

# The legality of non-harmonised excise duties in the European internal market using the Federal Republic of Germany as an example<sup>1</sup>

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## Abstract

With the signing of the Single European Act, Member States of the European Union (EU) committed themselves to establishing the internal market by 31 December 1992; a market without internal borders that guarantees the free movement of goods, persons, services and capital. This article examines the regulations relating to the legality of non-harmonised excise duties, using the Federal Republic of Germany as an example. Regulations relating to the taxes on specific products and services are discussed. It is concluded that, even if it is legally possible to introduce non-harmonised excise duties within the internal market, the fiscal supervision of non-harmonised excise duties is weak and difficult to perform, especially in intra-Community trade, and that further harmonisation should be the long-term goal. However, this can only succeed once the EU agrees on uniform rates of duty for harmonised excise goods.

## 1. Introduction

By signing the Single European Act, Member States committed themselves to establishing the internal market by 31 December 1992.<sup>2</sup> The internal market is an area without internal borders which guarantees the free movement of goods, persons, services and capital.<sup>3</sup> Taxes relating to the consumption of specific goods (historically known as ‘excise duties’) are of crucial importance for competition and therefore had to be harmonised in the run-up to the internal market.<sup>4</sup>

The harmonisation of regulations relating to excise duty was largely achieved by several Directives.<sup>5</sup> The basis of all harmonised objects of taxation is contained in Directive 92/12/EEC on the general arrangements for excise duty.<sup>6</sup> The range of ‘products subject to excise duty’ (‘excise goods’) is limited to energy products, electricity, alcohol and alcoholic beverages as well as manufactured tobacco.<sup>7</sup> The harmonised system of taxation and the abolition of border controls facilitate the intra-Community movement of goods under duty suspension. Accordingly, goods are moved from the country of origin to the country of destination under a duty suspension arrangement and charged duty in the place where they are released for consumption (that is, the ‘country of destination’ principle). Goods under a duty suspension arrangement have not yet been taxed and are therefore subject to fiscal supervision.

The harmonised law differentiates between duty suspension during storage in an authorised tax warehouse and movement.<sup>8</sup> The old paper-based supervision of a supply under duty suspension has now been replaced by electronic supervision.<sup>9</sup> Accordingly, goods subject to excise duty can only be moved under duty suspension once an electronic administrative document has been opened. As a rule, excise duty is charged once the goods have been released for consumption.<sup>10</sup> In intra-Community trade, the ‘country of destination’ principle justifies the Member State charging excise duty in the place where the dutiable product has been released for consumption. There are exceptions for private acquisitions: a product

charged duty in the originating country and acquired by a private person for personal consumption will be exempt from duty in the country of destination.<sup>11</sup>

Legislation harmonising excise duty is limited to that necessary for the creation and functioning of the internal market. Despite the obligation to achieve harmonisation, the principle of subsidiarity means that national peculiarities continue to play a significant role.<sup>12</sup> Such peculiarities can also include the retention or introduction of new duties on products other than harmonised excise goods.

## 2. Requirements for non-harmonised excise duty

Since the advent of the internal market it has become clear that the aim is not to abolish all the non-harmonised excise duties in the Community. Rather, it is considered compatible with the aims of the internal market to grant Member States the discretion to retain or introduce national excise duties and systems of collection<sup>13</sup> so that they can compensate any losses resulting from harmonisation efforts by tapping into additional sources of revenue. This discretion of Member States was contained in Directive 92/12/EC, which applied to all harmonised objects of taxation and established general principles of taxation.<sup>14</sup> This was replaced by Directive 2008/118/EC (the Excise Directive) which permits duties on products other than excise goods to continue and harmonises the conditions under which the non-harmonised excise duty of a Member State complies with European Union (EU) law. The legal basis and conditions themselves are found in Art. 1 (2) and (3) Excise Directive (Art. 3 (2) and 3 in the former edition). There is an additional, general restriction contained in Art. 401 of Directive 2006/112/EC,<sup>15</sup> which states that the ‘excise duties cannot be characterised as turnover taxes’.<sup>16</sup> Both the general arrangements for value-added tax and excise duties must facilitate the conditions necessary for an internal market without tax barriers.<sup>17</sup>

### 2.1 Art. 1 (3) Excise Directive (Art. 3 (3) former edition)

According to Art. 1 (3) Excise Directive, Member States may impose duties on products other than excise goods as well as services provided that such taxation does not give rise to any formalities connected with the crossing of frontiers.

