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Eco-taxes on packaging and the principle of fiscal non-discrimination

by

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ABSTRACT

Both negative and positive harmonization are likely to restrict Member States' regulatory powers to protect the environment. In particular, given that numerous environmental fiscal measures are likely to restrict one way or another inter-State trade though they may not be their objective, Member States have become reluctant to foster a green tax policy. Interactions between environmental taxes and the free movement of goods enshrined in the Treaty on the Functioning of the EU (TFEU) seem thus to be at odds with one another. The annotated case raises some critical issues regarding the validity of environmental taxes on certain beverage packaging. In case C-198/14 *Valev Visnapuu*, the CJEU made important clarifications in that respect.

INTRODUCTION

A central feature of EU environmental law is its uncanny relationship with the internal market. Given that the core of the EU integration process lies the internal market which is underpinned by free movement principles removing obstacles to free trade and free competition, the relationship between economic integration and environmental protection has always been fraught with controversy. In ensuring that tax policy does not serve protectionist interests, several provisions of the TFEU prohibit the adoption of fiscal instruments aimed at protecting the environment. A dividing line must be drawn between fiscal and non-fiscal obstacles to the free movement of goods. Indeed, when faced with a measure hindering inter-State trade, the practitioner will have to distinguish the prohibition of charges having equivalent effect to customs duties and of discriminatory internal taxation (either Arts 28 and 30 TFEU; or Art 110 TFEU) from quantitative restrictions on imports or exports or any other measures having equivalent effect (Arts 34 and 35 TFEU). An excise duty that is clearly of a fiscal nature falls within the scope of Article 110 TFEU. In this context, it is important to assess whether such a tax discriminates directly or indirectly foreign products.

FACTS OF THE CASE

Under the Finnish Law on excise duty on certain beverage packaging, an excise duty is set at EUR 0.51 per litre of packaged product. In order to foster a genuine waste management policy, beverage packaging is exempt from the payment of that duty if it is part of a functioning return system whereby beverage packaging is reused or recycled. This exemption aims at encouraging manufacturers and consumers to place on the market and purchase beverage packaging that are part of such a return system.

Case C-198/14 arose from a dispute between Mr Visnapuu, acting on behalf of a company registered in Estonia and the Finnish Customs Administration, regarding the imposition of excise duty on alcoholic beverage packaging which was not part of a return system. That company sold to Finnish customers various brands of beverages with low or high alcohol contents via the Internet and then delivered them directly to Finnish buyers. In selling these

alcoholic beverages, it failed to pay the excise duties payable when the packaging is not part of a return system. The Court of First Instance of Helsinki condemned Mr Visnapuu and ordered him to pay the unpaid taxes to the Finnish Customs Administration.

Claiming, among others, that the Law on excise duty on certain alcoholic beverage packaging was indirectly discriminatory and therefore contrary to Article 110 TFEU, Mr Visnapuu has appealed against that decision. The Helsinki Court of Appeal asked the CJEU whether the tax at issue was constituting a measure having an quantitative restrictions on imports (MEE) under Article 34 TFEU or had to be classed as 'internal taxation' pursuant to Article 110 TFEU.

Another preliminary question was referred to the CJEU. It concerned the compatibility of the Law on alcohol providing for a retail licence for the import and retail sale of those alcoholic beverages with the conditions laid down for State monopolies of a commercial character in Article 37 TFEU. Given that our case note focuses on the consistency of waste management schemes with both primary and secondary law, we shall not examine this issue that is related to health policy.

ABSENCE OF ENVIRONMENTAL TAX HARMONISATION IN THE FIELD OF PACKAGINGS

Account must be taken of the fact that environmental taxes that are levied either to raise revenue or to influence undertakings and consumer behaviour may afford protection to domestic products.

In contrast to the wide application of the ordinary legislative procedure to a number of internal market issues (Article 294 TFEU), fiscal harmonization regarding 'excise duties and other forms of indirect taxation', given its sensitive nature, is still subject in accordance with Article 113 TFEU to a special legislative procedure. By the same token, environmental 'provisions primarily of a fiscal nature' have to be adopted in accordance with a special legislative procedure (Article 192(2)(a) TFEU). It follows that fiscal EU measures have to be enacted by the Council acting unanimously and after consulting the European Parliament.

In sharp contrast, the product standards with a view to enhancing the internal market by virtue of Article 114 TFEU have been harmonised in accordance with the ordinary legislative procedure that requires only a vote by qualified majority within the Council.

