

THE ORDINARY AND EXTRAORDINARY POWER OF THE EUROPEAN COURT OF JUSTICE

David Goldberg

The amount of tax collected by a state or, for that matter, by any taxing authority is a function of two things.

First, it is a function of the rate at which tax is charged and, secondly, it is a function of the amount on which tax is charged. Our incredibly long tax system is mainly concerned with the question of how we measure the amount on which taxes are paid: there are some pages to do with the rate at which tax is charged, but the vast bulk of the legislation is concerned with defining the subject matter on which the charge is levied. That is true in the case of both direct and indirect taxes: determination of the subject matter of the charge is what our legislation is mainly concerned with.

That fact is often overlooked these days in fashionable comments about tax systems, which commend the use of flat rates of tax. I do not mean to suggest by this comment that I am not in favour of flat rate taxation, but what I do intend to suggest is that flat rate taxation will not simplify our legislation hugely, because it is still necessary to define the subject matter of the charge, and the rate at which tax is charged does not necessarily make it easier or shorter to define the amount on which tax is to be levied. In a sense, our corporation tax system demonstrates this: it is a flat rate

tax system, but determination of the chargeable subject matter requires several thousand pages of legislation.

Nonetheless, I do not think that the rate at which tax is charged is unimportant: when a person, whether an individual or a legal entity, is deciding where to establish himself, the rate at which tax is levied is likely to be the first thing at which he looks: indeed, the intricacies of how the tax system works and how the amount on which a person is to be taxed is measured is something that will be far from the mind of most businessmen, who are likely to assume that all systems of measurement are roughly the same. It seems to me, therefore, that, when you look at a tax system, the rate of tax is at least as important and, in some ways, more important than the amount on which tax is payable.

This country retains, broadly, freedom to set its rates of tax. There are some limitations on the rate at which VAT can be set but, as far as the other taxes are concerned, we are free here to choose our rates of tax as we will. But this is no longer entirely so of the system of measurement. To a large extent, we have lost our sovereignty to define the amount on which we are to charge tax. Now that is not at all surprising where VAT is concerned, because every country in the European Community has agreed to adopt, by accepting the 6th Directive, a more or less common basis of measuring the amount on which VAT is chargeable. Accordingly, although cases about VAT can be, and often are, referred to the European Court of Justice – the ECJ – for decision, the Court, when deciding those cases, is

functioning very much as a quite ordinary Court: it is interpreting legislation which we have, more or less, adopted into our national legislation. The legislation is not being interpreted by a national Court and in that respect there is, of course, a difference between purely domestic litigation and litigation which involves an EC element. Nonetheless, what the ECJ is doing in relation to VAT is the sort of thing we would expect judges to do and I think we have all become so used to it that it scarcely surprises us any more that it is happening. But the position is really rather different where direct taxes are concerned. In that area the ECJ has become so powerful that it operates almost as a legislative body without the force of democracy to which a legislative body is usually subject.

The business of a Court is to declare the law. The declaration of law involves, as is now well recognised, the creation of law to some extent. It is, however, to be hoped that extensions of law are created in accordance with principles which have been laid down by previous decisions of Courts, which are then expanded by the new decisions. This is the theory of law with which common lawyers are familiar and comfortable. Civilian systems of law, although having, to a large extent, a different technical basis from the common law, operate in much the same way, although with less regard to the doctrine of precedent than we are used to in this country.

No matter what system of law is being applied, what users want from a system of legal decision making is that it should contain some predictive power. In other

words, as situations arise where it is necessary to determine the consequences in law of what is being done, it should be possible to turn to the decisions of the Courts and say: this is what will happen here. At least, even if we cannot say “this is what will happen”, we want to be able to say “this is what is likely to happen”. To a greater or lesser extent that is, usually, something that can be done in this country: one looks at the decisions of the Courts and extracts certain principles from them: we then apply those principles to the situation at which we are looking, and determine what the result will be.