#### 2.1.1 Excise duties on other products

The term ‘products other than excise goods’ in Art. 1 (3) (a) Excise Directive is to be interpreted to the effect that the goods concerned must be different from the ‘excise goods’ listed in Art. 1 (1).<sup>18</sup> This term includes energy products, electricity, alcohol and alcoholic beverages as well as manufactured tobacco and refers to other Directives for further definition.<sup>19</sup> Unlike Art. 1 (2) of the Directive, which determines the lawfulness of charging other indirect taxes on excise goods, Art. 1 (3) provides for the taxation of goods outside the harmonised catalogue of products. The excise duty in question is presumed to be broad in scope. Being a ‘special, product-based tax on consumption’, it must only relate to a certain product or group of products in order to qualify as ‘other indirect taxes’.<sup>20</sup> The Member States therefore have the right to introduce new excise duties on other goods or to retain a non-harmonised excise duty which existed before the internal market was created.<sup>21</sup>

#### 2.1.2 Tax on services

In addition to the right to introduce excise duties on products other than harmonised excise goods, the Excise Directive gives Member States the right to tax services (including those relating to excise goods) provided the duty in question does not resemble a turnover tax (Art. 1 (3) sentence 1 (b)).<sup>22</sup>

**Service.** The scope of the Excise Directive largely relates to trade in excise goods rather than services. The fact that Art. 1 (3) sentence 1 b) (Art. 3 (3) in the former edition) relates to services suggests that it is referring to something other than an excise duty. The *travaux préparatoires* suggests that this

supplementary provision was adopted in order to preserve local taxes on consumption and expenditure (for example, duties on restaurants and beverages).<sup>23</sup> This has been confirmed by a judgment of the European Court of Justice (ECJ)<sup>24</sup> in a dispute concerning whether a municipal duty on beverages complied with the Excise Directive.

Whereas the ‘additional’ taxation of excise products (for example, alcoholic drinks) by a Member State has to comply with the strict requirements of Art. 1 (2) Excise Directive, a duty on services relating to excise goods will be subject to the lower requirements of Art. 1 (3).<sup>25</sup> Accordingly, the taxation of services does not have to serve any special purpose.

In practice, it can be very difficult to tell whether duties are payable on products or services and usually it will come down to the character of the transaction in question. Accordingly, the ECJ bases its decision on the predominant feature of the dutiable transaction.<sup>26</sup> For example, in the case of alcohol drinks sold in bars, cafes, etc., the supply of the excise product would be dutiable because the service provided by the bar owner represents the secondary aspect of the overall commercial activity.<sup>27</sup> The situation would be different if the commercial activity involved the sale of food because the price would be largely determined by the costs of providing the service. If the commercial activity involved the sale of beverages then the selling price of the products would predominate. The ECJ has also held that if alcoholic beverages were sold in a catering context, for immediate consumption on the seller’s premises, the supply of services would be dutiable.<sup>28</sup> Such commercial activity involves a number of services which are distinguishable from operations relating to the supply of the products.

**‘Cannot be characterised as turnover taxes’.** According to Art. 1 (3) b) Excise Directive (Art. 3 (3) in the former edition), duties levied on services connected to excise products cannot be characterised as ‘turnover taxes’. This prohibition ensures that the tax measures of a Member State do not interfere with the operation of the common system of value-added tax. According to the settled case law of the ECJ,<sup>29</sup> the duty concerned must be general in nature (that is, one which applies to all transactions whether involving products or services). Accordingly, it must be levied generally in respect of transactions for the supply of products and services and calculated in accordance with the price charged. It must accrue at every stage of production and distribution and include the value added of the products and services (that is, the duty payable on a transaction is calculated by deducting the duty paid on the previous transaction). The term ‘turnover taxes’ in Art. 3 (3) (Art. 3 (3) in the former edition) has the same meaning as that in the VAT System Directive.<sup>30</sup>

A duty will not be considered transaction-related if it only covers a certain category of products as opposed to all transactions in the participating Member State. Therefore, duty charged on the supply of ice cream for consideration (including fruits used as ingredients and drinks) would not represent a transaction-based tax since it is only payable on a limited group of products.<sup>31</sup>

### 2.1.3 ‘Must not give rise to any formalities connected with the crossing of frontiers’

In trade between Member States, the imposition of excise duties on goods other than harmonised excise goods, on the one hand, and on services supplied in connection with harmonised excise goods on the other, must not give rise to any formalities connected with the crossing of frontiers in accordance with Art. 1 (3) sentence 2 Excise Directive (Art. 3 (3) sentence 2 in the former edition).

