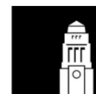
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Article

Non-(Fully) Harmonized Excise Taxes and Irrebuttable Presumptions

Rita de la Feria*

The global growth of excise taxes as regulatory taxes is arguably one of the most significant taxation developments of the last two decades. Not only their importance in terms of revenue collection may be increasing, reverting a long decline trend of excise taxation, but more importantly, the number of products subject to excise taxes in many EU Member States has also expanded well-beyond the traditional excisable goods. Yet EU tax law has not kept pace with these changes, with potential significant consequences for the functioning of the Internal Market. The aim of this article is to consider the compatibility of excise taxes rules not fully harmonized under the Excise Duties Directive, such as motor vehicle taxes, with EU law. It first argues that, whilst these taxes are not subject to full harmonisation, they must nevertheless be compatible with EU primary law, namely Treaty provisions and general principles of EU law. Second, it argues that the Court of Justice case law as regards free movement and the use of irrebuttable presumptions in other non-fully-harmonized taxes, such as income taxes, should apply mutatis mutandis *to excise taxes. It concludes that, the use of irrebuttable presumptions in excise taxes not fully harmonized under the Excise Duties Directive, such as motor vehicle registration rules, is contrary to general principles of EU law, and may constitute a restriction to free movement rules.*

Keywords: taxation, consumption taxes, excise taxes, motor vehicle taxes, motor vehicle registration, irrebuttable presumptions

1 Introduction

Taxes have been regulating human behaviour for many centuries. The global history of taxation is replete with stories of taxes that altered taxpayers' behaviour in unexpected and often surprising ways: taxes explain, for example, why windows in old UK buildings are sometimes bricked-up (windows tax), why Hungarian's cuisine favours pork dishes (sales tax), or why Dutch old houses are often narrow (land tax).[1] Until this century, however, those alterations in behaviour were largely unintended.

Excise taxes too have been applied for many centuries. Whilst taxes on specific commodities are said to go back thousands of years,[2] certainly by the seventeenth century they were well established sources of revenue in many European countries. Excise taxes on alcoholic drinks, as well as tea, coffee and even sugar, were popular and by the beginning of the eighteenth century excise taxes collected as much as 50% of total revenue in some European countries.[3] The popularity of these early excises taxes is generally associated with the formation of the fiscal-military state; so whilst there were clear behavioural concerns, and the choice of which commodities were subject to excise taxes was often associated with morality concerns,[4] the main objective of these taxes was to collected revenue – more often than not, to fund war efforts.[5] The prevalence of excise taxation over other forms of taxation was therefore primarily driven by practicality, and the fact they were relatively easy to collect, rather than any conceptual thinking over their comparative advantages.

Hence, whilst taxes have been changing behaviour for centuries, and excise taxes have been around for at least as long, the use of excises taxes specifically as regulatory tools is much more recent. On this regard, the key turning point for modern excise taxation came with the work of Arthur Pigou, who in 1920 proposed the introduction of taxes on specific products, whose consumption imposes costs on society, with the specific aim of regulating taxpayer behaviour.[6] Today's excise taxes – sometimes also known as Pigouvian taxes – are largely designed to decrease the consumption of products which are deemed to impose additional costs, whether health, environmental or other, on society or on the individual. The rationale of these modern excise taxes is to internalize in the price of specific products, the negative externalities and internalities of their consumption,[7] so that the price reflects their

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[1] For these and many other fantastic tax stories, *see* M. Keen & J. Slemrod, *Rebellion, Rascals, and Revenue: Tax Follies and Wisdom through the Ages* (Princeton University Press 2021).

[2] D'M. Coffman, *Excise Taxation and the Origins of Public Debt* (Palgrave 2013).

[3] H. Yeomans, *Taxation, State Formation, and Governmentability: The Historical Development of Alcohol Excise Duties in England and Wales*, 42 Soc. Sci. Hist., 269–293 (2018), doi: 10.1017/ssh.2017.47.

[4] M. Daunton, *Trusting Leviathan: The Politics of Taxation, 1799–1914* (Cambridge University Press 2001).

[5] For a review of the literature on *see* Yeomans, *supra* n. 3.

[6] A. Pigou, *The Economics of Welfare* (New York: Macmillan 1920).

[7] The traditional view of rationale of excise taxes focused solely on negative externalities, i.e., the costs others or on society as a whole, not on negative internalities, i.e., the costs on consumers

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true societal cost. The increase in the price will then drive down consumption of those products – tobacco, alcohol, fuel, etc – thus decreasing their negative externalities and internalities – health problems, environmental damage, etc.

The relative importance of modern excise taxes as share of total revenue is very far from that of those early excise taxes. Their decline is directly associated with the growth of other taxes: as other taxes became more significant from a budgetary perspective – first income taxes, and then general consumptions taxes, particularly VAT – the role of excise taxes as key, easy to collect revenue sources, diminished. Thus, by 2022, the relative share of excise taxes in OECD countries represented on average only 6.9% of total tax revenue.[8] Yet, these numbers hide the recent resurgence of modern excise taxes as regulatory taxes.[9] Indeed, over the last two decades, modern excise taxes have been growing in importance: not only are they are still an important source of revenue in many European countries, but perhaps more significantly, they are increasingly seen as the most appropriate regulatory instrument for dealing with a variety of societal problems – from obesity to climate change.[10] Consequently, the range of products to which excise taxes apply has also been growing.[11] Products traditionally subject to excise taxes – such as those referred in Article 1(1) of Directive (EU) 2020/262 as 'excise goods',[12] namely energy, alcohol and tobacco products – are now but a fraction of the range of goods and services subject to excise taxes in most countries worldwide. These include sugar, fat, marijuana, plastics, gambling, air transport, and motor vehicles.[13]

themselves. This view, however, presumed fully rational consumers, who will not consume items who are bad for them in the long-run, and is now regarded as outdated. Regulating the over-consumption of items that are bad for individuals is therefore now considered as an important element of excise taxes, *see* J. Gruber & B. Koszegi, *Is Addiction 'Rational'? Theory and Evidence,* 116(4) Q. J. Econ. 1261–1303 (2001), doi: 10.1162/003355301753265570; T. O'Donoghue & M. Rabin, *Optimal Sin Taxes*, 90(10–11) J. Pub. Econ. 1825–1849 (2006), doi: 10.1016/j.jpubeco.2006.03.001; and T. O'Donoghue & M. Rabin, *Studying Optimal Paternalism, Illustrated by a Model of Sin Taxes*, 93(2) Am. Econ. Rev. 186–191 (2003), doi: 10.1257/000282803321947029.

[8] OECD, *Consumption Tax Trends 2022* (OECD Publishing 2022).

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[9] This point is further developed in R. de la Feria & V. Rahal Canado, *The Fall and Rise of Sin Taxes*, *forthcoming*. *See also* R. S. Avi-Yonah, *Taxation as Regulation: Carbon Tax, HealthCare Tax, Bank Tax and Other Regulatory Taxes*, 1(1) Acct., Econ. & L. (2011), doi: 10.2202/2152-2820.1008.

