375.

[93] See only: Regulation 1612/68 on freedom of movement for workers within the Community, (1968) OJ (English Special Edition), 475; esp. Article 7 (emphasis added): "1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment; (2). He shall enjoy the same social and *tax advantages as national workers.*"

[94] For persons, see: See Case C-204/90, Bachmann v. Belgium, EU:C:1992:35; Case C-279/93, Finanzamt Köln-Altstadt v. Schumacker, EU:C:1995:31; as well as Case C-80/94, Wielockx v. Inspecteur der Directe

constitutional principles governing *regulatory* barriers should be extended to *fiscal* measures. The wording and structure of the three other free movement provisions indeed suggested this: for unlike the free movement of goods, there only existed a single set of rules for regulatory and fiscal measures! Should the Court thus not apply the restriction-based approach, developed for regulatory measures under each of these freedoms, equally to fiscal measures; or, would the Court developed different principles for these measures by – for example – insisting on an international (discrimination) test *à la* Keck?[95]

The Court appeared at first to favour a "unitary" approach by developing its jurisprudence on fiscal measures in close alignment with its case law on regulatory matters.[96] In the context of the freedom of capital, the Court thus held that non-discriminatory fiscal restrictions may be covered by the prohibition in *Sandoz*.[97] The Court dealt with Austrian legislation imposing a stamp duty of 0.8 per cent on any loan. Sandoz challenged the national measure by claiming that the imposition of a stamp duty 'constituted an obstacle to the free movement of capital between a borrower residing in Austria and a lender established in another Member State which was likely to deter the borrower from turning to such a lender'.[98] The Austrian Finance Minister objected that

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Belastingen, EU:C:1995:271. The services provisions cover, like the free movement of persons provisions, 'regulatory' as well as 'fiscal' measures; see e.g. Case C-134/03, Viacom Outdoor Srl v. Giotto Immobilier, EU:C:2005:94; as well as Case C-544/03, Mobistar SA v. Commune de Fléron, EU:C:2005:518. For the capital provisions, see only: Sandoz GmbH v Finanzlandesdirektion für Wien, Niederösterreich und Burgenland, Case C-439/97 (infra n.97), and Kerckhaert and Bernadette Morres v Belgische Staat, Case C-513/04 (infra n.?). For the extensive literature on taxation and free movement, see only: S. Kingston, The boundaries of sovereignty: the ECJ's controversial role applying Internal Market law to direct tax measures, (2006-2007) 9 Cambridge Yearbook of European Legal Studies 287; M. J. Graetz & A. C. Warren, Dividend Taxation in Europe: When the ECJ Makes Tax Policy, (2007) 44 C.M.L. Rev. 1577; J. Snell, Non-discriminatory tax obstacles in Community law, (2007) 56 International and Comparative Law Quarterly 339; K. Banks, The application of the fundamental freedoms to Member State tax measures : guarding against protectionism or second-guessing national policy choices?, (2008) 33 European Law Review 482; M. Isenbaert, EC Law and the Sovereignty of the Member States in Direct Taxation (IBFD Publications, 2010); C. H.J.I. Panayi, European Union Corporate Tax Law (CUP, 2013).

95 Criminal proceedings against Bernard Keck and Daniel Mithouard, Joined cases C-267/91 and C-268/91, ECLI:EU:C:1993:905. With Keck, the Court expressly accepted that for different types of national laws there would be different tests within Article 34 TFEU. For this development and its problems, see:

96 For an excellent analysis of the early case law here, see: K. Banks, The Application of the Fundamental Freedoms to Member State Tax Measures (supra n.94).

97 Case C-439/97, Sandoz GmbH v. Finanzlandesdirektion für Wien, EU:C:1999:499. According to T. Horsley, 'The Concept of an Obstacle to Intra-EU Capital Movement' in N. Nic Shuibhne and L. W. Gormley (eds.), From Single Market to Economic Union: Essays in Memory of John A. Usher (Oxford University Press, 2012), 155 at 165: 'The ruling in Sandoz represents, in the area of direct taxation, the high-water mark in the Court's review of non-discriminatory national rules as obstacles to intra-EU movement.'

