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# The Role of the Jurisprudence of the Court of Justice Within the EU Taxation Law

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## 4.1 The Role of the Court of Justice Within the System of the EU Taxation Law

### 4.1.1 The Judicial Power in the European Union

The Court of Justice of the European Union (also referred for convenience as the “ECJ”) has the function of ensuring the uniform interpretation and application of EU law in all the Member States (“nomophylactic” function).

The ECJ is called (according to art. 267 TFEU) to give preliminary rulings concerning the interpretation of EU law and thus to carry out a hermeneutics reconstruction of the rules and the principles laid down in the Treaty and in the normative acts of derivate EU law. Indeed, even if the national courts are required to implement the EU rules into national law, because the law is directly applicable in the Member States (see what said earlier in the Chap. 2, Sect. 2.4), they can

propose questions concerning the interpretation of EU law or the compatibility of provisions of national law with the European legal order.

In particular, the Court of Justice has been asked to rule on the *quaestio juris* (question of law) defining the meaning of the EU legislation relevant to the proceedings, while the national court is required to rule on the question of fact, thus arriving at a decision on the specific facts by applying the relevant standards (including the EU standards).

The content of the decision of the Court of Justice concerns not only the reconstruction of the EU rule (and thus the interpretation in the strict sense), but also often the compatibility of the internal rules with the parameter offered by the EU regulation. The historical fact tends to be considered in the judgment of the Court of Justice as the demarcation element of the *thema decidendum*, especially in order to establish the applicability of the EU law (and therefore the jurisdiction of the Court of the Justice).

The mechanism of the preliminary ruling—also referred to as “interpretive ruling of the European Union”—is presented as a faculty for various national courts and becomes an obligation only for the courts of last instance (for the decisions of which it is no longer possible to submit an appeal).

Through this judicial mechanism, the national courts are presented as a kind of “tool” of the process of European integration in order to promote the uniformity and the correct application of the EU law; thus avoiding that the courts of different Member States can form a jurisprudence conditioned by the local legal traditions, the preliminary ruling leads to a “judicial cooperation” between separate but coordinated legal orders, and seems destined to produce a centralized and European jurisprudence regarding the EU law, with respect to which the contributions of the national courts are valued as inputs and impulses from different legal systems that converge into a single regulated context.

The interpretative decisions given by the Court of Justice as a result of the preliminary ruling produce a binding effect for the national court which has required the intervention of the ECJ (and for the successive stages of the same trial). These decisions also are intended to expand their effects beyond the judgment to which they refer, as they relate to general issues; in this sense it can be argued that the interpretative judgments by ECJ may produce a binding effect on the national courts and the national public administrations.

As for the effectiveness of the temporal judgments of the Court of Justice, it applies the basic rule of the effectiveness *ex tunc* (“since then”), with recognition of the latitude of interpretation and validity of EU legislation from the original outset of the European regulation. Moreover, this criterion was often balanced with the requirements of legal certainty and of the protection of innocent third parties; so, particularly in economic and financial matters, the ECJ has recognized the effectiveness *ex nunc* (“since now”) of the interpretative judgments where interfering with the conduct of third parties acting in good faith who had relied on the scope of the national legislation prior to the judgment of the ECJ.

### **4.1.2 The Role of the European Court of Justice in the System of Sources of the EU Taxation Law**

The European Court of Justice has been specifying the size and the boundaries of EU law through a constant reading and “recognition” of the various legislative acts of the EU institutions.

In the literature, it has often been pointed out that the Court of Justice has made a significant contribution to the definition of the legal system of the European Union, with inputs of a creative nature and with the aim to compensate for the lack of reference standards into the system of EU legislation. The “creative” function was identified in particular in the autonomous creation of norms for the integration of EU law, primary and secondary, and in any case in the continuing search for general principles that could define the axiological horizon of the applicable European law.

In this perspective, it has been repeatedly observed that the jurisprudence of the ECJ has made a decisive contribution to the development of EU law, impacting also on the legislation of the European institutions through the indication of the general outlines emerging in the current regulations and the constant comparison with the fundamental purposes of the supranational integration.

Therefore, it seems obvious the assignment of a role of primary importance to the jurisprudence of the Court of Justice in the definition of the system of the sources of the various sectors of EU law (and of course also of the EU tax law).