[10] European Commission, *Annual Report on Taxation 2023* (Luxembourg: Publications Office of the European Union 2023). *See also* S. Cnossen, *Excise Taxation to Preserve Health and to Protect the Environment: A Review*, Can. Tax J. 70, 159–184 (2022), doi: 10.32721/ctj.2022.70.supp.cnossen.

[11] Despite some dissenting voices alerting to the significant trade-offs inherent to excise taxation, particularly in terms of its distributional effects, *see* B. Frey, *Excise Taxes: Economics, Politics, and Psychology*, in *Theory and Practice of Excise Taxation* 234–248 (S. Cnossen eds, Oxford University Press 2005), Ch. 8.

[12] Hereafter referred to 'Excise Duties Directive'.

EU harmonisation has not, however, reflected these significant changes in excise taxation. Whilst harmonisation of excise taxes dates back to 1992, the current Excise Duties Directive is directed primarily – although as discussed below, not necessarily exclusively – at traditional excise commodities, namely alcohol, tobacco and energy products. As a result, excise taxes on commodities not expressly covered within the scope of the Directive, have fallen on a quasi-legal vacuum – as non-fully harmonized taxes, they should be subject to primary EU law, but carrying relatively less attention (and visibility) than income taxes, the standard of judicial review applied has so far diverged from that applied to those taxes. This is the case with motor vehicle taxes, which according to a recent survey, now apply in all Member States, to the acquisition and/or ownership of motor vehicles.[14]

This article considers the use of vehicle registration – treated in most Member States as a taxable event – as an irrebuttable presumption in motor vehicles taxes. It argues that despite the fact that those taxes are strictly outside the scope of the Directive, similarly to all non-fully harmonized taxes, they must nevertheless be compatible with EU primary law, namely Treaty provisions and general principles of EU law. As such, the Court of Justice case law as regards free movement and the use of irrebuttable presumptions in other non-fully-harmonized taxes, such as income taxes, should apply *mutatis mutandis* to excise taxation. The remainder of the article therefore proceeds as follows. Section 2 considers the *ratio* of motor vehicles taxes as excise taxes, and the use of motor vehicle registration rules as anti-fraud rules. In section 3, the Court's case law on the compatibility of non-fully harmonized excise taxes rules with EU law is analysed, drawing parallels with the Court's approach in other non-fully harmonized taxes, namely as regards double taxation, and the use of irrebuttable presumptions. Finally, section 4 argues that motor vehicle registration rules applied in many Member States, insofar as they constitute irrebuttable presumptions, they are contrary to general principles of EU law, and constitute a restriction to free movement rules.

2 On the *ratio* of motor vehicle taxes

Establishing the compatibility of motor vehicle registration rules with EU law, requires first an understanding of the *ratio* of those provisions. As demonstrated below, that *ratio* is essentially to ensure the payment of an excise tax on the use of motor vehicles, by establishing a legal proxy for that use, namely vehicle registration. Or said in a different manner, as is the case with motor vehicle

[13] Interestingly, some of these products, such as sugar and gambling, were previously subject to taxation under the old excise taxes on morality grounds and later abandoned, *see* Daunton, *supra* n. 4.

[14] European Automobile Manufacturers' Association (ACEA), *2022 Tax Guide.*

taxes generally, the intention of the legislator is clearly not to tax vehicle registration *per se*, but rather to tax the use of motor vehicles, in order to internalize the health and environmental costs of that use. A casuistic control of the use of motor vehicles is complex, however, and it often requires considerable administrative effort, so for reasons of simplicity and facility of control, laws often apply legal proxies for determining that use, including motor vehicle registration.

2.1 Motor Vehicle Taxes as Excise Taxes

Excise taxes are generally defined as selective taxes on the use of goods or on the permission to use goods or perform activities.[15] As has been consistently recognized by the CJEU,[16] taxes on selective goods, such as motor vehicles taxes, which are not included in list of excise goods harmonized under Directive (EU) 2020/262,[17] should nevertheless be regarded excise taxes. Or said in another way, their non-inclusion within the list of fully-harmonized excise taxes does not prevent their characterisation as such. This much also often results from a literal and contextual interpretation of motor vehicles taxes laws.[18] Nevertheless, even in the absence of these literal and contextual cues, the characterisation of motor vehicle taxes as excise taxes would have resulted from their very nature: they share the same *ratio* as other modern excise taxes, namely that of regulatory taxes, designed to correct market or individual failures, and change behaviour.

2.1.1 On the Rationale of Excise Taxes

The exact design of these excise taxes varies from country to country, and even between different excises taxes within the same country. One of the key differences is whether the tax is specific (on product), *ad valorem* (on price), or a mixture of the two. Whilst specific duties are generally preferable in competitive markets, and the decision on whether to apply *ad valorem* or specific duties – or a balance between the two – will depend on the exact characteristics of the market for those items, generally it is advisable to have a mixture of the two methods, depending on the product in question: *ad valorem* method should be used for products as regards which the markets are monopolistic and there is limited product diversity; and specific duties should be applied in all other circumstances.[19]

Nevertheless, all excise taxes share key principles, in particular: *(1)* they are *taxes on actual consumption*, where the taxable event is the use of the excise products, even where for simplification purposes the law uses a legal proxy, such as the sale, import or registration of the excise product, to presume consumption; and *(2)* they are subject to the *principle of destination*, as taxation should be levied in the country where consumption, and thus the negative externality/internality has occurred, as such, exports are freed of tax, and imports taxed; where there is a departure of this principle, international coordination is necessary.[20] Both these principles, the principle of excises as taxes on actual consumption and the principle of destination, are enshrined in Directive (EU) 2020/262, particularly Articles 6(2) and 33 therein. A teleological interpretation of all rules governing excise taxes – whether or not they fall strictly within the scope of that Directive – requires therefore that they are read in light of these two fundamental principles of excise taxation.[21]

2.1.2 On the Rationale for Applying Excise Taxes to Motor Vehicles

The negative externalities of road use are now well-known, and have been to a large extent quantified. Although, the size of the externality varies hugely according to time and location, as well as the characteristics of the motor vehicle in question (fuel type, engine size, etc),[22] the following have been identified as key costs associated with road use[23]: *(1) global air pollution*, as a result of CO2 and other gas emissions, which contribute to climate change; *(2) local air pollution*, which increases the incidence of respiratory and cardiovascular disease, the costs of which are estimated to be of the same magnitude as those of global warming; *(3) congestion costs*, the extra journey time that road users impose on each other, which is in essence an additional tax on labour; *(4) climate costs*, although congestion costs have been traditionally estimated to be higher than global and local air pollution costs,[24] climate changes costs have significantly increased; *(5) accident costs*, which depending on the country in question can sometimes exceed congestion costs[25]; *(6) road damage*, and operating costs,

[15] OECD, *Revenue Statistics* (Paris: OECD Publishing 2019).

[16] Case C-105/22, *P.M.*, ECLI:EU:C:2023:414, para. 29; Case C-402/14, *Viamar*, ECLI:C:2015:830.

