Accijnzen : een onderzoek naar de rechtsgronden van de Nederlandse accijnzen aan de hand van 200 jaar parlementaire geschiedenis (1805-2007) en naar de werking van het Europese accijnsregime binnen de interne markt in het licht van deze rechtsgronden
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CHAPTER 6

Summary and conclusions

6.1 Legal grounds

‘Whoe’er expects a faultless tax to see
Experts what neither is, nor was, nor è’er shall be’

J.R. McCulloch,
1852

Legal grounds establish the legitimacy and the raison d’etre of a tax scheme. They give a simple answer to the question as to why the tax scheme was established, exists or is maintained. The legal grounds are, however, related not only to the existence of excise duties, but also to rate increases, a decision not to increase rates, to the indexing of rates, to rate reductions or the abolition thereof. The decision process of the legislator in the actual political balances of power legitimizes occurring law. The expression legal grounds is understood to mean: the legislators motives founded to the tax measure from which by that legislator for that measure the essence is considered to be justified.

The legal grounds of excise duties are diverse. In the first place, excise duties generate substantial revenue from objects chosen for taxation because of their revenue-generating capacity on behalf of the State, i.e. financial resources for society. By means of excise duties everyone, including transient non-residents, makes a contribution to society, no matter how slight. Excise duties are historically proven solid, stable and effective taxes with a supporting base and low perception costs. The inconspicuousness of the levy and the quick accustomisation to price increases contribute to this. Excise duties are levied almost unnoticd as an invisible component of the prices of the goods subject to excise duty. There is no obligation to place the excise duty on the invoice. The low number of tax subjects in combination with the phenomenon of shifting of the excise duty via the price of the taxed excise product to the end user keeps the implementation costs low. According to the text of the Excise Duties Directive (hereinafter called: EDD), the European legislature makes the autonomous process of shifting of the costs in accordance with the national excise duty legislation possible in the European legislation, or in any event does not impede it. The European

legislature applies the same basic principle that excise duties are to be incorporated in prices and passed on to consumers. The actual passing on of the excise duties is dependent on various factors in commercial transactions. The excise duties which are passed on contribute to a proportional and fair spread of the tax burden.

An excise duty is an objective and impersonal tax which places a burden on designated, specific goods and services, regardless of the income of the person bearing the burden. Excise duties are powerful generic instruments for achieving or encouraging what could only be achieved in another manner at the expense of greater sacrifices of freedom, time and effort. They are also the instrument that can be used in times of need to effect the most extreme tax levies necessary to cover the expenditure required for maintaining the state.

As behaviour-affecting and sometimes also corrective means-related levies they are geared to specific target groups. Excise duties are used as macro-economic price instruments for wage, price, monetary, energy and ecological politics, sustainable development, public health and a healthy living environment (economic and ecological instrumentalism), because they internalise social costs (external costs) in prices of goods and services and, as a price element, have a steering effect on expenditure and thus a corrective effect; they curb deflation and inflation, restrict mobility, noise nuisance, air pollution, growth of the car fleet, growth of road traffic, unsafe roads, road traffic congestion, encourage clean cars and engines, economical and selective driving, power conservation, economic use of freshwater and discourage alcohol consumption and smoking. This gives the community excise duties a double rationale: the budgetary rationale and a behaviour-affecting rationale. The intention is thus to avoid the levying of excise duties so that expenditure on goods and services that are priced inclusive of an excise component is to a great extent voluntary expenditure, and to that extent does not contribute to increasing the tax burden. The basis of the excise duty regime is to leave productive expenditure outside of the levy and to only cover productive expenditure in the interests of sustainable development, energy saving and public health. The energy tax, which enforces energy savings, is an explicit financing instrument for reducing the burdens on labour and enterprise.

The real pressure to maintain effectiveness is easy to realise by means of indexation or otherwise periodic adjustment of the rates. In practice, it is not easy to keep the real pressure at a level that maintains the effectiveness of community excise duties. The rates of the alcohol excise duties have not been adjusted since 1993 and have in the meantime fallen in strength by over 25% due to price inflation. The rates of tobacco excise duties have not been adjusted since 1995. The rates of excise duty on mineral oils, which also date from 1993, were adjusted at the time of the introduction of the Energy Taxes Directive in 2004. According to the text of the EDD, the community excise duties as a component of the price and as an instrument for internalising social costs in prices of goods are to be levied unnoticed with the least pain and maximum realisation, forming voluntary payments which are avoidable.