The question which, accordingly, arises is whether we can extract any principle from the decisions of the ECJ relating to tax which will enable us to work out what the law is, absent a decision on the precise point by the ECJ. This is something which must be of increasing importance as the years go by, because it seems at least likely, perhaps likely to the point of inevitability, that the influence of the ECJ will grow rather than contract.

So I am going to attempt to extract principles from the ECJ’s cases on direct taxation: I have to confess that I find this a difficult task because the Court is not always clear as to why it is reaching a decision. In large measure, this is not to be wondered at: the Court is a large Court and there are many judges with different views. No doubt the Court is quite often able to agree on a result, but not always able to agree on the reasons for it; and this leads to decisions which, while lengthy, sometimes seem to lack coherence. Moreover, the tools

which the Court uses to reach its decisions are relatively new and really rather broad. There are, nonetheless, trends appearing clearly and I shall, accordingly, attempt to extract some principles from what is going on.

First, as far as direct taxes are concerned, there does not, as yet, exist a common consolidated corporate or individual tax base in the EC. In principle, each state is, accordingly, entitled to its own national tax system and can set its own system of measuring taxable income and its own tax rates. But, secondly, if the national system conflicts with the EC Treaty, then, as shown in this country (albeit in another context) by the *Factortame*¹ decision, domestic law is overridden. The question of whether there is or is not a conflict between our domestic tax system and the EC Treaty is, accordingly, one of fundamental importance nowadays both to the operation and to the creation of our fiscal code. The decision as to whether there is a conflict between our national tax system and the EC Treaty is determined (once it has been raised by a taxpayer or by the Commission and, where appropriate, referred to the ECJ) by the ECJ and not by the national Court. It is in this way that decisions of the ECJ have an impact on our domestic legislative framework which means that, in a certain sense, it is acting as a legislative body: once the Court has declared that our national law conflicts with the Treaty, we have to legislate to get rid of the conflict; and we do so because the ECJ has told us that we must.

There are, broadly, seven tools which the ECJ uses in determining whether there is a conflict between our

domestic tax system and the Treaty. They are: first, to fourth, the four freedoms – movement of workers; movement of services; movement of capital and freedom of establishment. Then, fifthly, there are Articles 87 to 89 of the Treaty, prohibiting unapproved state aid. Sixthly, there is Article 293, aimed at the elimination of double taxation. And, lastly, there is the Parent/Subsidiary Directive, which is also aimed at the prevention of double taxation.

Of these tools, the requirement that capital be allowed to move freely is the most broad ranging.

The European Commission has the ambition of creating a co-ordinated European tax base. In other words, the ambition in relation to direct taxes is to achieve what has presently been achieved in relation to VAT. The ambition is that there should be, eventually – eventually not being too far away – a common system of measuring the amount on which tax is charged, which is used throughout the EC or, possibly, within the EEA. Until that has been achieved, the Commission's aim is to ensure that there is, at least, a coherent and co-ordinated tax treatment throughout the EC and this involves:

- removing discrimination and double taxation;
- preventing inadvertent non-taxation and abuse;
- reducing the compliance costs associated with being subject to more than one tax

system.

It seems to me that there are at least five situations in which the seven tools used by the ECJ and the political ambition of the Commission are likely to be relevant to tax. They are:

1. exit taxes: that is where a State seeks to levy a charge on a change of residence by an individual or a legal entity or on the movement of an economic activity from one Member State to another;
2. controlled foreign companies: that is where a Member State seeks to collect tax in relation to the profits of a legal entity established in another Member State;
3. group taxation: that is where what is in reality a single economic grouping is divided among different legal entities which operate in different Member States;
4. taxation of branches: that is where a taxpayer based in one State operates in another State, without establishing a different legal entity there;
5. dividend taxation: that is how a Member State treats a dividend received or paid by one of its residents and whether it makes a distinction between dividends received from or paid to its own residents and those

paid to or received by non-residents, (and, although I have referred here only to dividends, similar issues may arise in relation to cross border interest and it is worth bearing this in mind).