[17] Council Directive (EU) 2020/262 of 19 Dec. 2019 laying down the general arrangements for excise duty (recast), OJ L 58, 27 Feb. 2020, at 4–42. On this regard – and most others – the new Directive adopts the same wording as Directive 2008/118/EC; for a review of the differences between the two legal instruments, *see* T. Bieber & D. Schmaranzer, *Excise Duty Directive 2020/262: Towards A Digitalized and Customs Oriented Excise Law*, 32(2) EC Tax Rev. 83–86 (2023), doi: 10.54648/ECTA2023013.

[18] Case C-105/22, *P.M.*, ECLI:EU:C:2023:414.

[19] S. Delipalla & M. Keen, *The Comparison Between ad Valorem and Specific Taxation under Imperfect Competition*, 49(3) J. Pub. Econ. 351–367 (1992), doi: 10.1016/0047-2727(92)90073-O.

[20] S. Cnossen, *Excise Taxation for Domestic Resource Mobilization*, CeSifo Working Papers 8442 (2020).

[21] This point is further developed *infra*.

[22] D. Fullerton, A. Leicester & S. Smith, *Environmental Taxes*, in *Dimensions of Tax Design – The Mirrlees Review* 423–518 (S. Adam et al eds, Oxford University Press 2010).

[23] Cnossen, *supra* n. 20; and T. Sansom et al., *Surface Transport Costs and Charges* (University of Leeds: Institute for Transport Studies 2001).

[24] Fullerton, Leicester & Smith, *supra* n. 22; and K. Small, *Urban Transportation Economics* (Harwood Academic Publishers 1992).

[25] In South Africa, e.g., the economic cost of road traffic accidents has been estimated at 1.8% of GDP, *see* J. Prozzi et al., *Transportation in*

which results from wear and tear on roads, requiring continuous reparation and maintenance[26]; and *(7) noise pollution*, for which no estimate is available.

Worth emphasizing that these external costs, which excise taxes are designed to internalize in the price of motor vehicles, are all associated with their use, not their registration or even their ownership. The sole act of registering a motor vehicle does not *per se* give rise to these costs, only the use of that vehicle will.

2.2 Motor Vehicle Registration as an Anti-Fraud Rule

Whilst it is clear that motor vehicle taxes are excise taxes, designed to address the many negative externalities associated with the use of those vehicles, some Member States have opted to treat vehicle registration as proxy for actual consumption. The use of proxies for consumption is a common feature of consumption taxes legislations worldwide, given the difficulties in establishing consumption or use. Insofar as excise taxes are concerned, however, given that their *ratio* is to tax the actual use of specific products, those type of proxies for consumption are de facto legal presumptions – they presume that use has taken place – and should therefore be interpreted as such.

2.2.1 The Use of Legal Proxies to Tax Consumption

Establishing the time and location of the effective consumption of products is difficult. In general consumption taxes, namely VAT, where the *ratio* of the tax is to tax supplies of goods or services, not necessarily their actual use, laws often use legal proxies to establish the time and location of the actual supply. In terms of time, in the absence of clarity on the timing of the supply, VAT laws will often determine that the chargeable event will be the issuance of the invoice, the making of a payment, or whichever takes place first.[27] Insofar as location is concerned, most VAT laws around the world will use legal proxies, depending on the nature of the good or service, to establish the place of supply, from the location of the customer, to the place of performance of the supply.[28] Moreover, even though the *ratio* of VAT is not to tax the actual use of the goods or services, many VAT laws will include what is known as *use and enjoyment clauses*, which determine that in cases where there is lack of clarity as regards the place of supply, or other legal proxies give rise to double or non-taxation, the place of supply will be deemed to be the place of use or enjoyment of the good or service in question. The EU VAT Directive also adopts this approach, setting up a range of legal proxies to determine the place of supply of goods or services[29] – sometimes giving rise to a complex chain of legal proxies[30] – whilst also including a use and enjoyment clause for specific services.[31]

Excise taxes law also often use legal proxies to establish the time and location of the actual use of the specific products, which will trigger negative externalities (or internalities). This is particularly evident in the Excise Duties Directive. Whilst Article 6(1)(b) therein determines that excise taxes are due at the moment of importation (legal proxy), the rest of the Directive includes several norms – not least Article 6(2) – designed to ensure that only actual consumption, i.e., the use of the excise goods is taxed. Thus, the Directive includes detailed provisions regarding suspension of duty arrangements (see in particular, Article 12 therein); and even where these do not apply, and imports are subject to excise taxes, the Directive often determines that tax paid will be reimbursed (see in particular Article 10). The *ratio* of only taxing actual consumption of excise products is further reflected on the Preamble to the Directive, which emphasizes the principle that '*Member States should, where the purpose of this Directive so requires, reimburse excise duty paid on excise goods [even when they are] released for consumption*'.

In the case of motor vehicle registration rules, domestic legislators are in essence opting for a double proxy to establish the actual use of motor vehicles. Similarly to the Excise Duties Directive – as well as most excises' legislations worldwide – Member States' domestic law will often determine that tax is due in the first instance upon importation of motor vehicles. Importation is therefore the *first legal proxy for actual consumption* of motor vehicles. However, since importation often does not reflect actual consumption in the country, domestic legislation will often establish the right to refund the excise paid, where registration of the motor vehicle has not taken place – registration is therefore a *second legal proxy for actual consumption* of those vehicles. By doing so, the domestic legislator is therefore establishing a de facto legal presumption: motor vehicle registration rules presume that motor vehicles registered in one Member State are actually consumed in that Member State, and thus limit the right to refund on the basis of that (irrebuttable) presumption.

Developing Countries: Greenhouse Gas Scenarios for South Africa (Arlington: Pew Centre for Global Climate Change 2002).

[26] D. Coady et al., *Global Fossil Fuels Subsidies Remain Large: An Update Based on Country-Level Estimates,* IMF Working Paper WP/19/89 (2019).

[27] *See* Arts 64–66 of Council Directive 2006/112/EC of 28 Nov. 2006, OJ L347, 11 Dec. 2006, at 1–118, hereafter 'EU VAT Directive'.

[28] For a detailed analysis of the range of legal proxies used in VAT to determine the place of supply, *see* R. Millar, *Jurisdictional Reach of VAT*, in *VAT in Africa* 175–214 (R. Krever ed., Pretoria University Law Press 2008).

[29] Articles 31–57 of the EU VAT Directive.

[30] R. de la Feria, *Place Where the Supply/Activity is Effectively Carried Out as an Allocation Rule: VAT vs Direct Taxation*, in *Value Added Tax and Direct Taxation – Similarities and Differences* 961–1014 (M. Lang et al., eds, Amsterdam: IBFD 2009).

[31] Articles 58–59 of the EU VAT Directive.