With specific reference to the area of taxation, it should be noted that the ECJ has consistently been solicited over the years to intervene in its interpretation to settle doubtful matters, gaps and shortcomings of the EU law.

In particular, based on the examination of the case of a period of twenty-five years (and that is that included in the period 1978/2003) it has been identified some basic elements, which can be summarized as follows:

- total number of judgments in taxation matters: 329
- decisions on general principles: 77
- decisions on VAT: 136
- decisions on direct taxes: 16
- decisions on indirect taxes and duties: 100

The general quantitative data is very significant especially when compared with the number of legal acts of the EU institutions (as already mentioned in Chap. 3).

The judgments of the ECJ can then be grouped into four homogeneous groups, whose affinity index constitutes the object of the judicial decision. In this regard it is clear, since now, the really relevant position occupied by the judgments concerning the VAT (reaching about 42% of the total number of decisions of the ECJ in tax matters), understandable when compared with the increased importance of this form of taxation into the European legal system; also surprising is the large number of decisions on the general principles (about 23% of the total), namely the set of principles and rules which recognized the applicability of the EU tax regulation regardless of a specific legislative text reference; there are numerous cases

concerning indirect taxes and duties (about 30% of the total); very few decisions appear related specifically to direct taxes.

It is also considered important to observe how the track chronology of tax case law indicates a vibrating and non-linear trend, so that it can be distinguished a grouping of decisions in some periods and an evident reducing of judgments in other periods. By examining the pattern of decisions it can be argued that in only three years 1982/84 there were 63 decisions in the face of a smaller number of decisions (60) over the next eleven years, as well as in the period 1996/2000 it can count up to 112 decisions amounting to about 34% of the total EU case-law that formed in twenty-five years taken as a reference.

However, beyond the considerations of statistics and classification, that provide reconstructive insights around the incidence and the role of the Court of Justice in tax matters, it is possible to point out some main areas of EU case law, so as to indicate the emerging general principles of the European regulatory law (and thus corresponding to a general and non-specific logic of the single tax) or to explain the position usually taken in the assignment of the discipline of a single tax (or a homogenous group of taxes).

### **4.1.3 Considerations on the Contribution of the Advocates General to the Formation of the Decisions of the Court of Justice**

Very important in the process of formation of the EU case-law is the contribution made by the General Advocates, who through the submission of written conclusions provide a concise background of the present case, purified and adequately screened from possible deviations and compared to the legal arguments put forward.

Without a binding nature, the conclusions of the general advocates have an important influence on the decision of the Court of Justice because they contain a comparative analysis on the laws of the Member States and an accurate reconstruction of the previous case-law of ECJ that constitute most of the time the indispensable material to be used to produce the judgment of law.

Indeed, it is to be assumed that the overall contribution of advocacy, as an independent body with respect to the parties involved in the trial, aimed essentially at protecting the general interest of the European Union, is an important element of the formation of the judicial conviction and justifies keeping alive the connection between the specificity of the case and the plot of the value of the European law.

With regard to the tax matters it can be observed that the conclusions presented by the General Advocates have frequently been accepted in the judgments of the ECJ, as it can be inferred from the reasons given by the judges.

In particular, the contribution of General Advocates are attributable not only to the major reconstructive theories formulated by the case law concerning the regulation of VAT and other harmonized taxes, but especially to the “creative” thesis developed by the European Court of Justice with regard to the regulatory principles relating to direct taxes.

## **4.2 The Main Guidelines Followed by the European Jurisprudence on Taxation**

### **4.2.1 The Essentially Acknowledging Attitude of the Court of Justice About the VAT**

The greatest number of decisions of the ECJ certainly refers to the value added tax, given the typically European nature of this form of taxation.

However, it is significant that the Court of Justice in this area shows a trend characterized essentially by a mere reconnaissance of the existing rules, refusing to develop general principles to be utilized also for the discipline of other taxes. Particularly, the attitude of recognition is expressed through the detailed description of the rules laid down in EU measures of the secondary legislation (especially in the Directives concerning VAT) and through the clarification by way of interpretation of the semantic latitude taken by those rules.