In the event of equal rates and implementation rules for similar goods and services, regardless of origin, the proper working of the domestic market for goods and services subject to excise duty and the access thereto is safeguarded (principle of internal neutrality). The fiscal discrimination prohibition, which externally has a neutral effect, and the state subsidy regime prevent the community excise duties from serving as
protection for certain companies. On the basis of the causality principle, the prevention principle and the compensation principle, excise duties can see to it that proportionality exists between the costs incurred by a certain behaviour and to whom those costs are to be passed on.

6.2 **Not in agreement with the internal market principle**

'Of the four essentials of taxation, only the definition of the tax object and the definition of the excise duty owed are in accordance with the internal market principle'

The European excise duty regime obliges the Member States to levy excise duties on alcoholic, energy and tobacco products. These tax objects are precisely defined for community application in the EDD and its six implementation directives. Of the four essentials of taxation, only the definition of the tax object and the definition of the excise duty owed are in accordance with the internal market principle. The other two, the tax obligation and in particular the rates, are so inadequately defined in the EDD and its six implementation directives for a proper working of the internal market, that a large number of provisions are not in accordance with the internal market. After fourteen years of internal market, the excise duty harmonisation is still only limited to product definitions and minimum rates, which leave scope for the continuation of enormous rate differences between the now 27 Member States which necessitate that structures with the character of import and export rules are maintained to let every state treasury fill its coffers, as if no internal market existed. Because the realisation of the term tax subject, the levying, the collection and the rates are national matters, within the excise duty regime there are also significant differences in the application of rules and rates which do not fit in the internal market view and are contrary to the internal market principle.

6.3 **Non-neutrality**

'Vertually all features of Netherlands excise duties can be found in the European excise duties. The community minimum rates give the Member States the scope to use the excise duty instrument as much as necessary in times of emergency to cover the expenditure necessary to maintain the state. However, the European excise duty regime still has another major deficiency: the internal market for excise duty goods is not internally neutral. The six specific implementation directives contain several series of general compulsory and optional exemptions and reduced rates and Member State-specific optional exemptions and reduced rates. The Member States can make use of many exemptions and reduced rates, which options are used in very diverse ways. Due to the minimum harmonisation, enormous rate differences exist between the Member States, so that the community excise duties within the internal market cannot be internally neutral. In addition, because the levy and the collection takes place in accordance with national taxation and collection legislation and consequently by
definition there are differences in taxation and collection between the Member States, the non-neutrality of the excise duties within the internal market is only reinforced. What is remarkable is that systems like the state subsidy regime, the customs regime and the many systems in the area of the common agricultural policy have been given shape in such way that they are in fact internally neutral within the internal market.

The aim of the EDD is to encourage a proper working of the internal market in the area of the levying of excise duties. The internal market is defined as a space without internal borders within which the free movement of goods and services takes place as if said space were the internal area of a state (internal market principle), which is a vital prerequisite for the existence of a customs union within which the free movement of goods is guaranteed. However, this aim is only intended to serve the external neutrality of the levy, i.e. that goods subject to excise duty are taxed in the same way within a Member State regardless of origin. The EDD is not intended to serve the internal neutrality within the internal market, i.e. equal rates and equal implementation rules within the internal market. This alone makes the EDD contrary to the internal market principle.

The internal area of the Community serves as the reference point for the levying of excise duties only for the private traffic of goods subject to excise duties, the traffic without commercial purposes. The levying of excise duties of private purchases takes place as a final levy in the Member State of acquisition. This traffic encompasses the purchase by private individuals of goods subject to excise duties for own personal consumption, which they transport personally to the Member State of which they are a resident. Due to the requirement of personally transporting the goods this meagre application of the internal market principle is even more narrow than before the institution of the internal market; according to the excise duties regime in effect at that time, personal goods which in the framework of relocation to another Member State were transferred as well as small shipments between private individuals, are exempted in the Member State of import.

The internal market principle does not apply to the traffic of goods subject to excise duties with commercial purposes. In this traffic, the reference point for the levying of excise duties is not the internal market of the Community, but the Member State of destination of the goods (country of destination principle). This is the same situation as before the institution of the internal market as of 1 January 1993. Because of the lack of a community treasury, excise duties are levied subject to the country of destination principle by the fiscal authority of the Member State where the goods are destined. The excise duties flow into the coffers of that Member State. The minimum harmonised excise duties regime is wholly modelled around the external neutrality with total disregard for the internal neutrality of tax levying which must exist within an internal market.