98 Case C-439/97, Sandoz (supra n.97), para. 14.

the national law 'did not discriminate against lenders established in a Member State other than that of the borrower'.[99] Yet the Court held that this was irrelevant. The national law 'deprive[d] 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'; and since the stamp duty was 'likely to deter [national] residents from obtaining loans from persons established in other Member States', it constituted a restriction to capital movement under Article 63 TFEU.[100]

Did this mean that the fundamental freedoms for persons, services and capital would adopt a restriction test that went beyond discrimination? And in particular: what about non-discriminatory national measures that hindered free movement not because they themselves discriminate but where the obstacles arise due to the existence of multiple tax burdens? Would a dual fiscal burden through double taxation violate Union internal market law? After some doubts, the Court provided a clear - negative – answer for direct taxation in *Kerckhaert*.[101] A Belgian resident had received dividends from a French company. These dividends had been taxed at the rate of 15 per cent in France, yet they were equally subject to Belgian income tax at the rate of 25 per cent – without the possibility of having the French tax 'set off' against the Belgian tax. The applicants argued that since their 'French' dividends were taxed twice, the Belgian tax legislation constituted a restriction on the free movement of capital that fell foul of Article 63 TFEU.

Would the (unmediated) dual taxation of capital violate the free movement principle behind the internal market? In the context of regulatory barriers to goods, the answer after *Cassis de Dijon* is crystal clear: the dual regulation by the home and the host State violates free movement law – unless it is justified by means of imperative requirements of the public interest. Yet the Court rejected the extension of this jurisprudence and insisted that European Union law only prohibited fiscal discriminations within a national tax system:

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99 Ibid., para. 15.

100 Ibid., para. 19. For a similar formulation, see Case C-478/98, Commission v. Belgium, EU:C:2000:497, para. 18: 'Measures taken by a Member State which are liable to dissuade its residents from obtaining loans or making investments in other Member States constitute restrictions on movements of capital within the meaning of that provision.'

101 Case C-513/04, Kerckhaert and Morres v. Belgische Staat, EU:C:2006:713. For an extensive discussion of the case, see G. Kofler and R. Mason, 'Double Taxation: A European "Switch in Time"?' (2007) 14 Columbia Journal of European Law 63 at 74 et seq.

"It is true that discrimination may consist not only in the application of different rules to comparable situations but also in the application of the same rule to different situations. However, in respect of the tax legislation of his State of residence, the position of a shareholder receiving dividends is not necessarily altered, in terms of that case-law, merely by the fact that he receives those dividends from a company established in another Member State, which, in exercising its fiscal sovereignty, makes those dividends subject to a deduction at source by way of income tax. In circumstances such as those of the present case, the adverse consequences which might arise from the application of an income tax system such as the Belgian system at issue in the main proceedings result from the exercise in parallel by two Member States of their fiscal sovereignty.

It must be recalled, in that regard, that conventions preventing double taxation such as those envisaged in [ex-]Article 293 EC are designed to eliminate or mitigate the negative effects on the functioning of the internal market resulting from the coexistence of national tax systems referred to in the preceding paragraph. [Union] law, in its current state and in a situation such as that in the main proceedings, does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the [Union]. (…) Consequently, it is for the Member States to take the measures necessary to prevent situations such as that at issue in the main proceedings by applying, in particular, the apportionment criteria followed in international tax practice."[102]

In this judgment of principle, the Court unmistakeably discarded the idea of "fiscal" mutual recognition.[103] Fiscal measures dealing with direct taxation would only be subject to a discrimination test; and "discrimination" did not include the negative consequences following legislative disparity. Following *Bobie* in the context of indirect taxes,[104] the Court has therefore expressly insisted that discrimination needed to be exclusively assessed on the basis of one (!) national system. All adverse consequences flowing from the imposition of the – second but neutral – Belgian tax simply resulted 'from the exercise in parallel by two Member States of their fiscal sovereignty'.[105] The Court has repeated this solution in *Test Claimants (II)* – also for the freedom of establishment:

"[S]ince European Union law, as it currently stands does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the European Union, each Member State remains free to organise its system for taxing distributed profits, provided, however, that the system in question does not

[102] Case C-513/04, Kerckhaert and Morres v. Belgische Staat, paras.19-23.

[103] J. Snell, Non-discriminatory tax obstacles in Community law (supra n.94), 360.