2.2.2 *Preventing Fraud: From Legal Proxies to Legal Presumptions*

Not all legal proxies in consumption taxes should be strictly characterized as legal presumptions: most place of supply rules in VAT, for example, are not presuming consumption but merely trying to establish where the supply is likely to have taken place. Some legal proxies, however, do imply a presumption that the taxable event has indeed taken place, or that no refund of tax paid is due. This is generally the case, where there is a perceived risk of fraud; in these cases, the legislator establishes a legal presumption as an anti-fraud rule, in essence to ensure that all tax due is effectively paid. Most VAT legislations worldwide, for example, restrict the right to deduct on so-called 'high-risk expenditure' – i.e., expenditure as regards which there is a high risk that private consumption will be passed on as business expenditure – such as hospitality, alcohol products, or fuel. Whilst the EU VAT Directive does not harmonize this area of the VAT system, it does include a *standstill clause* (Article 176), which allows Member States to restrict the right to deduct in those situations, where restrictions in question had been in place prior to EU accession. The restriction to the right to refund of excises in motor vehicle registration rules is a similar type of norm: in both cases, the legislator sets-up a legal presumption, limiting the right to deduct/refund, to prevent tax evasion. This possibility is also envisaged in Article 10(1) of Excise Duties Directive, where it is stated that excise taxes may be reimbursed '*in accordance with the conditions that the Member States shall lay down for the purpose of preventing evasion of abuse*'.

The *ratio* of this type of anti-fraud rules, which set up legal presumptions to limit the right to deduct or refund, is clear: to minimize enforcement and administrative costs. Generally, there are three main methods of preventing tax evasion, namely: *(1) casuistic analysis* of each refund request, in order to determine its legitimacy; *(2) flat-rate deduction or refund* set-up on the basis of an estimate of average legitimacy of refund requests; and (3) *denial of refund* in specific circumstances. The first method, whilst fairer, creates a heavy administrative burden, so most countries tend to prefer either the second method or the third method, both of which make use of legal presumptions, and which are substantially less onerous.

However, whilst these legal presumptions are effective methods to combat tax evasion, with minimal enforcement burden placed upon tax administrations, they can also undermine the functioning of the tax system, by denying requests for refund in situations where not only it is legitimate for the taxpayer to do so, but where the refund is actually necessary to preserve the purpose of the law. This is particularly the case as regards the third method (*denial of refund*), which is substantially stricter than the second method (*flat-rate deduction or refund*). For this reason, and as discussed further below, the CJEU has consistently held that where legal presumptions are applied by the domestic legislator to prevent tax evasion, which limit the rights of taxpayers, they must respect the fundamental principle of proportionality. In particular, the blank denial of rights, by means of an irrebuttable presumption, which does not allow the taxpayer to present prove that refund is indeed due, goes beyond what is necessary to prevent tax evasion, and therefore violates the principle of proportionality.[32]

3 On the compatibility of non-fully-harmonized excise taxes with EU law

As the CJEU has consistently held, motor vehicles are not included in the categories of excise goods set out in Article 1(1) of Excise Duties Directive, and thus are not covered by the harmonisation of excise duty arrangements. Therefore, '*Member States may introduce or maintain taxes on these goods, [however] they must exercise their competence in that field in a manner that is consistent with EU law*'.[33] This includes all primary legislation, namely Treaty provisions and general principles of EU law,[34] as well as secondary legislation. Domestic excise tax legislation that may result in double taxation, and makes use of irrebuttable presumptions, gives rise to concerns over their compatibility with different elements of EU law.

3.1 Double Taxation: (In)Compatibility with Treaty Provisions and the Excise Taxes Directive

Although excise taxes on products other than those listed in Article 1(1) are not fully harmonized, paragraph (3) of that Article does introduce a minimum level of harmonisation on those taxes,[35] where it states that, '*levying of such taxes may not, in trade between Member States, give rise to formalities connected with the crossing of frontiers*'. Although the introduction of restrictions to intra-EU trade is already significantly limited by the fundamental freedoms, as set out in the TFEU and interpreted by the Court, it is clear that the EU legislator, insofar as excise taxes are concerned, felt the need to reinforce those limitations at secondary legislation level. This has important implications on

[32] Case C-177/99, *Ampafrance*, ECLI:EU:C:2000:470, para. 62. *See* further *infra*.

[33] Cases C-402/14, *Viamar*, ECLI:C:2015:830, para. 39; and C-451/99, *Cura Anlagen*, ECLI:EU:C:2002:195, para. 40.

[34] On the status and function of general principles of EU law, *see* J. Nergelius, *General Principles of Community Law in the Future: Some Remarks on their Scope, Applicability and Legitimacy*, in *General Principles of EC Law in a Process of Development* (U. Bernitz et al., eds, Alphen aan den Rijn, Wolters Kluwer 2008).

[35] On the different levels of harmonisation *see* P. J. Slot *Harmonisation*, 21 Eur. L. Rev. 378–397 (1996), doi: 10.1007/s002619900086. *See also* S. Weatherill, *The Fundamental Question of Minimum or Maximum Harmonisation*, in *The Internal Market 2.0* (S. Garben & I. Govaere eds, Oxford: Hart Publishing 2020).

the interpretation of what constitutes a restriction to the EU internal market, for the purposes of excise taxes which are not fully harmonized.

It is now settled case law that non-harmonized areas of taxation, or areas that have been subject to minimum harmonisation, are still subject to judicial review under primary EU legislation, namely Treaty provisions and general principles of EU law. Although until the decision in *Avoir Fiscal*, in 1986,[36] there was still some doubts as to whether tax measures in non-harmonized areas of taxation could be regarded as restrictions to free movement under the so-called 'strict sovereignty exception',[37] those doubts have long since been completely quashed. Under the repeated mantra that Member States must exercise their competence in taxation in a manner that is consistent with EU law, the level of intervention of the Court in this field is such that, it has been argued that national tax sovereignty remains merely a formal façade, having been gradually emptied of all substance.[38] Although this is arguably an overstatement,[39] it is nevertheless true that the standard of judicial review insofar as non-harmonized, or minimally harmonized, areas of taxation is strict – at times, arguably stricter than that applied by the CJEU in fully harmonized areas of taxation, such as VAT or excise taxes falling fully within the scope of Excise Duties Directive.[40]

As the Court has consistently reiterated as regards income taxation, double taxation resulting from the exercise of taxing powers of Member States in non-harmonized areas does not *per se* constitute a restriction to free movement provisions.[41] Whilst this position has often been subject to criticism,[42] and the European Commission has implicitly acknowledged that double taxation is an obstacle to the functioning of the internal market, the Court has expressed the view that in the absence of positive harmonisation is not appropriate for it to establish criteria on allocation of income tax powers between Member States.[43] The situation, however, is quite different insofar as excise taxes are concerned for two primary reasons.