As a result, in spite of the obligation to flesh out the polluter pays principle,[1] the harmonization of eco-taxes made no headway.

Given the absence of harmonization in the field of eco-taxation, Member States still have significant freedom to carry out their own tax policy. Hence, they are empowered to tax whatever products (waste, packaging, chemical substances, etc.) they wish and at whatever rate they wish. In that connection, *Futura Immobiliare* is a case in point. The CJEU noted that national authorities are endowed with 'broad discretion' when determining the manner in which an environmental charge on household waste must be calculated. [2]

[1] N. de Sadeleer, *Environmental Principles: from Political Slogans to Legal Rules* (OUP, 2002), 44-49.

[2] Case C-254/08 *Futura Immobiliare* [2009] ECR I-6995, para. 55.

With respect to waste packaging taxation, it comes as no surprise that the Member States' tax policy has been pulled in different directions. Whereas several Member States levy taxes on packaging to raise revenue others do levy such taxes with a view to influencing undertakings and consumer behaviour. This is the case of the Finnish Law on excise duty on certain beverage packaging, that provides for tax exemption in order to favour the purchase of beverages that are part of a return system.

Given that there is no 'EU eco-tax' on beverage containers, the Member States must ensure that their domestic excise duties do not infringe the economic freedoms enshrined in Treaty law.

THE TRHEE SETS OF PROVISIONS OF PRIMARY LAW PROHIBITING OBSTACLES TO TRADE IN GOODS

Given that national measures establishing such exo-taxes must be assessed in the light of primary law, account must be made that that the TFEU contains three sets of provisions prohibiting obstacles to trade in goods between Member States: Articles 28 TFEU and 30 TFEU, 34 TFEU to 36 TFEU and 110 TFEU. The scope of these Treaty provisions tends to differ according to the legal category to which they belong: to each barrier to the free movement of goods there is a corresponding prohibition governed by specific rules.[3]

When faced with a fiscal measure, the practitioner will firstly have to distinguish the prohibition of charges having equivalent effect to customs duties (CEE) —Articles 28 and 30 TFEU—from discriminatory internal taxation—Article 110 TFEU.

Articles 28 and 30 TFEU prohibit Member States from adopting customs duties on imports or exports or CEEs whereas Article 110 TFEU condemns internal taxation of a discriminatory nature.

Where the measure is not deemed to be a fiscal barrier to trade, it may nevertheless fall under the prohibition of to 'measures having equivalent effect' to 'quantitative restrictions' on imports (MEEs) within the meaning of Article 34 TFE. Article 34 TFEU has a general character compared to Articles 28-30 TFEU[4] and Article 110 TFEU.[5]

The reason these provisions are mutually exclusive is that while Member States may adopt taxes and charges within their general system of internal taxation inasmuch as they are not discriminatory, CEEs are categorically prohibited. MEEs can be justified in accordance with Article 36 TFEU or an imperative requirement in so far as they are proportionate to their objective. Accordingly, these different provisions may not be cumulatively applied.[6]

[3] As to the manner in which enviromental measures are caught by these economic freedoms, *see* N. de Sadeleer, *EU Environmental Law and the Internal Market* (OUP 2014), 229-469.

[4] Case 252/86 *Bergandi* [1988] ECR I-1343.

[5] Case C-198/14, above, Opinion of AG Bot, at paragraph 60.

[6] N. de Sadeleer, n 5 above, 243.

The following table distinguishes the tariff and non-tariff barriers to the free movement of goods.

Tariff barriers to the free movement of goods	
Custom duties	Articles 28-30 TFEU
Charges having an equivalent effect thereto	Articles 28-30 TFEU
Discriminatory internal taxation	Articles 110 TFEU
Non-tariff barriers to the free movement of goods	
Quantitative restrictions	Articles 34-35 TFEU
Measures having an equivalent effect to quantitative restrictions	Articles 34-35 TFEU
Exemptions to the prohibition of quantitative restrictions and measures having an equivalent effect to quantitative restrictions	Articles 36 TFEU

RESPECTIVE SCOPE OF ARTICLES 28 AND 110 TFEU

CEEs are necessarily protectionist and discriminatory, as they are levied on the crossing of borders. There is an absolute prohibition on such charges, as opposed to the rules applicable to internal taxation that are caught by Article 110 TFEU or to MEEs.[7]

Due to a lack of definition within the Treaty, the CJEU defines the concept of CEEs in broad terms to avoid the emergence of new forms of customs duties.[8] It is settled case law that a CEE covers 'any pecuniary charge, however small and whatever its designation and mode of application, which is . . . unilaterally imposed on domestic or exported goods by reason of the fact that they cross a frontier of one of the Member States and which are not customs duty in the strict sense'.[9]

Though the Court in several cases has been ruling that environmental charges may amount to CEEs,[10] it did not adjudicated that issue in the *Visnappu* case. It must be noted that Advocate general Yves Bot held the view that 'the disputed levy is charged on that beverage packaging not because it crosses a frontier but by reason of the fact that it is not part of a return system.