[104] Bobie Getränkevertrieb GmbH v Hauptzollamt Aachen-Nord (supra n.71).

[105] Case C-513/04, Kerckhaert and Morres v. Belgische Staat (supra n.101), para. 20.

entail discrimination prohibited by the FEU Treaty."[106]

Within the European "common market", an individual may thus have to pay inheritance tax twice – if two Member States insist on imposing their fiscal "sovereignty".[107] The Court has indeed expressly held that the Member States are "not obliged therefore to adapt their own tax systems to the different systems of tax of the other Member States in order, inter alia, to eliminate the double taxation arising from the exercise in parallel by those Member States of their fiscal sovereignty".[108]

With regard to direct taxation, the Court thus expressly rejected the 'federal' model and instead prefers a – modern – 'international' model that is based on the fiscal sovereignty of the Member States.[109] In the absence of Union legislation providing general criteria for the apportionment of direct taxes within the common market, it is consequently exclusively in the hands of these States to – themselves – eliminate multiple taxation. Member States can and have done this via bilateral international tax treaties.[110] But has the Union here nonetheless imposed "federal" consequences on these international agreements? In particular: does the prohibition of discrimination on grounds of nationality require bilateral treaties to be 'multilateralised'?[111]

This argument has indeed been made,[112] but critics have invoked the reciprocity principle as a limit to extending the benefits granted under a bilateral treaty.[113] In the

[106] Case C-35/11, Test Claimants in the FII Group Litigation v. Commissioners of Inland Revenue and the Commissioners for Her Majesty's Revenue & Customs, EU: C: 2012: 707, para. 40

[107] Block v Finanzamt Kaufbeuren, Case C-67/08, EU:C:2009:92.

[108] Ibid., para.31.

[109] J. Snell, Non-Discriminatory Tax Obstacles (supra n.94), 348.

[110] Case C-513/04, Kerckhaert and Morres v. Belgische Staat (supra n.101), paras. 21–2.

[111] C. Tietje, Die Meistbegünstigungsverpflichtung im Gemeinschaftsrecht, (1995) 30 Europarecht 398 at 399.

[112] Ibid, 406, 412–3: 'Im folgenden wird sich unter systematischen und teleologischen Gesichtspunkten zeigen, daß es sich bei einer Meistbegünstigungsverpflichtung eben doch um eine Form der Nichtdiskriminierung handelt und die Verpflichtung zur Meistbegünstigung im Falle bestehender inter-se Abkommen im Gemeinschaftsrecht daher nach Art.6 EGV zu beurteilen ist ... Diesem Ergebnis zufolge können sich Unionsbürger auf Art.6 EGV berufen, um sich einer Ungleichbehandlung aufgrund unterschiedlicher Regelungen in Doppelbesteu erungsabkommen oder auf sie bezogener Personenkontrollen nach dem zweiten Schengener Übereinkommen zu erwehren.'

[113] In this sense see E. Kemmeren, The Termination of the "Most Favoured Nation Clause" Dispute in Tax Treaty Law and the Necessity of a Euro Model Tax Convention, (1997) 6 EC Tax Review 146 at 147–8: "The basis for this point of view is found in the special nature of a bilateral tax treaty between a Member State and another State, whether this State is a Member State or not. Such an agreement is the result of a negotiating process between both states by which the rights and obligations are laid down on the basis of the reciprocity principle. Such a treaty underlies a (well-)provided balance, also with respect to

past, the Court has indeed tended to defend the international market model against the idea of a "federal" MFN clause.[114] This was most famously confirmed in *D.*[115] A German national had here claimed that the Dutch law on wealth tax was discriminatory and thus violated the freedom of capital; yet the Dutch measure differentiated on objective grounds and was thus held to be not discriminatory. However, there existed a bilateral Convention between Belgium and the Netherlands for the avoidance of double taxation of income and property; and under Article 25(3) of that Convention, a person resident in Belgium would have been entitled to allowances and other tax benefits that the Netherlands granted to its own residents.