This list is not intended to be exhaustive: other issues arise in relation to individuals – for example the ability or rather, inability, to make investments outside the UK in a way which attracts a tax relief given to UK investments. However, the five areas mentioned are, perhaps, the ones of most significance.

There has already been much litigation in the ECJ in relation to these areas, and I shall make some comments on each of the categories in turn.

It seems to me that in the early days the Court was primarily concerned to prevent discrimination, so that all that it required of a State was that it should treat residents and non-residents, who were, objectively, in the same situation, alike.

But it seems to me to have moved on quite considerably from that position, as the more recent cases show.

Exit taxes

It is apparent from the *de Lasteyrie* decision² that it is not permissible to impose an immediate tax charge, or any other burdensome requirement, on a taxpayer in respect of his change of residence from one member

jurisdiction to another. The *de Lasteyrie* decision is, of course, about an individual, but there is nothing in it which limits its operation to individuals: to my mind, it applies equally to companies. However, although there may be no immediate tax charge or burdensome requirement on a change of residence, it seems from the decision in the case of *N³*, that the State which is being left may make an immediate assessment to tax in respect of the change of residence, although it may not collect the tax due until an actual economic event occurs. This means, for example, that, if X Ltd acquired an asset for 100 and then moves its residence from the United Kingdom to another Member State when the asset is worth 250, the United Kingdom can assess X Ltd to tax on a gain of 150, but it cannot collect the tax unless and until X Ltd actually disposes of the asset.

The *de Lasteyrie* decision and the *N* decision are, of course, not cases about UK tax, but I think we can deduce from those decisions that certain of our domestic provisions about exit charges are in conflict with the Treaty and therefore void. First and most obviously, it seems to me that TCGA 1992 s.185, imposing a deemed disposal on a company ceasing to be resident in the United Kingdom is void, as far as it operates to impose an immediate charge to tax. Secondly, FA 1988 s.130, as far as it requires a company ceasing to be resident in the United Kingdom to secure its liability to tax, is likely to be void if the company is moving to an EEA territory. Thirdly, the restrictions on the operation of TCGA 1992 s.171 (relating to group transfers) and TCGA s.139 ICTA 1988 s.343 (relating to reconstructions), which

limit those provisions so that they only operate to avoid charges to tax when there is a transfer from one UK taxpayer to another UK taxpayer, are also likely to be void as being a form of impermissible exit tax.

In some ways, the last paragraph may sound surprising, particularly in relation to s.171, which has already been amended so as not to discriminate against taxpayers on the grounds of residence. I am not, however, sure that those changes go far enough to satisfy the recent decisions of the ECJ. Until relatively recently, the ECJ seems to have been more willing than it now is to accept that the home state may protect its tax base. To my mind, the *de Lasteyrie* case and the *Marks & Spencer*⁴ case show that the ECJ has moved on and will consider illegal (as a breach of the Treaty) any tax charge which arises and becomes immediately payable because of a move from one Member State to another. It seems to me, moreover, that the ECJ would be correct in reaching that conclusion, as exit taxes clearly operate as a restriction on the free movement of capital and on the freedom of establishment.

Controlled foreign companies

In this context we have, of course, the *Cadbury Schweppes* case⁵, and there is other litigation about the same topic. Here again, the concepts clearly engaged are the freedom of movement of capital and freedom of establishment.

The *Cadbury Schweppes* case illustrates in a useful way another point which has to be borne in mind about

the way in which the ECJ operates. A decision of the ECJ is a response to the questions put to it by a national court; and it is necessary for a number of people to respond to the decision of the ECJ. First, the national court which made the reference has to apply the decision of the ECJ. This may be more or less easy, according to how Delphic the ECJ has been in its decision: it can, as we shall see, quite often be truly Delphic. Secondly, the taxing authority has to respond to the decision of the ECJ insofar as it has found an aspect of the tax system to be unlawful. And lastly, the Commission may react to the decision of the ECJ if the taxing authority fails to do so.