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[7] Case 7/68 *Commission v Italy* [1968] ECR 423. See L. Gormley, *EU Law of Free Movement of Goods and Customs Union* (OUP, 2009) 384–6.

[8] Case 2/62 *Commission v Luxembourg* [1962] ECR 425.

[9] Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085, para. 20; Case C-213/96 *Outokumpu Oy* [1998] ECR I-1777, para. 20; Case C-387/01 *Weigel* [2004] ECR I-4981, para. 64; and Joined Cases C-393/04 & C-41/05 *Air Liquide* [2006] ECR I-5293, para. 51.

[10] N. de Sadeleer, n 5 above, at 242.

In those circumstances, the excise duty provided for in the Law on excise duty on certain beverage packaging does not constitute a [CEE]'.[11]

That being said, even if a charge is not a CEE under Articles 28 and 30 TFEU, it may still be contrary to Article 110 TFEU.

RESPECTIVE SCOPE OF ARTICLES 34 TFEU AND 110 TFEU

The definition of the respective scope of these provisions is far from theoretical. Article 110 TFEU does not overlap with Article 34 TFEU on the account that their normative content and applicability conditions differ greatly.

It is settled case law that because of its narrower scope, Article 110 TFEU is considered to be a *leges speciales* of Article 34 TFEU, the application of which is residual.[12] In effect, the CJEU has adopted a broad interpretation of the concept of MEEs, holding that all national measures which are 'capable of hindering, directly or indirectly, actually or potentially, intra-Community trade'.[13] The case law is somewhat sophisticated given that the Court distinguishes between distinctly and indistinctly applicable measures and, more recently, 'any other measure which hinders access of products originating in other Member States to the market of a Member State'.[14]

On another note, one may not derogate from Article 110 TFEU, even for 'an overriding requirement relating to the public interest', whereas Article 34 TFEU can be the subject of exemption that can be found in Article 36 TFEU. In addition, environmental protection in its own rights is deemed to be an 'overriding requirement relating to the public interest' justifying MEEs.[15]

While Article 110 TFEU is by definition 'fiscal in purpose',[16] Article 34 TFEU is concerned with non-fiscal barriers. In other words, the financial character of the contested domestic measure brings it within the scope of Article 110 TFEU; its main objective must be fiscal and therefore redistributive.

Both the AG and the CJEU stressed that the excise duty at issue was clearly of a fiscal nature on the account that it was paid to the custom authorities on certain beverage packaging. As a result, the Law on excise duty on certain beverage packaging fell within the scope of

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[11] Case C-198/14, above, Opinion of AG Bot, at paragraph 51. See C. Barnard, *The Substantive Law of the EU,* 3rd ed. (OUP, 2007), 74; P. Oliver, *Oliver on Free Movement of Goods in the European Union*, 5th ed. (Hart, 2010), 84-155; C. Blumann (dir.) *et al*., *Commentaire Mégret. Introduction au marché intérieur – libre circulation des marchandises* (Université de Bruxelles, 2015), 268-320.

[12] Case 27/67 *Fink-Frucht* [1968] ECR I-327. See also C-383/01 *De Danske Bilimportører*, C:2003:116, Opinion of Advocate General Jacobs, at paragraph 6030; Case C-198/14, above, Opinion of AG Bot, at paragraph 60.

[13] Case 8/74, *Dassonville*, EU:C:1974:82, paragraph 5.

[14] Case 110/07 *Trailers* [2009] I-519, para. 37; case 142/05 *Swedish Watercrafts* [2009] I-4273, para. 24; Case C-108/09 *Ker-Optika bt* [2010] C:2010:725, para. 50. Vigorous debate ensued as to how to interpret these terms. See A. L. Sibony, 'Can Market Access be taken seriously?' (2012)2 *EJCL-REDC* 325 ; A. Fromont and C. Verdure, 'La consécration du critère de l'acccès au marché en matière de libre circulation des marchandises: mythe ou réalité?' 47 *RTDeur* (2011) 716-748; M. Fallon and D. Gerard, 'Trailing the trailers in search of a typology of barriers' (2012) 2 *EJCL-REDC* 258.