First, the rationale for the Court's reluctance to intervene to prevent double taxation as regards income taxes, namely the lack of agreed criteria on allocation of taxing powers, is not present as regards excise taxes. Indeed, as regards excise taxes, there is a clear and accepted principle on allocation of taxing powers, namely the principle of destination; partial departure of that principle is only recognized when the negative externalities relating to the use of the products in question are felt in another country, other than the country of destination. As discussed *supra*, the principle of destination is at the core of EU excise law. Second, it follows from Article 1(3) of Excise Duties Directive, and from paragraph (5) of the Preamble therein, that the EU legislator regarded potential excise taxation restrictions to free movement as particularly problematic.[44] As such, whilst it stopped short of subjecting all excise taxes to full harmonisation, it established a minimum (negative) harmonisation rule: these taxes cannot create restrictions to the fundamental freedoms. Insofar as excise taxation is concerned, therefore, Articles 30 and 110 TFEU must be read in conjunction with that provision. In particular, it must be concluded that the intention of the legislator in the Directive was to add another layer of protection to the fundamental freedoms, beyond the one already applied under Articles 30 and 110 to other non-fully harmonized areas of taxation. Thus, the minimum standard of what constitutes a restriction of the fundamental freedoms for the purposes of excise taxes is necessarily lower than for other non-harmonised taxes, such as income taxes.

It is true that the Court has in the past used the same formula as regards excise taxation not falling within the scope of Excise Duties Directive, as it has for income taxes, namely by stating that '*as it stands at present, EU law does not contain any provision designed to prohibit the effects of double taxation occurring in such taxes … and while the elimination of such taxes is desirable in the interests of free movement of goods, it may nevertheless only result from the harmonisation of national laws*'.[45] This statement, however, concerned a situation where the use of goods in question, which were subject to excise taxes, took place in more than one Member State. There was therefore a reasonable claim to the right to tax those goods by more than one Member State, under the two key principles of excise taxation, namely the principle of excise taxes as taxes on actual consumption and the principle of destination. This is not the case where the actual use of the products has taken place in only one Member State. In that situation, under those

[36] Case 270/83, *Commission v. France*, ECLI:EU:C:1986:37.

[37] S. van Thiel, *Free Movement of Persons and Income Tax Law: The European Court in Search of Principles* 21 et seq. (IBFD 2002); and M. Isenbaert, *EC Law and the Sovereignty of the Member States in Direct Taxation* 193 et seq. (IBFD 2010).

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[38] P. Pistone, *The Impact of ECJ Case Law on National Taxation*, (8/9) Bull. Int'l Tax'n 412–428 (2010), doi: 10.59403/2d46twd.

[39] For a comprehensive analysis of the role of the Court in non-fully harmonized areas of taxation, *see* R. de la Feria & C. Fuest, *The Economic Effects of EU Tax Jurisprudence*, 41(1) Eur. L. Rev. 44–71 (2016), doi: 10.2139/ssrn.2718118.

[40] This argument is further developed in R. de la Feria, *VAT and the EC Internal Market: The Shortcomings of Harmonisation*, in *Traditional and Alternative Routes to European Tax Integration* 267–308 (D. Weber ed., Amsterdam: IBFD 2010).

[41] Inter alia, case C-513/04, *Kerckhaert and Morres*, ECLI:EU:C:2006:713, para. 22.

[42] A. Van der Vijver, *International Double Taxation in the European Union: Comparative Guidelines from Switzerland and the United States*, 26(1) EC Tax Rev. 10–22 (2017), doi: 10.54648/ECTA2017002.

[43] Case C-403/19, *Societe Generale*, ECLI:EU:C:2021:136, para. 28–29.

[44] Paragraph (5) of the Preamble reads: '*In order to ensure free movement, taxation of goods other than excise goods should not give rise to formalities connected with the crossing of frontiers*'.

[45] Case C-676/21, *Vehicle Tax*, ECLI:EU:C:2023:63, at para. 38.

key principles of excise taxation, only the Member State where actual consumption has occurred has a legitimate claim to taxing those products. In this situation, Articles 30 and 110 TFEU, read in conjunction with Article 1(3) must be interpreted as determining that national legislation that gives rise to double excise taxation, by taxing products which have not been used in their territory, constitutes a restriction to the free movement of goods, and the functioning of the internal market.

3.2 Irrebuttable Presumptions: Incompatibility with General Principles of EU Law

General principles of EU law preform a key function within the EU legal system. Not only are they key interpretative aids and gap fillers,[46] but they can also act as overriding rules of law[47] – therefore triggering *contra legem* interpretation of EU and domestic legislation, and acting as instruments of judicial review – and they can apply directly at national level, in the absence of domestic legislation to the effect.[48] Irrebuttable presumptions to prevent tax evasion of avoidance give rise to concerns over their compatibility with two of those principles, namely the principle of proportionality and the principle of prohibition of abuse of law, which includes within its scope a prohibition of both abusive and fraudulent practices. The principle of proportionality is one of the oldest general principles of EU law; it is now expressly mentioned in the Treaties (Article 5(4) TFEU), and has been regularly applied by the CJEU for nearly seven decades across all areas of EU law. The principle of prohibition of abuse of law is a more recent principle, partly now codified in the Anti-Tax Avoidance Directive,[49] and regularly applied by the CJEU, particularly since the judgment in *Halifax* in 2006,[50] to an increasing number of areas of EU law. In the context of irrebuttable presumptions the two principles often operate in conjunction, and are applied as such by the Court.

3.2.1 *Proportionality*

The general principle of proportionality, first mentioned by the European courts in the case law of the 1950s,[51] is today amongst the most prominent general principles of EU law, regularly applied by the CJEU in its case-law across all areas of EU law.[52] Tax law is no exception: the principle of proportionality plays a fundamental and omnipresent role within the tax jurisprudence of the CJEU. This is particularly so as regards measures designed to prevent tax evasion and avoidance. As the Court has consistently held in this regard:

> *Member States must employ means which whilst enabling them effectively to attain the objectives pursued by their domestic laws, cause the least possible detriment to the objectives and principles laid down by the relevant Community legislation.*[53]

As with all general principles of EU law, the principle of proportionality will apply even in the absence of domestic legislation on the topic, in non-harmonized tax areas, such as income taxation,[54] or excise taxes not falling within the scope of Article 1(1) of Excise Duties Directive. Irrebuttable presumptions – even in those areas – have been consistently held by the Court to be incompatible with the principle of proportionality:

> *In order to determine whether an operation pursues an objective of fraud and abuse, the competent national authorities may not confine themselves to applying pre-determined general criteria, but must carry out an individual examination of the whole operation at issue. The imposition of a general tax measure automatically excluding certain categories of taxable persons from the tax advantage, without the tax authorities being required to provide* prima facie *evidence of fraud and abuse, would go further than is necessary for preventing fraud and abuse.*[55]

The Court has, on various occasions accepted the need for the legislator to apply legal presumptions so as to prevent tax evasion or avoidance, where other less onerous means are unavailable.[56] Those presumptions, however, must be rebuttable, *id est* taxpayers must be given the opportunity to prove that no fraud (or abuse) has taken place, and thus avail of the tax right in question. Said in another

[46] X. Groussot, *The General Principles of Community Law in the creation and development of due process principles in competition law proceedings: From Trans ocean Marine Paint (1974) to Montecatini (1999)*, in Bernitz & Nergelius eds, *supra* n. 34, at 185–204.

[47] J. Nergelius, *General Principles of Community Law in the Future: Some Remarks on their Scope, Applicability and Legitimacy*, in Bernitz & Nergelius eds, *supra* n. 34, at 223–234.