In this context, some commentators take the very restrictive view that any control of cross-border trade (including domestic fiscal supervision performed as part of national tax regimes) is unlawful.<sup>32</sup> However, abandoning all controls on cross-border supplies would mean that duties could only be described as ‘local’ in nature. This would amount to a prohibition on non-harmonised duties and thereby contradict the Directive’s aim. This only requires that the introduction of non-harmonised excise duties does not frustrate the aim of abolishing tax borders within the context of the internal market. It does not mean that Member States have to abandon all controls over cross-border trade. After all, if states are to retain

national excise duties, they must have effective means of collection.<sup>33</sup> Arguably, therefore, only control measures imposed in conjunction with the crossing of internal frontiers (that is, routine border controls) are unlawful.<sup>34</sup> Fiscal supervision alone does not restrict trade unlawfully<sup>35</sup> and so it is still possible to perform domestic fiscal supervision over cross-border supplies.

## **2.2 Art. 1 (2) Excise Directive (Art. 3 (2) former edition)**

Art. 1 (2) Excise Directive<sup>36</sup> allows Member States to subject excise goods to other indirect taxes under certain conditions, provided that there is a specific purpose justifying such double taxation. This provision represents an exception and is therefore to be interpreted restrictively.<sup>37</sup>

### **2.2.1 Specific purpose**

There must be a specific purpose for levying an indirect tax on goods already subject to excise duty in order to justify the resultant double taxation. Duties levied for purely fiscal reasons or as a means of reinforcing financial autonomy will not pass the test.<sup>38</sup> The purpose in question must not serve the general needs of public authorities and the duties themselves must not contradict the aims of the Community. Rather, the additional duty must seek to influence the behaviour of consumers and reflect regional and environmental characteristics. Duties levied in the interests of environmental, social and health policies have been recognised as serving specific purposes. The state can meet the requirement of a specific purpose by channelling all revenues to it or by designing the duty in a certain way (that is, its method of calculation).<sup>39</sup>

### **2.2.2 Principles of taxation in relation to excise duty or value-added tax**

The duty must also reflect the taxation principles underlying excise duty or value-added tax. Accordingly, the basis for charging the duty, how it is levied as well as its calculation and fiscal supervision must reflect the requirements of harmonised law. In other words, non-harmonised duties must display the essential characteristics of the European law on excise duty.<sup>40</sup> That is not to say that there has to be a complete correlation: it is sufficient if the indirect tax for specific purposes is designed in a way that accords with one of the two taxation techniques under Community law.

For example, a duty on beverages will not satisfy the basic principles of excise law if its calculation is based on a feature not commonly used in excise law (for example, the value of the goods as opposed to their weight, quantity or alcohol content). Charging duties when the goods are sold to the end consumer would also contradict the general arrangement because, under excise law, duties are normally charged once the goods are released for consumption. There is also no structural similarity to the system of value-added tax if the duties are charged once the goods are sold to the end consumer without the possibility of deductions.<sup>41</sup>

## **3. Legal situation in Germany**

### **3.1 Preliminary remarks**

In Germany, excise duties on sugar, salt, tea and lighting were abolished as from 1 January 1993. Only duties on coffee and natural gas remained as non-harmonised duties. As part of the ecological tax reform, the German government introduced an electricity duty on 1 April 1999 as a non-harmonised duty. This was amended by Directive 2003/96/EC (the 'Energy Tax Directive'), which considerably expanded the catalogue of harmonised objects of taxation in the energy sector as from 1 January 2004: both natural gas and electricity at the EU level were subjected to compulsory taxation. The inclusion of these goods within the catalogue of harmonised objects of taxation meant that Germany no longer levied non-harmonised duties on electricity and natural gas. One example of a politically motivated tax in Germany was the

introduction of a duty on soft drinks containing spirits ('alcopops') in 2004, which is still charged today. Nuclear fuel is also subject to a non-harmonised duty. Since 1 January 2011,<sup>42</sup> Germany has charged duty on the consumption of nuclear fuel for the commercial production of electricity.

## 3.2 Coffee duty

Both coffee (roasted and instant) and products containing caffeine which enter the German tax territory are subject to coffee duty. Unlike the duty on tea, coffee duty was retained after the creation of the internal market owing to its fiscal importance (it generates revenues of approximately 1.1 billion Euros).<sup>43</sup>

### 3.2.1 Principles of taxation

The system of taxation reflects the principles of harmonised excise law. Accordingly, the German Act on Coffee Duty (*Kaffeesteuergesetz/KaffeeStG*)<sup>44</sup> also provides for tax warehouses where coffee can be produced, processed and stored under duty suspension. The coffee duty is usually charged when the goods are released for consumption (§ 15 (1) *KaffeeStG*). The Act also provides for duty suspension when coffee is moved between tax warehouses within the German tax territory. However, as far as the supervision of coffee supplies is concerned, there is no electronic exchange of information using EMCS. Instead, the official form of the accompanying document has to be used (§ 14 (1) in connection with § 1 no. 2 of the German Ordinance on Coffee Duty (*Kaffeesteuerverordnung/KaffeeStV*).<sup>45</sup>