[15] N. de Sadeleer, n 5 above, at 296-300.

[16] A. G. Toth, *The Oxford Encyclopaedia of European Community Law*, vol. II (Oxford: OUP, 2005), 708.

Article 110 TFEU.[17] It was thus not necessary to examine the duty in the light of Article 34 TFEU.

CONSISTENCY OF THE FINNISH LAW ON EXCISE DUTY WITH DIRECTIVE 94/62/EC

A preliminary question arose. The Helsinki Court of Appeal asked the CJEU whether Articles 1(1), 7 and 15 of Directive 94/62/EC on packaging and packaging waste, [18] should be interpreted as precluding the provisions of the Finnish Law on excise duty aiming at favouring the reuse and the recycling of beverage packaging.

It is settled case law that where the matter is subject of an exhaustive, full, or complete harmonisation, the measure hindering the free movement of goods must be assessed solely in the light of the relevant provisions of secondary law. Accordingly, Article 34 TFEU cannot be applied.

However, as long as the EU lawmaker has not pre-empted the field, the domestic measure has to be reviewed solely in the light of the relevant Treaty provisions[19]. Therefore, as long as harmonization is not complete, Member States may invoke grounds contained in Article 36 TFEU or a mandatory requirement with a view to impeding free movement of goods. [20]

Given that the formal existence of secondary law does not preclude the application of Treaty law, one has to assess whether the EU measures are subject to an exhaustive harmonisation. Were the three provisions of Directive 94/62/EC giving rise to an exhaustive harmonisation of the subject matter, the Finnish Law on excise duty on certain beverage packaging had to be assessed solely in the light of those provisions.

In that regard, Directive 94/62/EC is deemed to be a complex piece of legislation.

On the one hand, the marking and identification of packaging and the requirements on the composition of packaging and its capacity to be reused or recovered, governed by Articles 8 and 11 of Directive 94/62 and Annex II is subject to complete harmonisation.

On the other, the CJEU ruled that there was no full harmonization of national systems for the encouragement of packaging reuse, as Article 5 of Directive 94/62/EC allows Member States to encourage, in conformity with the TFEU, reuse systems of packaging that can be reused in an environmentally sound manner.[21]

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[17] Case C-198/14, above, paragraph 52, Opinion of AG Bot, at paragraph 62.

[18] European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste (OJ 1994 L 365, p. 10).

[19] Case 215/87 *Schumacher* [1989] ECR 617, para. 15; Case C-369/88 *Delattre* [1991] ECR I-1487, para. 48; Case C-347/89 *Eurim-Pharm* [1991] ECR I-1747, para. 26; Case C-62/90 *Commission* v *Germany* [1992] ECR I-2575, para. 10; and Case C-320/93 *Ortscheit* [1994] ECR I-5243, para. 14 ; case C-309/02 *Radlberger Getränkegesellschaft and S. Spitz* [2004] C:2004:799, paragraph 53

[20] Case C-323/93 *Centre d'insémination de La Crespelle* [1994] ECR I-5077; Case C-249/92 *Commission v. Italy* [1994] ECR I-4311; and Case C-3/99 *Cidrerie Ruwet* [2000].

[21] Case C-463/01 *Commission v. Germany* [2004] ECR I-11705, paras. 37 to 45.

Along the same lines, AG Bot held the view that 'the harmonising effect of Directive 94/62 remains limited in the field of the organisation of return systems for beverage packaging'.[22]

Article 7(1) of Directive 94/62 obliges the Member States to take the necessary measures to set up return, collection and recovery systems, and to regulate the organisation of those systems. It is clear from the wording of that provision that Member States have a degree of latitude in the actual organisation of those systems.[23]

Reasoning by analogy, the CJEU held that Article 15 of Directive 94/62 does not carry out any harmonisation but rather authorises the Council to adopt economic instruments to promote the implementation of the objectives set by that directive or, in the absence of such measures, authorises the Member State, acting 'in accordance with … the obligations arising out of the Treaty', to adopt measures to implement those objectives.[24]

Since the relevant provisions of Directive 94/62 have not been the subject of exhaustive harmonisation, the Finnish excise duty had to be assessed in the light of the relevant provisions of primary law, in this case the first indent of Article 110 TFEU.