[48] R. de la Feria, *EU General Anti-(Tax) Avoidance Mechanisms: From GAAP to GAAR*, in *The Dynamics of Taxation* 155–183 (G Loutzenhiser & R de la Feria eds, Oxford: Hart Publishing 2020).

[49] Council Directive (EU) 2016/1164 of 12 Jul. 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193, 19 Jul. 2016, at 1–14.

[50] Case C-255/02, *Halifax and Others*, ECLI:EU:C:2006:121.

[51] Case 8/55, *Fédération Charbonnière de Belgique*, ECLI:EU:C:1956:7. *See also* T. Tridimas, *The General Principles of EU Law* (OUP 2006).

[52] T. I. Harbo, *The Function of the Proportionality Principle in EU Law*, 16(2) Eur. L. J. 158–185 (2010), doi: 10.1111/j.1468-0386.2009.00502.x.

[53] Cases C-271/06, *Netto Supermarkt*, ECLI:EU:C:2008:105, para. 19; C-47/96, *Molenheide and Others*, ECLI:EU:C:1997:623, para. 46; and C-409/04, *Teleos and Others*, ECLI:EU:C:2007:548, para. 52.

[54] On the application of the principle proportionality to income taxation, *see* A. Zalasinski, *Proportionality of Anti-Avoidance and Anti-Abuse Measures in the ECJ's Direct Tax Case Law*, 35 Intertax 310 (2007), doi: 10.54648/TAXI2007035; and M. Hilling, *Justifications and Proportionality: An Analysis of the ECJ's Assessment of National Rules for the Prevention of Tax Avoidance*, 41(5) Intertax 294–307 (2013), doi: 10.54648/TAXI2013025.

[55] Joined cases C-504/16 and C-613/16, *Deister Holding and Juhler Holding*, ECLI:C:2017:1009, para. 62; and case C-6/16, *Eqiom and Enka*, ECLI:C:2017:641, para. 32.

[56] Inter alia, C-524/04, *Thin Cap Group Litigation*, ECLI:EU:C:2007:161, para. 82. *See also* A.P. Dourado & R. de la Feria, *Thin Capitalization Rules in the Context of the CCCTB*, in *Common Consolidated Corporate Tax Base* 817 (M. Lang et al., eds, Vienna: Linde Verlag 2008).

manner, the principle of proportionality essentially prevents the national legislator from applying 'automatic mechanisms' to combat tax evasion and abuse.[57] It is also noteworthy that this aversion to irrebuttable presumptions in tax law is also evident in the jurisprudence of ECtHR, which on more than one occasion has held that a breach of the right to property in Article 6 ECHR occurs when the taxpayer cannot challenge the evidence of abuse provided by tax authorities.[58]

3.2.2 *Prohibition of Abusive and Fraudulent Practices*

The CJEU has been alluding to abuse and abusive practices in its judgments for more than thirty years.[59] For a long time, however, the significance of these references was unclear.[60] This state of affairs changed radically with the Court's decision in *Halifax* in 2006,[61] arguably one of the most important ever delivered by the Court, both within the field of taxation and beyond. After many years developing the principle of prohibition of abuse of law, the co-constitutive process of reverberation that characterizes the development of general principles of EU law had finally reached its cognisance stage: the moment of collective recognition of the existence of this principle.[62] Since then there have been many CJEU judgments densifying the principle, but one of the most important of these was undoubtedly *Italmoda.*[63]

The decision in *Italmoda* is significant for two interlinked reasons: first, not only does the Court expressly states that the principle of prohibition of abuse of law also applies to fraud situations – rather than just avoidance; but second, it also confirms that, as such, the principle will apply to domestic situations, even in the absence of national provisions, *id est* it displays the characteristics of a general principle of EU law.[64] This last element has been further confirmed in recent cases, concerning both fully harmonized (VAT) and partly harmonized (corporate income tax) areas of taxation.[65] All national measures, whatever the area of taxation, must therefore be compatible with this principle, as interpreted by the Court, one of the key elements of which is its incompatibility with irrebuttable presumptions.

The Court has stated on various occasions, as regards all taxes, that the principle of prohibition of abusive and fraudulent practices must be interpreted as always allowing taxpayers to prove that neither did they commit fraud, nor did they know (nor should have known) that fraud was being committed.[66] Specifically as regards excise taxes, the Court has held that the refusal of the right to refund excises on the basis of an irrebuttable presumption is contrary to the general principles of EU law.[67] In this regard, as Advocate-General Poiares Maduro famously stated in one of the first consumption tax fraud cases to reach the CJEU, concerning the use of irrebuttable presumptions to prevent VAT fraud: '*the United Kingdom seems to envisage combating carousel fraud – or at least dispensing with the problems it poses – by limiting the scope of the VAT system*'.[68] This statement applies *mutatis mutandis* to the use of irrebuttable presumptions to prevent excise taxes fraud.

4 On the Legality of the Motor Vehicle Registration Rules

In light of the above, domestic legislation that presumes that that motor vehicles registered in one Member State are actually consumed in that Member State, and limits the right to refund on the basis of that presumption, without the possibility being granted to the taxpayer to prove that use has not actually taken place, should be regarded as incompatible with EU law.

4.1 Irrebuttable Presumptions under EU Law

An irrebuttable presumption, which automatically denies the right to refund excise taxes where registration has taken place, without allowing the taxpayer to prove that no use has taken place, is indeed suitable to attain the objective of ensuring that excise taxes are paid on motor vehicles used in that Member State, but it goes beyond what is necessary to attain that aim. It is, therefore, contrary to the EU general principle of proportionality. In this regard, although generally the incompatibility of irrebuttable presumptions with general principles of EU law is now settled case law, the CJEU decision in

57 A. Mudrecki, *Impact of the Principle of Proportionality in Tax Law on the Jurisprudence of the Court of Justice of the European Union and the Supreme Administrative Court in Poland*, 3(1) Pub. Governance, Admin. & Fin. L.. Rev. 46–56 (2018), doi: 10.53116/pgaflr.2018.1.5.

58 ECtHR, *Henrich v. France*, Decision of 22 Sep. 1994; and ECtHR, *Riener v. Bulgaria*, Decision of 12 Apr. 1996. *See* R. Garcia Anton & T. Marzal, *Proportionality and the Fight Against International Tax Abuse: Comparative Analysis of Judicial Review in EU, International Investment, and WTO Law*, 31(1) Asia Pac. L. Rev. (2023), doi: 10.1080/10192557.2022.2102592.

59 The first decision was Case 33/74, *Van Binsbergen*, ECLI:EU:C:1974:13, concerning free movement of services.

60 For a comprehensive analysis of the history of the principle, *see* R. de la Feria, *Prohibition of Abuse of (Community) Law: The Creation of a General Principle of EC Law Through Tax*, 45 Common Mkt. L. Rev. 395 (2008), doi: 10.54648/COLA2008027.