As we shall see in relation to group cases, our legislature does tend to react to decisions of the ECJ and, although there may be questions as to whether it has reacted adequately or not, the fact that the legislature may react is, on the whole, not particularly interesting. However, the reaction of our domestic Courts to the decision of the ECJ does raise quite interesting issues. In relation to *Cadbury Schweppes*, two questions have to be determined by our domestic Courts as a result of the decision. The first is whether our domestic legislation, containing the motive exemption from liability under our CFC rules, can be interpreted in accordance with the ECJ's decision that, in principle, taxation of CFCs infringes the Treaty. It seems to me quite plain that our domestic legislation cannot be interpreted consistently with the decision of the ECJ and so the second and, in many ways, more interesting issue left to the national court arises. That issue is whether the CFC in question can be regarded really just as a tax scheme rather than as

a genuine economic activity.

It seems to me that this issue leaves considerable scope for differing views. I expect *Cadbury Schweppes* in the end to win its case when the domestic litigation has been finished, but the *Cadbury Schweppes* decision itself may not mean the end of all CFC taxation.

The case, of course, also has implications for individuals, who may be taxable under what was, until recently, ICTA 1970 s.739⁶, in respect of income of foreign entities which they have power to enjoy. Where the entity is in a Member State, the UK may not now be permitted to apply s.739. Moreover, the question of how far TCGA 1992 s.13 (imputing gains of non-resident “close” companies to UK resident participators) is valid in relation to EEA entities also now arises.

Group taxation

The *Marks & Spencer* case shows that all members of a group, no matter where they are based in the EC, must, to a large extent, be treated in the same way by each national tax system. Accordingly, it is necessary for this country to give relief for foreign losses. We have reacted very promptly to the decision by amending our group relief legislation in last year’s Finance Act, so that, subject to certain limitations, UK companies can now claim relief in respect of overseas losses of non-resident companies which are established in an EEA territory.

What intrigues me about the Court’s decision in *Marks & Spencer* is how it can be reconciled with the

decisions which the Court has been reaching in relation to branches, and what those decisions tell us about the principles being followed by the ECJ – a question I return to below. Before I do so, however, I should note one particular feature of the *Marks & Spencer* case, which is that the ECJ has made it plain that a group is only to get relief for losses once: it is not to get relief in more than one jurisdiction or more than once. Accordingly, the ECJ has referred back to the national court, the question of whether non-UK losses of the group can be used more than once. It seems to me that this is quite a firm matter of fact, which the national court can determine by reference to evidence with some ease: the question referred back to the national Court in *Marks & Spencer* is easier to determine than the question of abuse referred back in *Cadbury Schweppes*, which is a much more malleable issue.

Branches

The ECJ has looked at branches from the point of view of the host state and from the point of view of the home state. It has decided that the host state must charge tax on the profits of a branch at the same rate as it charges tax on the profits of a national⁷, but it does not have to permit relief, against profits of the permanent establishment, for losses that arise outside the host state and have nothing to do with the activity in the host state⁸. However, the home state must give relief for losses of the permanent establishment against profits arising in the home state⁹.

The question which arises is whether these decisions can be reconciled with the decision in the *Marks & Spencer* case. Let me assume an established French group with a profitable UK subsidiary. As I understand that case, losses from outside the United Kingdom can, subject to the limitations in our amended legislation, be surrendered to the UK company. However, if we now assume a French group with a profitable UK branch, the French losses cannot now be used against the profits of the UK branch. It seems to me that this puts the group in a better position than the branch and I find it hard to justify the distinction which the Court is making.

It is this difficulty which makes me wonder what principle the Court is truly following. I find it difficult to believe that, in the area of groups and branches, the Court is truly following principles derived from the four freedoms in reaching its decisions. It seems to me that, if a system of measuring the tax base can constitute a restriction of the freedom of establishment or movement, then, equally, the rate of tax must do so. And if the inability of a group to use foreign losses constitutes a restriction on the freedom of establishment or of movement, then, equally, so must the inability of a branch to use losses constitute a restriction. I do not, myself, find arguments that a branch does not involve an establishment or a movement very convincing, and I do not find the distinctions drawn by the ECJ between subsidiaries and branches convincing either.