Would European Union law require the *Dutch* authorities to treat a *German* national like a *Belgian* national? While admitting that "there are situations where the benefits under a bilateral convention may be extended to a resident of a Member State which does not have the status of party to that convention",[116] the present case concerned the question whether a non-resident can be compared to another non-resident who received special treatment under a double taxation convention. For the Court, this was a different situation and from here it held as follows:

> "Similar treatment with regard to wealth tax in the Netherlands of a taxable person, such as Mr D., resident in Germany and a taxable person resident in Belgium, presupposes that those two taxable persons are regarded as being in the same situation. It is to be remembered that, in order to avoid the same income and assets being taxed in both the Netherlands and Belgium, Article 24 of the Belgium-Netherlands Convention allocates powers of taxation between those two Member States and Article 25(3) lays down a rule under which natural persons resident in one of those two States are entitled in the other to the personal allowances which are granted by it to its own residents. *The fact that those reciprocal rights and obligations apply only to persons resident in one of the two Contracting Member States is an inherent consequence of bilateral double taxation conventions. It follows that a taxable person resident in Belgium is not in the same situation as a taxable person resident outside Belgium so far as concerns wealth tax on real property situated in the Netherlands. A rule such as that laid down in Article*

the financial consequences'; and K. Vogel, D. Gutmann, and A Paula Dourado, Tax Treaties between Member States and Third States: "Reciprocity" in Bilateral Tax Treaties and Non-discrimination in EC Law, (2006) 15 EC Tax Review 83 at 87: "Such a way of reasoning relies on the aforementioned idea that a tax treaty is a coherent set of rules established by two contracting parties with conflicting interest. It assumes that those Contracting Parties have reached an economic balance through negotiation. The consequence of this approach to tax treaties is that their structure should not be jeopardised on the basis of hazardous comparisons with the situation of third State residents."

[114] Case 204/90, Bachmann v Belgium, EU:C:1992:35.

[115] Case C–376/03, *D v Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen,* EU:C:2005:424. See more generally: K. Engsig-Sørensen, The Most-Favoured-Nation Principle in the EU, (2007) 34 Legal Issues of Economic Integration 315.

[116] *D,* Case C–376/03 (supra n.115), para.55 (emphasis added).

> *25(3) of the Belgium-Netherlands Convention cannot be regarded as a benefit separable from the remainder of the Convention, but is an integral part thereof and contributes to its overall balance*."[117]

The refusal to extend the mutual benefits of a bilateral agreement between two Member States to other Union citizens that were not resident in either state did, thus, not violate the non-discrimination principle. International cooperation can legitimately bring some Member States closer to each other without automatically violating this general principle on the European legal order is based. Bilateral international convention will here remain *bilateral* conventions; because the Union legal order does not impose a general "most-favoured-nation" obligation on its Member States.

[117] Ibid, paras.59–62.

(ii) Exception to the Rule: Value-Added Tax

For one special case, the Court has abandoned the international law solution for the European Union. This special case concerns a not so special tax: Value-Added-Tax (VAT). What are the constitutional principles applicable here? A partial answer to this question was given in *Schul*.[118] Decided only a few years after *Cassis*, the case concerned the sale of a second-hand sports boat that had been purchased in France, where value-added tax at the rate of 17.6% had duly been paid. The boat was subsequently exported into the Netherlands, where the Dutch revenue authorities levied an additional value-added tax of 18% on the sales price. This was the normal – indistinctly applicable – tax rate within the Netherlands, and it therefore seemed that no discrimination had taken place. The applicant nonetheless brought proceedings against the Dutch tax on the ground that "the tax is incompatible with the Treaty because similar supplies within the territory of a Member State by a private person are not subject to value-added tax" because "the levying of value-added tax on the importation of products from another Member State supplied by a private person *gives rise to an overlapping of taxes*".[119]

Would the double imposition of VAT thus violate European law? Having explored the "common system" of value-added tax adopted by the Union legislature,[120] the Court found that the latter was not applicable to the present situation.[121] The analysis would therefore have to concentrate on the constitutional principles governing Article 110. Ordinarily, the provision would not capture double-taxation, and the Member States *as well as the political Union institutions* therefore pleaded that only the political process could solve the question of double taxation.[122] The Court however offered a nuanced solution:

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118 Gaston Schul Douane Expediteur BV v Inspecteur der Invoerrechten en Accijnzen, Roosendaal, Case 15/81, EU:C:1982:135.