### 3.2.2 Structure of intra-Community trade

Owing to the absence of harmonisation and compliance with the conditions of Art. 1 (3) Excise Directive, peculiarities within intra-Community trade are unavoidable. It is possible to move coffee from customs warehouses within the tax territory to consignees in other Member States under duty suspension arrangements (§ 9 (1) sentence 1 no. 1 c *KaffeeStG*). However, contrary to harmonised law, the person who receives the coffee does not have to fulfil any particular conditions in relation to an acquisition under duty suspension arrangements. As far as the national character of the tax is concerned, there is no obligation on the person who receives the coffee to end the procedure. The intra-Community dispatch of coffee does not require any official papers. Only the warehousekeeper (as consignor) has to prove that the supply has been duly carried out using commercial documents and invoices (§ 16 *KaffeeStV*).

The legal situation regarding coffee duty where there is a supply into the tax territory is similar. According to § 9 (1) sentence 1 no. 2 *KaffeeStG*, a warehousekeeper in Germany can acquire coffee from another Member State under a duty suspension arrangement. Thereby, the law allows warehousekeepers in Germany to acquire coffee 'duty free'. However, the national character of coffee duty means that it is not possible to impose obligations on the economic participants in other Member States (consignor) and movements are not required to use official papers or comply with certain procedural rules.

The structure of coffee duty in Germany does not entail any unlawful formalities in connection with the crossing of frontiers and so it complies with the requirements of Directive 92/12/EEC. However, the lack of a uniform procedure between the Member States means that fiscal supervision is limited. As a result, there is a risk that economic participants will circumvent or infringe fiscal requirements in order to claim unjustified duty relief.<sup>46</sup>

## 3.3 Alcopop duty

Soft drinks containing alcohol (alcopops) are subject to duty<sup>47</sup> in accordance with § 1 (1) sentence 1 of the German Act Imposing a Special Duty on Soft Drinks Containing Alcohol (Alcopops) for the Protection of Young People.<sup>48</sup> Such beverages must use spirits as an ingredient and it is this rather than the alcoholic content that triggers the alcopop duty. Therefore, alcopops are subject to a duty on spirits and well as on alcopops. The alcopops must have an alcoholic content of more than 1.2% volume but less than 10% and be sold in filled, sealed containers ready for sale.<sup>49</sup> The duty payable on one hectolitre (hl)

is 5,550 Euros. The alcopop duty means that a 0.275 litre bottle normally sold in shops, with an alcohol content of 5.5%, is subject to a tax rate of 84 per cent.

### 3.3.1 Taxes for specific purpose

The specific purpose of the alcopop duty introduced by the German government is to improve the protection of young people against the dangers of alcohol consumption.<sup>50</sup> The duty ensures that the price of alcopops is beyond the reach of young people. The Act intends the high rate of tax to put such products out of the reach of children and teenagers. In accordance with § 4 AlkopopStG, the net revenues gained from the alcopop duty are channelled into the anti-addiction program administered by the Federal Centre for Health Education (*Bundeszentrale für gesundheitliche Aufklärung*).

The aim of protecting young people provides justification for the duty because it meets the requirement of a 'specific purpose' in Art. 1 (2) Excise Directive. Therefore, Member States have the right to introduce a new duty on alcopops in addition to the harmonised duty on spirits.

### 3.3.2 Design

In accordance with the criteria of Art. 1 (2) Excise Directive, the AlkopopStG states that the provisions of the German Spirits Monopoly Act apply *mutatis mutandis* to taxation and related procedures<sup>51</sup> (§ 3 (1) AlkopopStG). This means that the provisions and principles of the harmonised law on excise duty apply. Alcopops can be produced in a tax warehouse under duty suspension. The duty becomes payable when the goods leave the warehouse and are released for consumption. The tax debtor is generally the warehouse which releases the goods or the manufacturer of the alcopops. The measurement used is a specific unit (hl). According to the principle of indirect taxation, the duty is passed on to the consumer via the sale price. The alcopop duty is therefore designed in accordance with the Community legislation on excise duty.