It is true that the case law of ECJ has contributed significantly to single out the essential features of VAT on the basis of the rules set out in the various Directives: it was so recognized the legal nature of the tribute as a consumption tax; the qualifying elements of the VAT discipline have been identified in the general taxation of trading activities, in the proportionality of the rate, in the character of tax neutrality and in the multi-step procedure for the taxation of the several operations; the tax assumption has been determined with regard to the objective elements and to the subjective elements.

Moreover, the reconstruction of the guidelines of the tribute is often the theme of ECJ case-law also in the definition of the regulatory profiles for the application and the interpretation of the rules established by the Directives for the implementation of VAT (particularly regarding the deduction and the redraft, the chargeability of tax obligations, the procedural and instrumental obligations of the taxpayers etc.) as well as in the identification of the exceptions permitted by the internal discipline (exemptions or exclusions).

Sometimes, the attitude to the reconnaissance of the existing regulation operated by the Court of Justice with regard to the VAT is going to reduce in order to permit some reconstructions of the legal framework characterized by an evident “creative” spirit. Thus, in relation to the issue of the possible duplication of taxation on the same basis, the Court of Justice has defined the principle of prohibition of double taxation, not finding a specific normative reference (case 5.5.1982, C-15/81, *Schul*; case 25.2.1988, C-299/86, *Drexl*). Even with reference to the issue of the right to a refund of any overpayment, the ECJ has developed an approach that, despite the absence of explicit rules in the Directives, is to rebuild through an interpretation judgement the scope of individual rights and to limit the unreasonable compressions made by the internal discipline (case 6.7.1995, C-62/96, *BP Soupergaz vs. Greece*; case 2.12.1997, C-188/95, *Fantask*). It should also be mentioned the case of the abuse of law that was originally formulated specifically with reference to the discipline of VAT to contrast the negotiating artificial

constructions made by taxpayers in order to gain an unfair tax savings (case 21.2.2006, C-255/02, *Halifax*).

However, such a “creative” attitude still occupies a marginal space in the case-law related to the VAT discipline, as the main issues brought to the attention of the Court of Justice find a solution through the work of reconstruction and the analytical case study of the EU rules in force.

#### **4.2.2 The Casuistic Attitude of the Court of Justice on Excises or Duties, as Well as on the State Aids**

About the subject of excise duties and customs duties the case law of the ECJ assumes a typically oriented position to the *case by case approach*, with the aim to resolve specific issues and cases by the interpretation and the application of the EU law. Indeed it is not easy to discover valuable theoretical guidelines in this regulatory area, since in the most part of situations the Court is required to order and to recompose quite detailed and minute cases.

A recurring theme is represented by identifying the concept of “taxes having equivalent effect” to the duties, with respect to which the case law seems to be consolidating the belief that the similarity of the products should be judged in relation to the classification of products in the same fiscal, customs or statistical category (case 04/04/1968, C-27/1967).

It should be noted, however, as the ECJ case law has repeatedly tried to identify the scope of the prohibition of “charges having equivalent effect” to the principle of non-discrimination relating to the indirect taxes. In this regard it was clarified the systematic difference of the two standards and the need to point out for each concrete case the reference to one or to another legal regime (case 1.3.1966, 48/65, *Luttick*; case 17.7.1997, C-90/94, *Haar Petroleum*; case 17.9.1997, C-130/96 *Fazenda publica*).

Sometime, in order to distinguish adequately between the cases related to the prohibition of “charges having equivalent effect” or to the principle of non-discrimination it was suggested to pay attention to the profile of the target of the taxation: in particular it has been held that, where the tax revenue is intended to support the product subject to taxation generating a benefit wholly compensated with the tribute to be paid, it can be identified a “charge having equivalent effect”; otherwise, in the case of a tribute restored only partially by the benefit received, it can be applied the principle of non-discrimination (case 11.3.1992, C-78/90 up to C-83/90, *Compagnie commerciale de l'Ouest*; case 27.10.1993, C-72/92, *Schartbtke*; case 17.9.1997, C-130/96 *Fazenda publica*).

A widespread casuistic attitude seems possible to be identified even in the case law of the ECJ regarding the area of the State aids.