61 Case C-255/02, ECLI:EU:C:2006:121.

62 For an analysis of this process *see* R. de la Feria, *Introducing the Principle of Prohibition of Abuse of Law*, in *Prohibition of Abuse of Law: A New General Principle of EU Law?* xv (R. de la Feria & S. Vogenauer eds, Oxford: Hart Publishing 2011).

63 Joined Cases C-131/13, C-163/13 and C-164/13, EU:C:2014:2455.

64 R. de la Feria & R. Foy, *Italmoda: The Birth of the Principle of Third-Party Liability for VAT Fraud*, 4 Brit. Tax Rev. 262–273 (2016).

65 Cases C-251/16, *Cussens and Others*, ECLI:EU:C:2017:881, para. 70; and C-115/16, *N Luxembourg 1 and Others*, ECLI:EU:C:2019:134, para. 96. *See also* R. de la Feria, *On Prohibition of Abuse of Law as a General Principle of EU Law*, 4 EC Tax Rev. 142–146 (2020), doi: 10.54648/ECTA2020042.

66 Inter alia, case C-439/04, *Kittel*, ECLI:EU:C:2006:446.

67 Case C-81/15, *Ypourgos Oikonomikon*, ECLI:EU:C:2016:398.

68 Advocate General Opinion in Joined Cases C-354/03, C-355/03 and C-484/03, *Optigen, Fulcrum and Bond*, ECLI:EU:C:2005:89, para. 43.

Ampafrance is particularly pertinent, given the similarities between the anti-fraud rule in that case, and the motor vehicle anti-fraud rule. In that case, the Court stated that:

> '*Although it is not for the Court to comment on the appropriateness of other means of combating tax evasion and avoidance … it must be pointed out that, as Community law now stands, national legislation which excludes from the right to deduct without making any provision for the taxable person to demonstrate the absence of tax evasion or avoidance in order to take advantage of the right to deduct, it is not a means proportionate to the objective of combating tax evasion and avoidance*'[69]

Whilst *Ampafrance* referred to VAT, not excise taxes, there are striking parallels between the two rules in question, as follows: *(1)* both concern a non-harmonized area of consumption taxation; *(2)* both include a restriction on a fundamental principle of consumption taxation, in VAT the right to deduct input tax, in excise taxes the right to refund that does not reflect actual use; and *(3)* both concerned an irrebuttable legal presumption, designed to prevent tax evasion. Thus, similarly to the rule in question in *Ampafrance*, motor vehicle registration rules, to the extent that they constitute irrebuttable presumptions, should be regarded as disproportionate. In addition, although at the time *Ampafrance* was decided, the Court had not yet fully developed the EU general principle of prohibition of abuse of law, that presumption should also be regarded as contrary to that principle.

By applying excise taxes to motor vehicles which will be exported into another Member State – and thus pay excises there – whilst also denying refund of the taxes in a Member State where no use has taken place, these irrebuttable presumptions, also constitutes a restriction of the free movement of goods, and an obstacle to the functioning of the internal market. Although double taxation resulting from the exercise of taxing powers of Member States in non-harmonized areas does not *per se* constitute a restriction to free movement provisions, the standard of judicial review applicable under Articles 30 and 110 TFEU must necessarily be stricter, when those provisions are read in conjunction with Article 1(3) and paragraph (5) of the preamble to the Excise Duties Directive. As such, those provisions must be interpreted as determining that a domestic rule, which may give rise to double excise taxation, by taxing products which have not been used in their territory, in contravention of the key principles of excise taxation, namely the principle of taxes on actual consumption, and the principle of destination, constitutes a restriction to the free movement of goods, and to the functioning of the internal market, and is therefore incompatible with those two provisions.

Given the above, insofar as motor vehicle registration rules include an irrebuttable presumption contrary to general principles of EU law and creates an unacceptable restriction to EU free movement, those norms should be interpreted as far as possible in light of those provisions. On this regard, whilst where *contra legem* interpretation would be necessary domestic rules must be disapplied,[70] this would not be necessary in this case, as the reference to registration in those provisions could be merely interpreted – both at judicial and tax administration levels – as including only registration for actual use and consumption. On the contrary, where the taxpayer presents objective evidence that the registration, temporary or permanent, does not reflect actual consumption and use of the motor vehicles, this situation should be regarded as outside the scope of the word registration, and thus, as fulfilling the non-registration criterion in those provisions. It is also worth noting that, this interpretation of those rules in conformity with EU law would also be identical to the one which would result from a teleological interpretation of that norm.

4.2 Teleological Interpretation of Anti-Fraud Rules in Excise Taxes

A teleological interpretation of motor vehicle registration rules, as applied in several Member States, requires an interpretation of that provision in light of the key principles of excise taxation, in particular the principle of excise taxes as a tax on actual consumption and use of the product, and the principle of destination, *id est* taxation at the country where that use has taken place. Both principles are enshrined in the Excise Duties Directive – indeed one of the few key differences between this Directive and previous ones is said to be precisely the increased emphasis on the principle of destination[71] – and, as such, are subjacent to Article 1 (3) therein. This teleological interpretation has also been endorsed by the CJEU, which in *van de Coevering* stated that a Member State may levy motor vehicle taxes to a person residing in that State, '*when that vehicle is intended to be used essentially in that State on a permanent basis or is in fact used in that way*'.[72] In the most recent decision in *P.M.*, referring to the Polish legislation on excise taxes, the Court again emphasised the fact that the motor vehicle tax is intended on taxing the use of the vehicle, as well as implicitly recognizing that registration for the purpose of that provision worked merely as a proxy for use:

> '*excise duties in respect of passenger cars covered by the Law on Excise Duty do not take on the characteristics of a tax linked to the duration of the use of those vehicles, but rather that of a tax on consumption of those vehicles, implemented via the registration of the passenger car concerned*'[73]

[69] Case C-177/99, ECLI:EU:C:2000:470, para. 62.

[70] Case C-334/92, *Wagner Miret*, ECLI:EU:C:1993:945.

[71] Bieber & Schmaranzer, *supra* n. 17.

[72] Case C-242/05, ECLI:EU:C:2006:430, para. 24.

[73] Case C-105/22, ECLI:EU:C:2023:414, para. 42.

Although on that particular case the CJEU ruled that the Polish legislation was not incompatible with EU law insofar as it did not apply a casuistic approach assessing the amount of use that took place in Poland, for the purposes of excise tax refund, the situation is fundamentally different where there is objective evidence that no use of the motor vehicles has taken place in the country. Therefore, whilst it could be tempting to infer from that case that the irrebuttable presumptions in non-fully harmonized taxes, doing so would constitute a misguided and simplistic interpretation of the Court's reasoning in that case.

Indeed, as discussed *supra*, a casuistic analysis of each refund request creates a heavy administrative burden; it is therefore common for countries to establish legal presumptions, or a flat-rate refund, which are substantially less onerous. The interpretation of these presumptions must not, however, be completely dissociated from the intention of the legislator, which in the case of motor vehicle taxes is to tax their use. A teleological interpretation of motor vehicles registration rules also requires therefore that the reference to registration in those provisions should be interpreted – both at judicial and tax administration levels – as including only registration for actual use and consumption; on the contrary, where the taxpayer presents objective evidence that this registration, temporary or permanent, does not reflect actual consumption and use of the motor vehicles, this situation should be regarded as outside the scope of the word registration, and thus, as fulfilling the non-registration criterion in those provisions.