CONSISTENCY OF THE FINNISH ON EXCISE DUTY WITH ARTICLE 110 TFEU

Aiming to eliminate 'all forms of protection which might result from the application of discriminatory internal taxation against products from other Member States, and to guarantee absolute neutrality of internal taxation as regards competition between domestic and imported products',[25] Article 110 TFEU is a necessary complement to the aforementioned provisions on the removal of barriers to free movement of goods.[26]

(i) Waste as a product

The fact that waste for disposal has no market value does not imply that it is not covered by the concept of 'products' within the meaning of Article 110 TFEU. Indeed, waste for disposal, even if it has no intrinsic commercial value, may nonetheless give rise to commercial transactions in relation to the disposal or deposit thereof.[27] Accordingly, an excise duty on certain beverage packaging must be regarded as being imposed on products for the purposes of that provision.[28]

(ii) Scope of Article 110 TFEU

The scope of Article 110 TFEU is extremely broad. Whereas the first paragraph of that provision prohibits discrimination between 'similar' products, its second paragraph prohibits taxation of products aiming at affording protection to 'other' products.[29]

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[22] Para 68.
[23] Case C-198/14, above, paras. 45-46; Opinion of AG Bot, at paragraph 71.
[24] Case C-198/14, above, para. 48.
[25] Case 356/85 *Commission v Belgium* [1987] ECR 3299.
[26] D. Berlin, *Commentaire Mégret. Politique fiscale* (Brussels: ULB, 2012) 37.
[27] Case C-221/06 *Stadtgemeinde Frohnleiten* [2007] ECR I-9643, paras 36–8.
[28] Case C-198/14, above, para. 53.
[29] The CJEU ruled that the second paragraph did not apply in the case at issue.

The first paragraph Article 110 TFEU reads:

> 'No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products'.

This paragraph prohibits Member States from taxing products of other Member States more heavily than similar domestic products. In other words, it only condemns the creation of fiscal discrimination.[30] It follows that although Article 110 TFEU is not intended to prevent a Member State from introducing new taxes or from changing the rate or basis of assessment of existing taxes, these powers to make tax arrangements are limited by the principle of non-discrimination.[31] Where the tax concerned is discriminatory in nature, 'the fact that the purpose of and reason for the tax may be environmental in nature or seek to reduce pollution has no bearing on any finding of infringement.'[32]

(iii) *Differentiated system of taxation*

Only beverage packaging which is part of a return system is exempt from the Finnish excise duty. Accordingly, the excise duty at issue applies to certain beverage packaging which is not part of a return system in that Member State.

In order to be admissible, such a charge must be part of a general taxation regime which applies the same criteria to domestic and foreign products and which is impartially warranted by the objective pursued. Differentiation is thus compatible with Article 110 TFEU if it fulfils the following requirements:[33]

- it must pursue aims compatible with the requirements of the Treaties and of secondary law (in this case Article 191 TFEU and Directive 94/62);
- it must be based on objective criteria;
- its rules and implications must avoid all types of discrimination.

Regarding, the objectivity of the criteria, AG Bot held the view that, 'as a means of incentivising recycling, reuse or refilling, the excise duty is in line with the above-mentioned aims of Article 1 of Directive 94/62 to reduce the environmental impact of packaging waste'.[34]

As a matter of course, the last condition is the most thorny one: to be consistent with Article 110, excise duty must apply irrespective of the place of origin or the purpose of the beverage packaging. One has thus to differentiate between direct and indirect discrimination.

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[30] Case 78/76 *Steinike & Weinlig* [1977] ECR I-595.

[31] Case C-402/09 *Ioan Tatu* [2011] *C:2011*:219, paras 50–2.

[32] Opinion AG Sharpston in Case C-402/09 *Ioan Tatu* [2011] *C:2011*:219, para. 38.

[33] Case 196/85 *Commission v France* [1987] ECR I-1597, para. 6; and Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085, para. 29.

[34] Opinion of AG Bot, at paragraph 82.

(iv) *Tax exemption indistinctly applicable to both domestic and foreign products*

Given that the Finnish excise duty on certain beverage was payable on national and imported products, subject to the same conditions and on the same terms, it did not explicitly differentiate beverage packaging according to its origin.[35] Hence, the Finnish tax exemption applied *de jure* to both domestic and foreign products.