### 3.3.3 Peculiarities in intra-Community trade

Since the alcopop duty takes the form of a non-harmonised duty, peculiarities apply when the interests of other Member States are involved. This applies when alcopops are moved within the Community and exported to third countries.<sup>52</sup> In such cases, the legal principles governing the similarly non-harmonised coffee duty apply; § 3 (2), the AlkopopStG states that the provisions of the Coffee Duty Act are to apply *mutatis mutandis*.<sup>53</sup>

## 3.4 Nuclear fuel duty

As of 1 January 2011, Germany introduced a duty on nuclear fuel owing to the extension of the lifespan of nuclear power stations.<sup>54</sup> Along with the duties on coffee and alcopops, this is the third non-harmonised duty that currently applies in Germany.<sup>55</sup> According to § 12 of the German Act Imposing a Duty on Nuclear Fuel (the 'KernbrStG'), this duty will expire on 31 December 2016. The Federal Ministry of Finance estimates that this duty will generate almost 2.3 billion Euros a year.

### 3.4.1 Foundations

The duty is triggered by the initial usage of fuel elements or rods and the ensuing chain reaction (§ 5 (1) sentence 1 KernbrStG).<sup>56</sup> It concerns a process whereby the fission of nuclear fuels causes neutrons to release additional neutrons, which produce further nuclear fission. The heat (energy) generated by nuclear fission is transformed into electrical energy. The operators are the tax debtors. In reference to the holder of an authorisation pursuant to § 7 (1) of the German Atomic Energy Act (*Atomgesetz*/'*AtomG*'), the operator is the person who holds an authorisation to operate a plant which performs the fission of nuclear fuel for the commercial production of electricity. The duty imposed on one gram of nuclear fuel is 145 Euros (§ 3 KernbrStG).

The duty on nuclear fuel has encountered harsh criticism on constitutional grounds and there are doubts about whether it is lawful. This is apparent both in the literature<sup>57</sup> and in court decisions.<sup>58</sup> For example, it has been questioned whether a duty on nuclear fuels really can be described as an excise duty. If this is not the case, the fundamental question then arises as to whether the Basic Law grants the Federation the competence to introduce a tax which is not expressly provided for in Art. 106 GG.

### 3.4.2 Compliance with EU law

Besides complying with constitutional requirements, a non-harmonised duty must also comply with the requirements of EU law. As far as the German duty on nuclear fuel is concerned, there are doubts in this respect.<sup>59</sup>

If the nuclear fuel duty involves a harmonised object of taxation, then it must be justified by a specific purpose in accordance with Art. 1 (2) Excise Directive. In this respect, is not enough to argue that it serves revenue collection. The question about whether the elements of nuclear fuel represent an ‘energy product’ or comparable product provokes controversy.<sup>60</sup> The nuclear fuel elements do not come within the scope of Art. 2 (1) Energy Tax Directive, which provides a definition of ‘energy products’, or the wording of its catch-all provision in Art. 2 (3). Neither can it be said that nuclear fuels are used as ‘fuels’ pursuant to energy tax law because this requires the driving of an internal combustion engine or gas turbine. According to the Directive, a product intended to be used as fuel for heating must consist wholly or partly of hydrocarbons. Nuclear fuel does not exhibit such characteristics.<sup>61</sup> Therefore, it does not represent a substitute product as referred to in Art. 2 (3) Energy Tax Directive. Even if nuclear fuel does display a certain connection to the excise product ‘electricity’, the taxation of ‘nuclear fuel’ nevertheless involves a product other than excise goods.<sup>62</sup>

Accordingly, the duty is not to be assessed according to Art. 1 (2) Excise Directive but Art. 1 (3) instead. The stricter criteria imposed by Art. 1 (2) – due to its reference to ‘specific purposes’ – do not apply.

Art. 1 (3) Excise Directive states that the taxation must not give rise to formalities connected with the crossing of frontiers. Under the Nuclear Fuels Act, only the operator of the atomic energy plant within the tax area is to be taxed and this does not affect cross-border trade. However, a non-harmonised duty must not infringe EU law. Doubts as to the conformity of this Act concern ‘output taxation’ in light of Art. 14 (1) (a) Energy Tax Directive.<sup>63</sup> According to this provision, the Member States are, as a rule, obliged to grant tax exemption to energy products which are used in the production of electricity. In order to prevent double taxation, the ‘input’ (energy products) is tax free, whereas the ‘output’ (electricity) is taxable. Since electricity is already taxed in Germany, it is argued that imposing a duty on nuclear fuel as an input amounts to double taxation, which is illegal under European law.<sup>64</sup> However, this argument would only hold true if the principle contained in Art. 14 Energy Tax Directive also applied to other goods and products which (like nuclear fuel) do not fall within the scope of the Directive. Leaving aside the wording of the legislation, such an interpretation would contradict the catch-all provision relating to other products in Art. 2 (3) Energy Tax Directive. Generally speaking, this provision does not include all products which are used for energy purposes: products used for heating, for example, are restricted to hydrocarbons. Jatzke<sup>65</sup> justifiably points out that, according to Art. 2 Energy Tax Directive, Member States only intended to regulate the taxation of energy products used in the production of electricity and not to make any binding prescriptions in respect of other goods. Since the nuclear fuel duty cannot be characterised as a value-added tax, it complies with EU law.<sup>66</sup>