119 Ibid., para.7 (emphasis added).

120 By the time of the case, the Union had already established a common coordination system through the adoption of Union harmonisation measures on the basis of Article 111 and 115 TFEU (ibid., para.9)

121 Ibid., paras.8-15.

122 Ibid., para.25: "The Member States which have taken pan in these proceedings, the Council and Commission contend that the elimination of the overlapping of taxes within the [Union], however desirable it may be, can be achieved only by means of the gradual harmonization of the national taxation systems under Article [113] or [115] of the Treaty and not by applying Article [110]. In support of that

> [A]t the present stage of [Union] law the Member States are free, by virtue of Article [110], to charge the same amount on the importation of products as the value-added tax which they charge on similar domestic products. Nevertheless, this compensation is justified only in so far as the imported products *are not already burdened with value-added tax in the Member State of exportation since otherwise the tax on importation would in fact be an additional charge burdening imported products more heavily than similar domestic products*. That view derives in the first place from the terms of Article [110] of the Treaty which prohibits not only the direct but also the indirect imposition of internal taxation on products from other Member States in excess of that on similar domestic products. That prohibition would not be complied with if imported products could be subject to the value-added tax applicable to similar domestic products without account being taken of the proportion of value-added tax with which those products are still burdened at the time of their importation.
>
> *Such an interpretation accords with the need to take account of the objectives of the Treaty which are laid down in Articles 2 and 3 [TEU] among which appears, in the first place, the establishment of a common market. The concept of a common market as defined by the Court in a consistent line of decisions involves the elimination of all obstacles to intra-[Union] trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market.* (…) Consequently, it is necessary also to take into account the value-added tax levied in the Member State of exportation for the purpose of determining the compatibility with the requirements of Article [110] of a charge to value-added tax on products from another Member State supplied by private persons where the supply of similar products within the territory of the Member State of importation is not so liable."[123]

The Court here insisted – in line with *Cassis de Dijon* – that even in the absence of Union legislation, Article 110 could apply to situations in which the obstacles to trade were created by the parallel existence and concurrent exercise of national tax systems.[124] Did this mean that Article 110 outlawed double VAT as such; or, had the Court simply suggested that a Member State, while being allowed to tax again, had to take into account the tax already levied previously? The judgment, sadly, pointed in both directions. In one part, we read that "the *amount* of value-added tax payable on importation must be reduced by the residual part of the value-added tax of the Member

argument it was alleged that the overlapping of taxes is a corollary of the fact that the Treaty, by reserving power in relation to internal taxation to the Member States, has allowed tax frontiers to remain."

123 Ibid., paras.31-34.

124 Ibid., para.38: "Nevertheless although the establishment of a system of complete neutrality in the field of competition involving full remission of tax on exportation is indeed a matter for the [Union] legislature, so long as such a system is not established Article [110] of the Treaty prevents an importing Member State from applying its system of value-added tax to imported products in a manner contrary to the principles embodied in that article."

State of exportation which is still contained in the value of the product when it is imported";[125] while other parts of the judgment suggest that the Court solely wished to outlaw the inclusion of the first tax in the calculation of the price base for the second tax. In light of these doubts, a second reference was soon made; yet the judicial principles underlying *Schul II* were not much clearer.[126] And sensing a formidable political opportunity, the Commission energetically drew up its own conclusions; and like in the aftermath of *Cassis de Dijon*, adopted a "Commission Communication" concerning the consequences of the two *Schul* cases.[127] The Commission here held:

> "In essence, the conclusions which the Commission draws from the judgments of the European Court in the *Schul* cases are that the double imposition of VAT on goods exported from one Member State to another is contrary to [Union] law and to the achievement of a genuine common market. (…) The Court was called upon to clarify the position on a number of points in Case 47/84 (Gaston Schul). In its decision of 21 May 1985, it laid down the method for calculating the VAT due on the importation by a private person of used goods which had already borne VAT in the Member State of export. The method laid down was as follows:
>
> (a) the taxable amount is constituted either by the price of the goods less the residue of the VAT paid in the exporting Member State which is still incorporated in that price or, in the absence of such a price, by the customs value, which is a VAT-free value;
>
> (b) the rate of tax is the rate applicable to supplies for consideration effected within the territory of the country of importation;
>
> *(c) the amount of VAT resulting from the application to the taxable amount at (a) of the rate at (b) shall be reduced by the residue of the VAT paid in the exporting Member State;*
>
> (d) the residue of VAT in the exporting Member State is:
>
> — either the amount of VAT actually paid in that State less the percentage by which the value of the goods has diminished, if the value of the goods has in fact diminished between the last VAT payment and their importation, or
>
> — the full amount of VAT actually paid in that State where the value of the goods has increased since the last VAT payment."