(v) *Tax exemption distinctly applicable de facto*

However, the fact the differentiated system of taxation is based on objective criteria does not obviate the risk of indirect discriminatory fiscal treatment. In other words, even if the conditions for direct discrimination are not met, internal taxation may be indirectly discriminatory as a result of its effects.[36]

According to settled case-law, an infringement of the first paragraph of Article 110 TFEU occurs when the tax on the imported product and the tax on the similar domestic product are calculated in a different way and under different conditions so that the imported product, even if only in certain cases, is more heavily taxed. Thus, under that provision, an excise duty must not affect products originating from other Member States more onerously than similar domestic products.[37] This case law has obvious practical consequences: if a Member State cannot, for practical reasons, provide tax relief aimed at domestic recyclable products to similar imported products, it will have to repeal its differentiated tax system.

With respect to waste management policy, *Stadtgemeinde Frohnleiten* is a case in point. The Court held that: 'While it may indeed be extremely difficult for the Austrian authorities to ensure that [contaminated] sites located in other Member States . . . satisfy the requirements laid down in the Austrian legislation', this cannot justify the application of 'the exemption applicable to waste from disused hazardous sites . . . in Austria' when importers of foreign waste cannot benefit from this exemption.[38]

The Court's refusal to take into consideration practical difficulties arising from the extension of tax relief to imported products has been criticized on the grounds that is was likely to jeopardize environmental taxation schemes.[39]

In the annotated case, the question arose whether the costs of collection, transport and recycling of beverage packaging which was not part of a return system were likely to be higher than the costs of participating in a return system. In effect, in accordance with the 'polluter-pays' principle, those costs should be borne by the operators who choose not to take part in a return system.[40] Mr Visnapuu claimed that Finnish legislation was discriminatory and contrary to Article 110 TFEU, since a seller operating from Estonia could not, in practice, join

[35] Case C-198/14, above, para. 54, Opinion of AG Bot, at paragraphs 79-80.
[36] Case C-402/09*Tatu* [2011] C:2011:219, paragraph 37 and the case-law cited.
[37] Case C-313/05, *Brzeziński* [2007] C:2007:33, paragraph 29 and the case-law cited.
[38] Case C-221/06 *Stadtgemeinde Frohnleiten* [2007] ECR I-9643, paras 70 and 71.
[39] Opinion AG Mayras in Case 21/79 *Commission v Italy* [1980] ECR I-1, para. 1. See also N. de Sadeleer, n 5 above, at 256-259.
[40] Opinion of AG Bot, at paragraph 81.

a functioning return system. Moreover, higher costs were stemming from the requirement to ensure that certain particulars appear on the beverage packaging and the requirement to lodge a guarantee and to pay a membership fee.

These arguments were dismissed both by AG Bot and the CJEU. They took the view that a foreign operator was not at a disadvantage compared to a national operator in so far as a national operator is subject to the same requirements.[41]

'It cannot be inferred from such difficulties encountered by a small trader engaged in distance sales in joining a functioning return system or setting up such a system that beverage packaging from other Member States is less likely to enjoy the exemption laid down for packaging integrated into a functioning return system and, consequently, is more heavily taxed than similar national products.'[42]

Therefore, the conditions laid down by the Finnish lawmaker for joining the return system or for setting up such a system were not indirectly discriminatory. Consequently, Article 110 TFEU does not preclude a national legislation imposing an excise duty on certain beverage packaging.

CONCLUSIONS

The issues addressed by the CJEU in the annotated case are of great practical significance, because of the risk of potential conflict between domestic tax mechanisms aiming at promoting recycling of packaging—soon to become widespread due to the impetus of the Circular Economy Package[43] —and primary EU law ensuring free inter-State trade of goods.

Member States retain a large measure of sovereignty in the field of taxation. Indeed, Article 110 TFEU does not prohibit them from adopting differentiated taxation for similar products, inasmuch as they aim to achieve legitimate economic and social objectives. In addition, fiscal measures adopted at national level with a view to encouraging the recycling of packaging benefit from a presumption of legitimacy in the light of EU law on the account that Waste management law promotes recycling over recovery.[44] However, if Member States retain sovereignty in pursuing such policy choices, they must not discriminate against foreign producers.

The rational of the judgment is as follows. Article 110 TFEU does not preclude a national legislation imposing an excise duty on certain beverage packaging that is promoting the recycling of packaging whenever national and foreign operators are subject to the same requirements. Practical difficulties faced by both foreign and domestic operators do not amount to a violation of Article 110 TFEU.

[41] Case C-198/14, above, para. 63, Opinion of AG Bot, at paragraph 91.
[42] Case C-198/14, above, para. 63.
[43] European Commission, Communication on Closing the loop - An EU action plan for the Circular Economy, COM/2015/0614 final
[44] Article 4, Directive 2008/98/EC on waste.