4.3 Rule of Law Implications of Anti-Fraud Policy

The last decade has witnessed a significant intensification of anti-fraud measures in all areas of taxation. There is now evidence, however, that at a global level this intensification of tax law enforcement has often tended to prioritise enforcements measures that maximize revenue gains rather than combat fraud itself.[74] Of course, there are many situations where combating fraud and maximizing revenue lead to the same result; but when it does not, the trend globally is for tax administrations to prioritise revenue maximisation. Amongst the various signs of this new approach are the two following: *(1)* a growing tendency to use irrebuttable presumptions, where the taxpayer is not given the opportunity to prove that no evasion has taken place, or that when it has, they did not, and could not, know that this has been the case; and *(2)* an increasing legal formalism, and reliance on the literal interpretation of norms, even in cases where it is clear that this interpretation would lead to a result that it is contrary to the purpose of the norm, or the intention of the legislator. Whilst the reasons for this new approach to tax law enforcement are multifaceted, the fact that it has developed worldwide without coordination is indicative of common factors, including state budgetary pressures, political economy dynamics, and decreasing resources within tax administrations.[75]

Within the EU, the CJEU has often fought against the trend, invoking primarily incompatibility of specific measures with general principles of EU law, such as proportionality and legal certainty. As discussed above, within the field of taxation, and particularly consumption taxation, there is now extensive case law concerning the use of irrebuttable presumptions to combat fraud, in particularly on the use of so-called third-party liability rules within both VAT and excise taxes.[76] Similarly, as regards legal formalism, CJEU jurisprudence demonstrates that the last decade has seen the adoption of an increasingly formalistic interpretation of procedural tax law, particularly compliance rules, by Member States' tax authorities to justify the denial of tax rights, where evidence of fraud is neither apparent nor suspected. Many of these cases concerned invoicing rules,[77] whereby the right to deduct or refund is refused on the basis of an error in the emission of the invoice,[78] but there are also cases concerning other compliance rules, such as accounting records,[79] accounting of tax,[80] and overpayment of tax.[81]

In all these cases, with one exception,[82] when called to decide the CJEU sided with the taxpayer, expressly rejecting a formalistic interpretation compliance rules, and adopting a substance-over-form approach, which mirrors the one it has previously adopted as regards tax avoidance.[83] It has therefore consistently stated that where substantive requirements are satisfied – such as no use of motor vehicles – the right to deduct cannot be rejected on the basis of the failure to comply with the formal requirements – such as no vehicle registration – unless that lack of compliance prevents confirmation that the substantive requirements were indeed satisfied. The most significant element in all these cases is that – similarly to the motor vehicle registration rules – evasion was never argued, and in all cases there was clear evidence from the outset of the existence of a

[74] R. de la Feria, *Tax Fraud and Selective Law Enforcement*, 47(2) J. L. & Soc'y 240–270 (2020), doi: 10.2139/ssrn.3520718.

[75] *Ibid.*

[76] On excise taxes in particular, *see* case C-81/15, *Karelia*, ECLI:EU:C:2016:398, at para. 50.

[77] *See* inter alia, cases C-368/09, *Pannon Gep Centrum*, ECLI:EU:C:2010:441; C-271/12, *Petroma Transports and Others*, ECLI:EU:C:2013:297; C-385/09, *Nidera*, ECLI:EU:C:2010:627; C-518/14, *Senatex*, ECLI:EU:C:2016:691; C-516/14, *Barlis 06*, ECLI:EU:C:2016:690; C-587/10, *VSTR*, ECLI:EU:C:2012:592.

[78] Case C-280/10, *Polski Trawertyn*, ECLI:EU:C:2012:107.

[79] Case C-146/05, *Collee*, ECLI:EU:C:2007:549.

[80] Case C-284/11, *EMS-Bulgaria Transport*, ECLI:EU:C:2012:458.

[81] Case C-138/12, *Rusedespred*, ECLI:EU:C:2013:233.

[82] Case C-271/12, *Petroma Transports and Others*, ECLI:EU:C:2013:297.

[83] R. de la Feria, *Prohibition of Abuse of (Community) Law – the Creation of a New General Principle of EC Law Through Tax?*, 45(2) Common Mkt. L. Rev. 395–441 (2008), doi: 10.54648/COLA2008027.

substantive right, despite the lack of respect for a formal requirement. As such, it is difficult to equate this legal formalism in respect of compliance rules in the context of deterrence or punishment of tax fraud. Its potential for additional revenue collection, however, is clear.

Nevertheless, regardless of the rationale to this global trend towards revenue maximisation, manifested through inter alia, the use of irrebuttable presumptions and legal formalism, it does create very significant risks for the proper functioning of Member States' tax systems. Not least because it unavoidably leads to selective law enforcement, undermining tax neutrality and creating distortions to competition. More importantly, however, it undermines the fundamental principles of equal treatment, legal certainty, and the rule of law. [84] It is, therefore, unsurprising that the CJEU, whilst acknowledging Member States' right to combat evasion and fraud, has consistently fought against this trend in other areas of taxation, in defence of taxpayers' rights.

5 Conclusion

Whilst the global growth of excise taxes as regulatory taxes is arguably one of the most significant taxation developments of the last two decades, it has so far received relatively limited academic attention when compared to other global tax trends. Yet, this rapid growth gives rise to many questions – from both an economic and a legal perspectives – that must be addressed. For EU law, one of these key questions is the standard of constitutional judicial review applicable to the widening range of excise taxes that are not fully harmonized. Until now, the relatively low visibility of these taxes has allowed the CJEU to somewhat avoid fully addressing this issue, whilst consistently reiterating its standard mantra as regards non-fully harmonized taxes, namely that Member States '*must exercise their competence in a manner that is consistent with EU law*'. As the trend deepens, however, this general statements will not suffice, and the need to provide more concentre and detailed guidance will be unavoidable.

This article argues that the standard of judicial review applicable to those excise taxes should be identical to the one applied by the Court to income taxes. The use of irrebuttable presumptions in excise taxation in particular deserves careful consideration. A growing tendency to use irrebuttable presumptions – as well as an increased legal formalism, and a reliance on the literal interpretation of norms, even in cases where it is clear that such interpretation would lead to a result that is contrary to the purpose of the norm, or the intention of the legislator – are symptomatic of a global trend in tax law enforcement, which prioritises revenue maximisation over prevention of tax fraud. Yet, this trend creates very significant risks to the proper functioning of Member States' tax systems, and consequently, the EU internal market. In this context, intensive judicial scrutiny is paramount; the risks of doing otherwise would be too great.

[84] For a full analysis, see R. de la Feria, *Tax Fraud and Selective Law Enforcement*, 47(2) J. L. & Soc'y 240–270 (2020), doi: 10.1111/jols.12221.