This casuistic approach finds its conceptual foundation in the idea that the judgment on the applicability of the EU regulation must be formulated *a posteriori* (with a retrospective regard), concerning the material effects produced over the market fair competition and not the scopes and the political purposes pursued or

declared by the national legislature. The provision of EU law, in fact, must be interpreted by the case law according to the purpose of preventing that the tax benefits granted by a Member State can affect some distorting effect on trade in the common market or may alter the regularity of the competitive game; the prohibition of the State aids is therefore not affected by the appreciation of the purposes of the national legislation, but rather it is defined in relation to the impact (and therefore to the global effects) that occurs on the system of competition (case 24.2.1987, C-310/85, *Deufil*).

It follows clearly the need to carry out, in the judgment of the Court of Justice, a careful analysis of the specific effects that are producing on the competitive structure of the common market in relation to the extent of the State aids established by the Member State.

### 4.2.3 The Creative Jurisprudence in Relation to the Direct Taxes

In contrast to what was seen for the VAT and indirect taxes, the Court of Justice has provided a decisively “creative” contribution to the reconstruction of the EU legislation applicable to the direct taxation.

At first, the ECJ has focused on the scope of the principle of tax non-discrimination in order to define precisely its scope: so, it is very significant that the first decision related to direct taxes expressly recognizes the prohibition of the direct discrimination against foreign citizens of a Member State by a national law (case 28.1.1986, C-270/83, *Avoir Fiscal*); later, it was clarified also the prohibition of the indirect discrimination, which is implemented by hidden or disguised forms of fiscal discrimination against the foreigner citizens of a Member State (case 8.5.1990, C-175/88 *Biehl*; case 13.7.1993, C-330/91 *Commerzbank*; case 27.6.1996, C-107/94, *Asscher*).

The effect of the discriminating national standard is judged by the Court of Justice not so much in terms of the actual outcome, but rather with regard to the mere potentiality of the damaging. Thus, it emerges a further characterization of the principle of non discrimination: this is intended as a simple risk of producing an alteration of the competitive structure of the common market and, therefore, as a potential limitation with respect to the equal treatment of economic operators, and not as an objective result to be determined on the basis of the material experience. Obviously this connotation of the principle of non-discrimination in terms of potentiality, carried out in the case law of ECJ, is to expand significantly the scope of the European action in relation to the wording of the rule contained in the regulatory EU law.

More recently, the Court of Justice seems to have shifted its focus from the pure discrimination to the restriction of a European freedom, independently by the analysis of the distorting effects produced by a discriminatory rule; therefore, the illegitimacy of the national rule can be judged as a restrictive regulation in relation to the effect of one of the four fundamental freedoms of the Treaty and not also with regard to the existence of a differentiation in the treatment between residents and

non-residents. This jurisprudential trend (inaugurated with regard to freedom of establishment by the case 21.9.1999, C-307/97 *Saint Gobain*, and then resumed by the case 8.3.2001, C-397/98 and C- 410/98 *Metallgesellschaft* and the case 10.12.1998, C-127/96, C-229/96 and C-74/97 *Hoechst*) produces a significant widening of the judgment of compatibility of the national tax with the EU law.

It should however be noted that the reasoning of the Court of Justice, aimed at the verification of both the discrimination and the mere restriction, requires a judgment of comparability of the legal situations with respect to which exists a detrimental effect of the EU rules. Indeed, prior to establishing the unlawfulness of a national provision for the breach of the principle of tax non-discrimination or restriction of a European freedom, it must establish at first the similarity of the legal situations examined. So it was clearly stated, even in matters of taxation, “*that discrimination can only consist of the application of different rules to comparable situations or of the application of the same rule to different situations*” (case 14.2.1995, C-279/93, *Schumacker*).

It should also be noted that in the case law it is not easy to identify a recurring and unique pattern of comparison, being rather proposed evaluation formulas of legally relevant features that change because of the single and specific case. At this purpose, there can be identified two basic methods of the judgment on the comparison of the situations taken into consideration for the non-discrimination or for the mere restriction: sometimes it is taken a single and specific aspect of the legal relationship (so-called “limited comparison”) or, otherwise, the comparison is established in relation to the overall economic and legal position of the subject (so-called “overall comparison”).

#### **4.2.4 The Rule of Reason and the Balance of the European Interest with the National Interests**

The protection of EU principles expressed in the Treaty rules (which are precisely the prohibition of discrimination and the restriction of the fundamental freedoms) must always be balanced with the protection of the primary national interests.