So it seems to me that the decisions on branches do raise issues about just what the basis of the ECJ's reasoning is, and this concern is increased when I note that, when the Court says that it is basing its decision on a breach of the four freedoms, it does so only by examining the provisions of the tax system of the referring State. But you can only truly say whether State A is restricting the freedoms by comparing what it is doing – not only internally but also externally – to what every State is doing. The Court is not making that comparison, and, while that is understandable, its failure to do it must impact on the logical integrity of the Court's decisions.

Dividends

There have been a large number of cases about dividends, and these illustrate a number of points about the impact which decisions of the ECJ have on our domestic law. So far as the United Kingdom is concerned, most of them concern or arise out of the now defunct system of ACT, and so, except, of course, to someone directly affected by one of them, they are not of great continuing interest for what they actually decide, but only for the implications that they have for the future. One of the earliest cases about dividend taxation related to the ability of a UK subsidiary to make a group election, when paying a dividend to its foreign parent, so as not to be liable to pay ACT in respect of the dividend. Our domestic legislation did not permit a group election between a UK subsidiary and a foreign parent and the ECJ ruled that illegal. The abolition of the ACT system

in this country means that we are not concerned with legislative amendments to the system to deal with the ECJ's decision, other than the wholesale abolition of ACT back in 1997, itself the subject of considerable debate at the moment. However, the result of the ECJ's decision was that many companies had paid ACT when they should not have done, and this has led to a great deal of litigation about the ability of such companies to recover the tax that they paid. This is not tax litigation as such but is litigation about restitution. It has caused a number of significant developments in our law of restitution and our law relating to periods of limitation – the period within which a claim may be brought. These developments fall outside the scope of this article, but do illustrate the impact which decisions of the ECJ have on what seem to be purely domestic issues.

Then there was litigation in the ECJ about the way in which ACT interacted with the provisions in our tax treaties allowing us to collect a certain amount of tax from non-residents; and these provisions were, to an extent, ruled to be illegal. Next, there has been litigation, in a purely domestic context, about the interaction between our tax treaties and the decision of the ECJ that ACT should not have been paid on dividends paid to foreign parents. As is well known, many of our double tax conventions give a recipient of a dividend a tax credit, largely because of the ACT which had been paid by the dividend-paying company. The *Pirelli* case raised the issue as to whether this tax credit was to be given to a non-resident when the ACT had not been suffered, because of the ECJ's decision that it was illegal to

charge it. The House of Lords, in a rather strained decision, has decided that the tax credit is not to be given. It seems to me that the case illustrates the principle that it does not pay to be too greedy: you cannot expect to have a tax credit if you have not actually suffered the tax that ought to give rise to the tax credit. There is, however, no principle of law that you are not allowed to be too greedy: that is a principle of practice, which it may be relevant to bear in mind when trying to discover what principle the ECJ (or, for that matter, any other court) is actually following in deciding its cases.

The most recent cases about dividends are the *FII* case¹⁰, which is about the ACT payable by a UK dividend paying company in situations where ACT remained payable, and *Test Claimants in Class 4 of the ACT Group Litigation*¹¹, which is essentially about the ability of the recipient companies to get tax credits under double tax agreements. The decisions are lengthy and they display differences. Essentially, the ECJ has refused to interfere with the agreements made between Member States as to the way in which tax credits were to be given by one Member State to residents of another. In other words, the Court has refused to interfere with the way in which Member States agree to share what may be regarded as a single tax charge between them.