## 4. Conclusions

Even if it is legally possible to introduce non-harmonised excise duties within the internal market, ‘going it alone’ like this prevents the creation of a true internal market.<sup>67</sup> In addition, the fiscal supervision of non-harmonised excise duties is weak and difficult to perform, especially in intra-Community trade. The

circumvention of procedural requirements owing to the lack of controls also opens the door to abuse. For these reasons, further harmonisation should be the long-term goal. However, this can only succeed once the EU agrees on uniform rates of duty for harmonised excise goods.

### Notes

- 1 Translated from German by Christopher Dallimore LL.B (Cardiff), Mag. Iur. (Trier), Dr. Iur (Münster).
- 2 See Art. 8a EEC; now Art. 26 (1) TFEU (Treaty on the Functioning of the European Union).
- 3 Art. 26 (2) TFEU.
- 4 Seiler in Grabitz, Hilf & Nettelsheim, *Das Recht der Europäischen Union Teil I*, EL 43, March 2012, Art. 113 TFEU para. 43; Schröder-Schallenberg 1995, *Harmonisierung der sonstigen Verbrauchsteuern* in Birk (ed.) *Handbuch des Europäischen Steuer- und Abgabenrechts*, § 27, pp. 709 ff. with further references.
- 5 For an overview, see the index of legal sources on European law in Bongartz & Schröder-Schallenberg 2011, *Verbrauchssteuerrecht*, 2nd edn, XXVII, XXVIII.
- 6 Originally, Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, O.J. L 76/1; Directive 92/12/EEC was superseded by Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC, O.J. L 9/12 ('Excise Directive').
- 7 Art. 1 (1) Excise Directive.
- 8 For further details, see Bongartz & Schröder-Schallenberg 2011, (fn. 4), pp. 54 ff. with further references.
- 9 Excise Movement and Control System (EMCS); see Art. 21 ff. of Directive 2008/118/EC, Regulation (EC) 684/2009 of 24 July 2009 implementing Council Directive 2008/118/EC in regard to the computerised procedures for the movement of excise goods under suspension of excise duty ('EMCS Regulation'), O.J. L 197/24.
- 10 See Art. 7 Excise Directive.
- 11 See Art. 32 Excise Directive.
- 12 Concerning the authority for harmonisation, see Art. 113 TFEU (formerly Art. 99 EEC Treaty); see Wolfgang in Lenz, *EC Treaty*, Art. 93, para. 10; Schröder-Schallenberg 2009, *Die Rechtentwicklungen des Verbrauchssteuerrechts nach Inkrafttreten des Binnenmarktes zum 1.1.1993*, in *Festschrift Kompetenzen und Verantwortung in der Bundesverwaltung – 30 Jahre Fachhochschule des Bundes für öffentliche Verwaltung*, München, pp. 707, 708 with further references.
- 13 Concerning the development, see Jatzke 1997, *Das System des deutschen Verbrauchssteuerrechts*, Berlin, pp. 48 ff. with further references; Jatzke 2012, *Grenzen des mitgliedstaatlichen Steuerfindungsrechts am Beispiel der Kernbrennstoffsteuer*, *ZfZ*, pp. 150, 151.
- 14 Bongartz & Schröder-Schallenberg 2011, *Verbrauchssteuerrecht*, p. 15 (para. B 10).
- 15 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, O.J. L 347/1.
- 16 See VG Cottbus of 4 May 2010, ref. no. 1 L 358/09 concerning the compatibility of entertainment tax with European law regarding the element 'characterised by turnover tax', with further references.
- 17 ECJ Judgment of 11 November 1997, Case C-408/95 (Eurotunnel SA u.a./SeaFrance), ECR 1997 I-6315 at 6340, 6346.
- 18 See ECJ of 9 March 2000, Case C-437/97, (EKW and Wein & Co.), ECR 2000 I-1157 at 1189, 1202; VG Frankfurt of 9 April 2002, ref. no. 10 E 3678/98.
- 19 That is, concerning energy products and electricity: Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity O.J. L 283/51; concerning alcohol and alcoholic beverages: Council Directive 92/83/EEC on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages, O.J. L 316/21 and concerning tobacco: Directive 2011/64/EU of 21 June 2011 on the structure and rates of duty applied to manufactured tobacco, O.J. L 176/24.
- 20 Jatzke 1997, p. 50 with further references.
- 21 Jatzke 1997, p. 47 f.
- 22 The character of a turnover tax may be doubtful in this case; see Friedrich, *Das neue Verbrauchssteuerrecht ab 1993*, DB 1992, 2000, 2001; Jatzke 1997, p. 51 f.
- 23 Concerning the background, see Jatzke 1997, p. 51 f.; Stobbe 1993, *Die Harmonisierung der besonderen Verbrauchsteuern* (Teil 1), *ZfZ*, pp. 170, 172; see also VG Frankfurt, judgment of 9 April 2002, ref. no. 10 E 3678/98.
- 24 ECJ, judgment of 9 March 2000, Case C-437/97, ECR 2000 I-1157.
- 25 ECJ, judgment of 10 March 2005, Case C-491/03, ECR I-2025: a tax on services is not subject to the stricter requirements of Art.3 (2) of Directive 92/12/EEC (now: Art. 1 (2) Excise Directive); see also Hess, VGH, judgment of 14 October 2005, ref. no. 5 UE 819/05, *DÖV* 2006, p. 398; *NVwZ-RR* 2006, p. 354.