This interpretation of the judgment – especially point (c) - acknowledged the idea of mutual recognition within Article 110.[128] And, in its subsequent jurisprudence, the Court

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125 Ibid., para.34 (emphasis added).

126 Staatssecretaris van Financiën v Gaston Schul Douane-Expediteur BV, Case 47/84, EU:C:1985:216.

127 Commission Communication on the Decisions of the European Court of Justice of 5 May 1982 and 21 May 1985 (the *Gaston Schul* cases) relating to the importation by an individual of used goods purchased in another Member State from an individual, OJ 1986 C 13/2.

128 Interestingly, D. Weber, In Search of a (New) Equilibrium Between Tax Sovereignty and the Freedom

indeed appeared to project this *Cassis*-like solution to fiscal measures. In *Drexl*,[129] a German national working and residing in Italy had bought a second-hand car in Germany and subsequently imported it into Italy. Not having paid the required 18% value-added tax charged upon importation, Drexl was charged with "smuggling"; and in his defence he argued that 13% value-added tax had already been paid in Germany. The question before the Court was thus this: would Article 110 allow Italy to charge the full 18% of the – adjusted – net value of the car; or would the Court insist that since the German tax had already been paid, Italy would have to deduce it from the amount of Italian tax due? Clarifying its previous jurisprudence, the Court advocated the second solution:

> "[T]he amount of value-added tax payable on importation must be calculated by taking into account the amount of value-added tax paid in the Member State of exportation which is still contained in the value of the product in such a way that that amount is not included in the taxable amount *and is in addition deducted from the value-added tax payable on importation*."[130]

The judgment signalled that the international principle according to which each State could exercise its fiscal sovereignty, without regard to that of its sister states, had come to an end. Unmitigated double taxation imposed on imports would henceforth violate Article 110.[131] This approach qualified the frame of analysis under Article 110 beyond

of Movement Within the EC, (2006) 34 Intertax 585 at 592 has argued that, in tax cases, the principle of mutual recognition should rather be called the principle of mutual acceptance: "[T]he ECJ has recognized the right of each of the Member States to levy its own tax. It is thus not so that the Member State of importation may not levy tax because the Member State of exportation has already levied tax. This would amount to mutual recognition. The ECJ merely observed that the double taxation that occurs is a restriction of the freedom of movement. The state of importation has simply to accept the taxation in the state of exportation (by giving a credit). Under the principle of mutual acceptance, a Member State may apply its own tax system and may thus levy additional tax. (…) From Gaston Schul one can see that the ECJ does not ask that the host Member State not levy any tax at all (thus recognizing taxation in the origin state). It only asks that the tax levied in the origin state be granted a credit."

[129] Criminal proceedings against Rainer Drexl, Case 299/86, EU:C:1988:103.

[130] Ibid., para.12.

[131] By contrast, in the subsequent decision in ORO Amsterdam Beheer BV and Concerto BV v Inspecteur der Omzetbelasting Amsterdam, Case C-165/88, EU:C:1989:608 the Court clarified that its *Schul* jurisprudence did not outlaw double-taxation on second had goods as such but only double-taxation following the importation of a good, see ibid., para.18: "First of all, it should be noted that, although in its judgments of 5 May 1982 and 21 May 1985 in the two Gaston Schul cases, cited above, to which reference is made by the plaintiffs in the main proceedings and by the Commission, the Court held that the imposition of VAT on the importation of goods supplied by a private person from another Member State, where no VAT was levied on a transaction of the same type within the territory of the State of importation, was incompatible with [Union[law, that ruling was not based on a general principle prohibiting tax cumulation but on Article [110] of the Treaty, which prohibits internal taxation which discriminates against imported goods ."

the single national frame; yet due to the wording of Article 110, the Court felt forced to root its – new – federal approach in a Union-wide notion of material discrimination.[132] Nevertheless: with regard to VAT, the Union legal order has adopted a (weak) federal model; and *Schul* has consequently – like *Cassis de Dijon* – been described as "one of the most extreme examples of judicial legislation by the Court". [133] This partial federalization of Article 110 is confined to an area in which a comprehensive system of Union legislation already coordinates most aspects anyway.[134] By contrast, for all other fiscal measures falling within the scope of Article 110,[135] the international solution – allowing for double taxation – appears to continue.[136]

IV. Conclusions

How are fiscal barriers to interstate commerce dealt within the United States and the European Union? This article explored the various constitutional tools to create some *unity* within the *diversity* of State authorities insisting on fiscal "sovereignty".