On the other hand, the Court has interfered quite dramatically, in the FII case with the UK's domestic tax system. The ECJ's decision is quite clear about some things, and has referred other things back to the national

court for decision which, I believe, set the domestic court quite a puzzle. I think that four principles can be derived from the *FII* decision. First, the United Kingdom must give an underlying tax credit in respect of dividends received by a UK resident from a non-resident company. It must always do that, even in cases where the UK resident has a less than 10% shareholding in the dividend paying company. This is one point which emerges clearly from the case.

Secondly, the tax rate payable in the United Kingdom by a UK resident company, in respect of a dividend which it receives or is entitled to receive, must be the same, whether the dividend is received from a UK resident or from a non-resident. This equality of taxation can be achieved by a credit method or by an imputation method or by freedom (exemption) from tax. It is for the domestic court to determine whether the rate of tax payable on dividends from residents and non-residents is the same. This seems to be an intriguing question when we, in the UK, do not impose any tax on UK dividends paid to UK companies. The real issue must, accordingly, be whether the underlying tax credit exhausts the liability to UK corporation tax. If so, there has been no illegality in our domestic law; if not, there has been. It seems to me, therefore, that the question of whether there are differences in the rate of tax must vary according to the amount of underlying tax for which credit is available; and so quite interesting issues will arise.

Thirdly, it is not permissible to make a UK resident company pay ACT just because it receives a dividend

from a foreign company. Therefore the principle of freedom of establishment and free movement of capital precluded a UK company from being allowed to pay on dividends free of ACT only because it had received a dividend which has been subject to ACT. Fourthly, surrenders of ACT from one UK resident company to another are not to be permitted if surrenders of ACT to a non-resident company are not permitted. Lastly, the system of foreign income dividends was illegal. Quite what all this means is going to take some working out and the consequences for our domestic law of restitution will, I think, be very interesting.

It is principally our law of restitution which will benefit from this decision and not our tax law, because generally the result of the ECJ's decision is not to free UK taxpayers from undischarged liabilities (most of them will have paid ACT and so on) but to say that they may have paid ACT without being liable to do so. It is, accordingly, necessary to work out how much tax a taxpayer paid without being truly liable to do so and then claim it back in an action for restitution. I should, however, mention here that, where a taxpayer has not settled his tax affairs with the Revenue and has open appeals pending before the Special Commissioners which are affected by an ECJ decision, he must pursue his tax appeal before the Commissioners (and by appeal from them) and may not short circuit the process by going directly to the High Court. It seems to me that, at least so far as surrenders of ACT are concerned, the *FII* decision may be something of a one way street against the taxpayer, because it rather indicates that surrenders

of ACTs should not have been permitted, unless they could also be made to a non-resident company.

I find this an interesting extension of the ECJ's willingness to interfere with a domestic tax system because, so far, while it has been willing to make decisions which erode the tax base of the State which refers the point at issue to it, it has not been willing to do anything which erodes the tax base of another Member State. However, the suggestion that ACT surrenders should have been permitted to non-resident companies does open up the possibility of eroding the tax base of a non-referring State. After all, what is a non-resident company to do with ACT surrendered to it? If the answer is that it is to do nothing with the ACT surrendered to it, what is the point of saying that the inability to surrender ACT to a non-resident is objectionable? The ECJ, in finding a UK resident's ability to surrender ACT objectionable because of the inability to surrender to a non-resident, must have been at least contemplating that the non-resident potential surrenderee could do something with the ACT. The only thing it could possibly do with an ACT surrender is to use it against its own domestic corporation tax or to use it against a liability to UK corporation tax. It is a possible reading of the ECJ's decision that it intended to limit its judgment to cases where the non-resident in question has a liability to UK corporation tax. If that is the correct reading of the decision it is, on this point, relatively limited – in some ways more limited than the *Marks & Spencer* case. On the other hand, if it is not so limited, it would be something of a reach and I am not sure that the ECJ

intended to go so far as that. Nonetheless, the *FII* case does seem to show an even greater willingness by the Court to interfere with domestic systems than previous decisions have demonstrated.