- 26 ECJ of 2 May 1996, Case C-231/94 (Faaborg-Gelting-Linien), ECR 1996, I-2395 at 2406, 2395, para. 12-14.
- 27 Concerning the infringement of Community law by a tax on beverages, see VG Frankfurt, judgment of 9 April 2002, ref. no. 10 E 3678/98.
- 28 ECJ of 10 March 2005, Case C-491/03, ECR I-2025.
- 29 ECJ, judgment of 7 May 1992, Case C-347/90 (Bozzi), ECR 1992 I-2947; judgment of 16 December 1992, Case C-208/91 (Beaulande) ECR 1992 I-6709 at para. 12; judgment of 17 September 1997, C-130/96 (Fazenda Publica/Solisner Estaleiros Novais SP), ECR 1997, I-5053, 5070; judgment of 3 October 2006, C-475/03 (Banca Popolare di Cremona), ECR 2006, I-9373, 9460.
- 30 VG Cottbus, judgment of 4 May 2010, ref. no. 1 L 358/09 with further references.
- 31 ECJ, judgment of 9 March 2000, Case C-437/97 (EKW and Wein & Co.), ECR 2000 I-1157.
- 32 Arndt, Rechtsfragen einer deutschen CO<sup>2</sup>-/Energiesteuer, pp. 120 ff.
- 33 Jatzke 1997, p. 49.
- 34 Beermann 1993, Das Verbrauchsteuer-Binnenmarktgesetz, DStZ, p. 259.
- 35 Jatzke 1997, pp. 48 ff.
- 36 See Art. 3 (2) of Directive 92/12/EEC: concerning the development and controversy surrounding the lawfulness of the taxation, see Jatzke 1997, pp. 46 ff.
- 37 Stated expressly in the Opinion of Advocate General A Saggio of 1 July 1999 in Case C 437/97; ECR. 2000 I-1157, at 1189; VG Frankfurt, judgment of 9 April 2002, ref. no. 10 E 3678/98.
- 38 ECJ judgment of 9 March 2000, C-437/97, ECR 2000 I-1157.
- 39 Opinion of General Advocate A Saggio of 1 July 1999 in Case C-437/97, ECR I-1157 at 1189, 1176.
- 40 Seiler in Grabitz, Hilf & Nettelsheim, Art. 113 AEUV, para. 44.
- 41 ECJ, judgment of 9 March 2000, Case C-437/97, ECR 2000 I-1157, at 1207.
- 42 Kernbrennstoffsteuergesetz/‘KernbrStG’ (*Act providing for a duty on nuclear fuel*) of 8 December 2010, BGBl. I 2010, 1804.
- 43 See detailed arguments in Bongartz & Schröder-Schallenberg 2011, Verbrauchsteuerrecht, pp. 409 ff. (paras. L 1 ff.).
- 44 Kaffeesteuergesetz/‘KaffeeStG’ (*Act providing for a duty on coffee*) of 15 July 2009, BGBl. I, p. 1870) amended by an Act of 21 December 2010 (BGBl. I p. 2221).
- 45 Verordnung zur Durchführung des Kaffeesteuergesetzes/‘KaffeeStV’ (Ordinance implementing the Act providing for a duty on coffee) of 5 October 2009 (BGBl. I, p. 3262) amended by Ordinance of 1 July 2011 (BGBl. I, p. 1308).
- 46 Glockner, Kaffee zum Spottpreis? – Zur Problematik des Kaffeesteuerrechts, BDZ 2011, F 53-F 57: providing a detailed study using the coffee tax as an example.
- 47 Concerning the question of constitutionality, see FG Düsseldorf of 28 April 2005, ref. no. 4 V 481/05 A, ZfZ 2005, p. 313; rejecting an application for interim measures preventing the entry into force of the Act providing for a tax on alcopops, BVerfG of 4 August 2004, 1 BvQ 28/04.
- 48 Gesetz über die Erhebung einer Sondersteuer auf alkoholhaltige Süßgetränke (Alkopops) zum Schutz junger Menschen/‘AlkopopStG’ (*Act providing for a special duty on soft drinks containing alcohol (alcopops) in order to protect young people*) of 23 July 2004 (BGBl. I, p. 1857) amended by the Act of 21 December 2010 (BGBl. I, p. 2221).
- 49 Concerning the individual requirements of the tax object, see Bongartz & Schröder-Schallenberg 2011, Verbrauchsteuerrecht, pp. 422 ff. (para. M 5 ff.) with further references.
- 50 Pfab 2006, Die Besteuerung von Alkopops, DStZ, p. 249; Schmidt & Theis 2004, Die neue Sondersteuer auf Alkopops, ZfZ, p. 329.
- 51 Gesetz über das Branntweinmonopol/‘BranntwMonG’ (*Act on the monopoly over spirits*) of 8 April 1922 (RGBl. I, pp. 335, 405), last amended by the Act of 16 July 2011 (BGBl. I, p. 1090).
- 52 For the details, see Bongartz & Schröder-Schallenberg 2011, pp. 425 ff. (paras. M 21 ff.).
- 53 See comments on the Coffee Duty Act under III. 2. b.
- 54 Kernbrennstoffsteuergesetz/‘KembrStG’ of 8 December 2010 (BGBl. I, p. 1804).
- 55 Jatzke 2010, Die Kernbrennstoffsteuer – ein Exot im deutschen Verbrauchsteuerrecht, ZfZ, p. 278; Waldhoff 2012, Die Kernbrennstoffsteuer als Verbrauchsteuer und die steuerrechtliche Typenlehre, ZfZ, p. 57; Wernsmann 2012, Verfassungsfragen der Kernbrennstoffsteuer, ZfZ, p. 29.
- 56 For details concerning the structure of the duty, see Jatzke 2010, ZfZ, p. 278 with further references; Bongartz & Schröder-Schallenberg 2011, Verbrauchsteuerrecht, pp. 430 ff. (paras. N 1 ff.).
- 57 Schoenfeld 2011, Kernbrennstoffsteuer formell verfassungswidrig?, Aw-Prax, pp. 415 ff.; Stein & Thoms 2011, Energie- und Stromsteuerrecht: Gesetzliche Entwicklungen 2010, BB, pp. 471, 476.