We saw in Section I that the principal provision to limit the fiscal powers of the States under the US Constitution is the (dormant) Commerce Clause. Fiscal measures are here subject to a distinct analysis that has found expression in the *Complete Auto* test. Under the test, fiscal barriers to trade will only escape the Commerce Clause if they fulfil four

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132 For this point, see already: R. Barents, Recent Case Law On the Prohibition of Fiscal Discrimination under Article 95, (1986) 23 Common Market Law Review 641 at 656: "First, to apply this provision to the problem of double taxation, which in legal terms means the result of a disparity between differing national tax legislation, required that this provision had to be interpreted as a prohibition of material discrimination."

133 A. Easson, Taxation in the European Community (Continuum, 1993) 40.

134 On this point, see: B.J.M. Terra & P.J. Wattel, European Tax Law (supra n.88), Chapter 6; as well as M. Lang, Double Taxation and EC Law, in: R.S. Avi-Yonah (et al, eds.), Comparative Fiscal Federalism: Comparing the European Court of Justice and the US Supreme Court's Tax Jurisprudence (Kluwer, 2008), 11: "The European Union has made a lot of progress in harmonizing tax law as far as indirect taxes are concerned. Almost every issue in the VAT field is dealt with by EC directives. (…) Direct taxation is not harmonized at all."

135 See only: Nygård v Svineafgiftsfonden, Case C-234/99, EU:C:2002:244.

136 Cf. W. Schön, Der freie Warenverkehr, die Steuerhoheit der Mitgliedstaaten und der Systemgedanke im europäischen Steuerrecht – Teil II: Das Verbot diskriminierender und protektionistischer Abgaben und das Problem der Belastung "exotischer" Waren, (2001) 36 Europarecht 341 at 353: "Art.[110] EG schützt im Grundsatz nicht vor steuerlichen Doppelbelastungen."

conditions: two jurisdictional and two substantive in nature. First, a State must justify its "jurisdictional" nexus with the tax imposed; and, secondly, it must be able to point to a (nominal) benefit that the taxpayer receives in exchange. Once these two criteria are fulfilled, a State tax is then subjected to two substantive conditions. For a state tax must not discriminate against out-of-state goods (or persons), and non-discriminatory taxes must be fairly apportioned. The fair-apportionment criterion here operates, to some extent, like an excessive burden test; yet importantly: the excessive burden is not seen as a consequence of the (unilateral) State law but is rather considered the result of multiple States imposing their parallel fiscal "sovereignty". In the past, the Supreme Court has granted the States a degree of freedom in choosing their own apportionment formulas – as long as the state tax "reasonably reflects the in-state component of the activity being taxed".[137]

What about the regime for fiscal barriers to inter-state trade in the European Union? Section II demonstrated that the European Court has been much less "federal" than its American counterpart. The ECJ has thus insisted that Article 110 TFEU embodies a relative standard;[138] and, that it "does not provide a basis for censuring the excessiveness of the level of taxation which the Member States might adopt for particular products, in the absence of any discriminatory or protective effect."[139] The Member States are consequently only prevented from adopting (nationally) discriminatory measures.[140] This acknowledgement of the (internal) fiscal sovereignty of Member States contrasts with the rejection of 'regulatory sovereignty' for all fundamental freedoms, where the Court has embraced the idea of mutual recognition within a federally structure internal

137 Goldberg v. Sweet, 488 U.S. 252 (1989), 262.

138 On this "relativism" of Article 110, see only: A. Easson, Taxation in the European Community (Continuum, 1993), 63: "One rather striking conclusion that emerges from the 'classification' cases is that fiscal rules that are prohibited in one Member state could be perfectly legally applied in another state. For example, Germany would be permitted to tax spirits made from fruit and from cereals, beer and wine, large and small cases, in a way that Denmark, the United Kingdom and France are not allowed to, since Germany produces significant quantities of products in each category."