I should also say that, as a matter of pure logic, I find it difficult to justify the dividend decisions by reference to the freedom of establishment or the freedom of movement of capital. After all, in these cases, UK entities had been established and capital had moved, demonstrating the freedom to establish and to move capital.

Something else must be in play, but what?

Let me now try to find a synthesis of what the Court has been doing in relation to tax bearing in mind that, to an extent, the issues raised by the 4 freedoms are economic rather than purely legal. There are, of course, historical analogies which can be drawn. The ECJ functions as the interpreter of the EC Treaty in much the same way as the Supreme Court of the United States operates as interpreter of the US constitution, and the Privy Council (and now the highest domestic Courts) operated or operate as interpreters of the effective constitutions of Canada and Australia. The parallel cannot be taken too far because, of course, there is a difference between the US, Canadian and Australian situations on the one hand and the EC situation on the other. In each of the USA, Canada and Australia, there is a federal government and disputes have arisen as to the respective powers of the federal government on the one hand and the provincial or state governments on the

other. In the case of the EC, there is, of course, no federal government as such.

In the tax cases which are referred to the ECJ, the Court's task is not to resolve disputes between different levels of government: the dispute in those cases is always as to how the EC Treaty, which has been accepted domestically, impacts on other aspects of domestic legislation which have been enacted by the same legislative body as that which adopted the Treaty. There is the possibility of conflict between purely domestic legislation and the Treaty; and the ECJ determines whether that conflict exists or not. In the cases of federal systems, the interpreting court has usually resolved conflicts in relation to tax in favour of a federal power rather than provincial power. I believe that something similar is going on with the ECJ.

As I have tried to indicate, I do not find a synthesis of the ECJ's case law based on the four freedoms a particularly convincing basis for the agenda being followed by the ECJ. I do, however, think that the Court is following two principles quite closely. The first is that it is not permissible to discriminate between one person and another or between one economic activity and another on the basis of the place of residence of the person or the place where the economic activity is carried on. The other is that an EC resident should pay tax only once on its profits in the EC so that double taxation should be eliminated. So far, the Court seems more concerned with the possibility that an economic grouping may pay tax on more than its full economic

profit, than with the possibility that it may pay tax on less than its full economic profit. But the essential aim seems to me to be a federal one: tax is to be paid somewhere in the EC, but only once. The rate at which it is paid does not matter very much. It does seem to me that, eventually, even without a consolidated common tax base, this will lead to a federal EC wide direct tax system which will have largely been the creation of the ECJ which will have compelled national legislatures to amend their tax systems. That is the extraordinary power of the ECJ.

It is for consideration whether the ECJ is a satisfactory legislative body, when it is not subject to any democratic checks or balances. The point here is that the decisions of every other court I can think of, which has an interpretative power in relation to a fundamental constitutional document, are subject to review by a legislative body with an amending and reversing power given by some form of constitution. Because the ECJ is a creation of the Treaty and not of a national legislative body and there is no Community Constitution, that is not true of the Court's decisions. If our national legislature – if Parliament – does not approve of an ECJ decision, we do have remedies: we can try to persuade all our Treaty partners to amend the Treaty or we can resile from it. But these remedies are impractical and remote, so that they have no real power; and the ECJ is left with the true power to mould aspects of our tax system as it will. For many, if not most, of us, the Court is a far off institution about which we know little or nothing. I suspect that, instinctively, most British people are opposed to the idea

of a federal structure for the EC; but it may be that something along those lines is needed if we are to retain some form of representative democratic control over the ECJ: without it, that control does not seem to me to exist. At any rate, if there were a constitution, the extraordinary power of the ECJ would be more apparent and transparency is, these days, a prize worth having.

¹ C213/89

² C9/02

³ C470/04

⁴ C446/03

⁵ C196/04

⁶ [739] See now, *Income Tax Act 2007* s.714 *et seq*

⁷ *RBS v. Greek Slate Co* 311/97

⁸ *Futura* C250/95

⁹ *AMID* C141/99

¹⁰ C446/04

¹¹ C374/04