This fundamentally incorrect form of the excise duties regime is a result of the mutual lack of faith among the Member States to distribute the excise duties revenue among themselves as long as there is no common fiscal authority. In addition to what is in practice a nullification of the internal market principle, there are many more provisions which cannot exist in an internal market. Minimum rates with the by definition concomitant rate differences between Member States, transfer of tax liability schemes, fiscal representatives, deviating calculations, reservoir regulations and the
Proper working of the internal market for goods subject to excise duty

6.4 Proper working of the internal market for goods subject to excise duty

‘Fifteen years after its institution, the internal market for goods subject to excise duties is still bogged down in subsidiarity’

The community excise duties regime must contribute to a proper working of the internal market. The EC Treaty defines the internal market as ‘an area without internal borders, in which the free movement of goods, people, services and capital is guaranteed in accordance with the provisions of this treaty’. Within said area the free movement of goods and services takes place as if said area were the domestic area of a Member State where internal neutrality reigned (internal market principle), which is a vital prerequisite for the existence of a customs union in which the free movement of goods is guaranteed. According to the beginning of the preamble of the EDD, the goal of the EDD is to stimulate the proper working of the internal market in the area of excise duties. According to these definitions the internal market for goods subject to excise duties is an area without internal border effects, without rate differences and the same implementation rules.

The excise duties regime is far from meeting this ideal picture. Fifteen years after its institution, the internal market for goods subject to excise duties is still bogged down in subsidiarity. The internal market for goods subject to excise duties will not be realised as long as the minimum harmonisation is not converted into full harmonisation. The minimum rates maintain the substantial rate differences between the Member States, so that the internal market for goods subject to excise duties does not have a neutral effect. The fiscal discrimination prohibition guarantees legal and external neutrality. This limits the neutrality of tax levying within the internal market to the individual national legislation of the Member States which can at most extend to foreign markets where national goods compete with similar goods that have been produced in other Member States. The fiscal discrimination prohibition does not go so far that consequently the internal neutrality within the internal market, i.e. the same rates and rules within the internal market, can be enforced. The absolute neutrality enforced by the ECJ offers complete external neutrality. Nevertheless, internal neutrality has extended through to the excise duties regime via a number of fundamental provisions of the EDD. The taxable event and the obligation to pay excise duty are arranged in the same manner. With regard to the release or import in the territory of the Community, in accordance with the country of destination principle, excise duty is only owed once. After transfer to another Member State, goods on which excise duties have been paid are taxed again in accordance with the country of destination principle, while the original excise duty is repaid by the Member State of origin. Giving security has internal market-wide acknowledgement.
The internal market for goods subject to excise duties only exists marginally: only for the private traffic of goods subject to excise duties, i.e. traffic without commercial purposes. Due to the requirement to transport the goods personally, this meagre application of the internal market principle is even more narrow, than the scope which private individuals had prior to the institution of the internal market. The internal market principle does not apply to the commercial traffic of goods subject to excise duties, but rather the country of destination principle, the same as prior to the institution of the internal market as of 1 January 1993. Because there is no common treasury, the excise duties are levied subject to the country of destination principle by the fiscal authority of the Member State of destination of the goods, the Member State where the goods are deemed to be consumed. The excise duties flow into the coffers of that Member State. This fundamentally incorrect form of the excise duties regime is a result of the mutual lack of faith of the Member States to distribute the excise duties proceeds among themselves as long as there is no common fiscal authority and there is insufficient common will to achieve this and the Member States are acting on behalf of their own national agricultural and other economic interests.

In addition to this virtual nullification of the internal market principle, there are many more provisions which cannot exist in an internal market. The six specific implementation directives contain several series of general compulsory and optional exemptions and reduced rates and Member State-specific optional exemptions and reduced rates. The many optional exemptions and minimum rates with the by definition concomitant rate differences between Member States, transfer of tax liability schemes which cross internal borders, compulsory fiscal representatives which cross internal borders, deviating calculations, action radius limiting fuel reservoir arrangements, the loss of an exemption when an inland shipping vessel which happens to be sailing in another Member State is stocked there, the differing use of fiscal marks and rebate schemes and differences in levying and collection (because the levying and collection of excise duties is a purely national matter) cannot be reconciled with an internal market. The application by some Member States of two individual excise duties regimes, one before release and one before import, encourages the unwanted and unhealthy diversity in national levying and collection procedures.