- 58 FG Hamburg, judgment of 19 September 2011, ref. no. 4 V 133/11, ZfZ 2011, Beilageheft 4 (October 2011) p. 56; contra, FG Bad.-Württemberg judgment on 11 January 2012, ref. no. 11 V 2661/11; ref. no. 11 V 4024/11, ZfZ 2012, Insert no. 2 (April 2012) p. 22; the BFH rejected the application for a suspension of enforcement concerning the determination of nuclear fuel duty: see ruling of 9 March 2012, VII B 171/11, ZfZ 2012, p. 109; see also Bruch & Greve 2012, Die Kernbrennstoffsteuer im Fokus der Finanzgerichtsbarkeit, BB, pp. 234 f.; Seer 2012, Vorläufiger Rechtsschutz bei ernstlichen Zweifeln an der Verfassungsmäßigkeit eines Steuergesetzes, DStR, pp. 325 ff.
- 59 Stein & Thoms 2011, BB, pp. 471, 477 with further references; compare with detailed justification in Jatzke 2012, ZfZ, pp. 150 ff.
- 60 See Stein & Thoms 2010, BB, pp. 471, 477; concerning this problem, see Schoenfeld 2011, Aw-Prax, pp. 415, 421.
- 61 For an extensive investigation of these questions, see Jatzke 2012, ZfZ, S. 150, 153.
- 62 Jatzke 2010, ZfZ, p. 278 with further references.
- 63 Stein & Thoms 2011, BB, pp. 471, 477; Schoenfeld 2011, Aw-Prax, pp. 415, 421.
- 64 See Stein & Thoms 2011, BB, pp. 471, 477.
- 65 Jatzke 2012, ZfZ, pp. 150, 154 f.
- 66 Jatzke 2012, ZfZ, pp. 150, 155.
- 67 Schrömbges 1990, Auf dem Weg zur Beseitigung der Steuerschranken in der EG?, ZfZ, p. 136.

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