The case law of ECJ has identified some public interests of the individual Member States that can lead to derogate from the EU regulations being regarded as causes of objective justification.

In particular, the Court of Justice has identified three reasons of overriding general interest of the individual Member States which are likely to confront dialectically—and therefore are possibly to lead to an exception—with the fundamental principles expressed by the Treaty in relation to taxation, namely:

- the coherence of the national tax system;
- the need to counteract fraud and tax avoidance;
- the effectiveness of controls and tax audits.

In this regard, it has been identified by the Court of Justice a test of judgment (so-called *rule of reason*), aimed at assessing the suitability of the national interests to justify an exception to the principles of non-discrimination and non-restriction of the fundamental freedoms of the Treaty. In essence, on the basis of an objective assessment (and not of the mere scopes pursued by the national legislature), the Court of Justice compares the risks and the potential disadvantages suffered by the domestic legal system with the benefits in terms of protection of the European freedoms according to an assessment of reasonableness.

This assessment of balance is an argument often decisive in the appreciation of the possible alternative solutions for the protection of the national interests to be pursued with a minor sacrifice of the interests represented by the European freedoms and to be carried out according to the typical pattern of judgment of proportionality.

It is to point out that the recognition of the national public interest worthy of protection and the test of comparison with the European freedoms is a clear moment of “creation” of the European law by the Court of Justice.

#### **4.2.5 Some Synthetic Observations on the Role of Court of Justice Relating to the Regulation of the European Taxation System**

In light of the analysis set out above some basic considerations may be drawn on the role played by the case law of the ECJ in the system of sources of European Union in the area of taxation.

In principle, it can be outlined a distinction between two groups of the decisions taken by the ECJ: the “creative” case law, mostly centered around the direct taxes; the “reproductive” jurisprudence, basically developed with the VAT and other indirect taxes.

The “creative” jurisprudence is characterized by the original contribution in the formulation of rules and principles with regard to the legal framework provided by the Treaty and by the derivate legislation, often compensating for the lack of reference standards and in any event by integrating the existing legislative order.

The “reproductive” jurisprudence, in contrast, takes a decidedly subordinate position to the legislative text, aimed to provide a merely interpretative reconstruction, mostly in an analytical key, about the rules laid down by the Treaty, the Regulations and the Directives.

It should be emphasized that the partition of the case law in the two groups indicates a significant consistency with the development of the EU legislation in the field of taxation: in fact, the “reproductive” jurisprudence is present in areas where there is a substantial amount of legislation, primary and derivate, providing a completed legal framework “decipherable” in the judicial action; on the contrary, with regard to the direct taxes, the “creative” jurisprudence connects to a regulatory framework which is almost empty, as a result of the lack of substantive laws (as seen in Chap. 3).

However, the importance of the role of the ECJ is basically referable to the contribution provided by the “creative” jurisprudence and in particular by the elaboration of general principles of taxation. Indeed, in a series of decisions concerning direct taxation, the Court of Justice has been able to devise rules and principles of general application aimed at ensuring the effective respect for the fundamental freedoms enshrined in the Treaty and to identify the limits and constraints related to the special interests of the nation-States that may object to a unconditional implementation of the aforementioned freedoms. The Court, thus, has been defining the fundamental dialectic of European tax law, identifying positive and negative elements of the developmental path of “tax liberalization” consistent with the aims of the European integration.

However, it should be noted that the ECJ case-law, and thus independently from belonging to one of the groups of the above mentioned decisions, declines and clarifies the principles of the “negative” taxation. The main subject of the decisions of the ECJ, in fact, regards the applications of the principle of non-discrimination and of non-restriction of the European freedoms and in particular cases where the exercise of the power of taxation by the individual States may hinder the regime of competition and affect, consequently, the functioning of the common market. Only in a very marginal number of decisions it is identifiable the profile of the harmonization of the tax laws of the Member States.

Also in this respect it is so evident a tendency of the EU bodies to reconstruct the phenomenon of taxation in an essentially “negative” dimension, as a possible distortion compared to a competitive structure of the common market and, therefore, as an obstacle to the process of trade and economic integration. It follows the inevitable tendency to develop rules and principles that restrict and deny, in fact, the power of taxation of the individual States rather than to seek for norms with a “positive” content about the architecture of the fiscal system.