139 Commission v Denmark, Case C-47/88 (supra n.76) para.10. The Court has, in a recent case, confirmed that, sometimes, it will exceptionally hold an excessive unilateral tax to violate the free movement provisions, see: Berlington Hungary and Others, Case C-98/14, EU:C:2015:386, esp. para.42: "Therefore, the answer to question 1 is that national legislation, such as that at issue in the main proceedings, which, without providing for a transitional period, introduces a five-fold increase in the flat-rate tax to be paid on slot machines operated in amusement arcades and, in addition, introduces a proportional tax on that activity, constitutes a restriction on the freedom to provide services, guaranteed by Article 56 TFEU provided that it is liable to prohibit, impede or render less attractive the exercise of the freedom to provide the services of operating slot machines in amusement arcades, this being a matter which it is for the national court to determine."

140 S. Kingston, The Boundaries of Sovereignty (supra n.94), 309: '[I]t would seem that the discrimination-based approach is, for now, winning the day, with the Court using a discrimination analysis[.]'

market.[141] However, an important exception to the rule exists in relation to value-added-tax, where the Court accepts a *Cassis*-like approach to double taxation.

Why is the European Union so reluctant to tackle the problem of double taxation within the European market?[142] Is it not the case that "the fact that a taxable event might be taxed twice is the most serious obstacle there can be to people and their capital crossing internal borders"?[143] While there are – admittedly – greater practical problems in tackling double taxation, as opposed to double regulation, there is surely something wrong when two (or more) States simultaneously impose corporate or inheritance tax on the same taxable event within a *common* market. The European Court should here take some lessons from its American counterpart.[144] For even if the latter has not allowed itself to judicially create – in the absence of Union legislation – a unitary tax apportionment regime for the American market, it has nonetheless – and rightly – insisted that each State is only entitled to its "fair" share. This solution may not completely eliminate fiscal exceptionalism within a common market but it does incorporate a federal limit on the taxing powers of the States and thus recognizes that they are part of a broader political entity: the Union.

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[141] B.J.M. Terra & P.J. Wattel, European Tax Law (supra n.88) 904: "Mutual recognition does not work in direct tax matters, as there is no EU rule telling us which jurisdiction should recognize which jurisdiction's subjection to tax. This sets direct tax cases apart from cases on (mutual recognition of) legal personality of companies incorporated elsewhere, professional diploma's product safety requirements, phytosanitary checks, etc."

[142] For scholars in favour of prohibiting double taxation within the internal market, see only: W. Schön, Europäische Kapitalverkehrsfreiheit und Nationales Steuerrecht, in W. Schön (ed.), Gedächtnisschrift für Brigitte Knobbe-Keuk (Schmidt, 1997), 743 and G. Kofler and R. Mason, 'Double Taxation: A European "Switch in Time"?' (2007) 14 Columbia Journal of European Law 63. For the opposite view see: D. Weber, In Search of a (New) Equilibrium Between Tax Sovereignty and the Freedom of Movement Within the EC (supra n.128), 614-615: "The idea is often put forward in the literature that the principle of mutual recognition should also be applied by the ECJ to direct taxes. If this principle were to be applied, disparities would also be seen as a restriction of the freedom of movement. This idea should, in my opinion, be left for what it is. Mutual recognition applied to direct taxation entails that one of the two Member States entirely or partially must give up its taxation rights (taxation in the other Member State is `recognized') so that the disadvantage arising from a disparity (for example, double taxation) can be removed. This would mean that the ECJ would have to make a choice as to which Member State has the power to tax a certain item of income (residence state or source state?). (…) It is inherent to the sovereignty to levy tax that the exercise of this sovereignty is not dependent on the taxation of another Member State. A Member State may make its own choices on how it wants to structure its tax sovereignty and, in doing so, is not dependent on any other state whatsoever (if this were not the case, the state would not be sovereign)."

[143] Advocate General Ruiz-Jarabo Colomer, D, Case 376/03, EU:C:2004:663, para.85

[144] In this sense also: J. Snell, Non-discriminatory tax obstacles in Community law (supra n.94), 364