All these deviations maintain the substantial rate differences and different implementation regulations within the internal market, are detrimental to internal neutrality, keep citizens and companies from enjoying the advantages of the internal market and force them to make unnecessary and avoidable costs. Resolving this issue is a prerequisite for the proper working of the internal market for goods subject to excise duties. Optional exemptions and non-temporary derogations must either be abolished or converted into compulsory exemptions in accordance with the BRAATHENS rule. After fourteen years of striving for an internal market, minimum rates must be converted within a reasonable term into compulsory uniform rates. Exemptions for diplomatic and consular representatives of Member States accredited in other Member States and for the armed forces of Member States stationed in other Member States are contrary to the internal market principle. The energy savings policy recently accepted under the German presidency should, in addition, be the instrument for achieving compulsory uniform and Pigouvian rates for energy products.
6.5 **Characteristics**

‘Contrary to VAT, excise duties cover both productive and consumptive expenditures’

Excise duties are characterised by the fact that without distinction by origin they are levied on specific, concrete taxable objects (goods and services), according to a specific basis or according to the value (excise duties ad valorem), the consumption of which the citizen will not quickly go without, regardless of the cost. Generally their nature entails that a specific product is always subject to the same amount in tax, regardless of the actual sales price and regardless of by whom or to whom the product is delivered. The excise duty owing is passed on via the price to the end user, so that the end user bears the costs. Contrary to VAT, excise duties cover both productive and consumptive expenditures. Excise duties contribute to a fair spread of the tax burden and form stable tax sources. The levying thereof generally goes unnoticed, through customisation and on a voluntary basis. The excise duty as a price instrument discourages the consumption of alcoholic beverages and tobacco products and encourages the economic use of scarce raw materials like energy and freshwater. The smaller the price elasticity (price sensitivity), the more suitable the object is for effective levying of excise duties. Due to broad basic principles and consequently a broad spread of the pressure, the rate can increase marginally and provide a high additional yield.

6.6 **Community and non-community excise duties**

‘The history of the directive fails to explain why the excise duties of mineral oils all of a sudden stopped being excise duties with the entry into force of the EDD and the lapsing of the Mineral Oils Structure Directive and the Mineral Oils Rates Directive as of 1 January 2004’

There are community excise duties and national (non-community) excise duties.

The *community* excise duties are the excise duties which have been harmonised in an EC context. These are the excise duties on alcohol, energy and tobacco products, all arranged in the EDD and its six implementation directives.

The *non-community* excise duties are the excise duties which are not harmonised in an EC context and are only autonomously levied within the individual Member States. For the Netherlands these are the excise duties on alcoholic beverages (also called soft drink excise duties), the tax on cars, delivery vans and motorcycles, chewing tobacco excise duty, snuff excise duty, insurance tax and water excise duties (the taxes on groundwater and mains water).

The community excise duties are to be deemed excise duties on the basis of the legality principle and the legal certainty principle. The excise duties on energy products and electricity are called *taxes* in the Energy Taxes Directive instead of *excise duties*, which deprives the citizen of insight into the working of these taxes. The history of the directive fails to explain why the excise duties of mineral oils all of a sudden stopped being excise duties with the entry into force of the EDD and the lapsing of the Mineral Oils Structure Directive and the Mineral Oils Rates Directive as of 1 January 2004. On the basis of the survey set out in the two chapters, the taxes
regulated in the EDD and the six specific implementation directives falling under the primate of the EDD are all excise duties.

6.7 **Formal and material excise duties concept**

'They are characterised by the typical characteristics of excise duties and thereby satisfy the economic, i.e. material definition of excise duties'

There are excise duties in a formal sense and excise duties in a material sense. Excise duties in a *formal sense* are the excise duties which are legal excise duties; formal excise duties are taxes which are explicitly referred to as *excise duty* in the tax law in which they are arranged. The Netherlands Excise Duties Act calls the excise duties on alcoholic products, mineral oils and tobacco products excise duties. Excise duties in a *material sense* are taxes which economically, i.e. in everyday reality, work as an excise duty. It does not matter whether these excise duties are called excise duties in the tax legislation under which they will be levied. They are characterised by the typical characteristics of excise duties and thereby satisfy the economic, i.e. material definition of excise duties. In an economic or material sense, excise duties are: (1) special cost price increasing consumption taxes, (2) which are levied once the production chain (3) with no distinction as to origin and (4) are levied virtually unnoticed by the government as such, (5) with regard to expenditure for domestic consumption of (6) specifically designated goods or services, (7) of which the burdens as a component of the cost price are preferably fully passed on to the end user, (8) the proceeds of which are substantial and (9) flow to general funds, and (10) which entail an expenditure-steering and corrective effect.

The ECJ applies the material excise duties concept.

6.8 **Pigouvian alcohol and tobacco rates**

'The liquidation of the tobacco market regulations should form the starting signal for the introduction of a uniform community Pigouvian rate for tobacco excise duty'

As stated, on the basis of the cause principle, the prevention principle and the compensation principle excise duties can ensure that there is proportionality between the costs caused by certain behaviour and to whom these costs can be passed on. It is suggested to charge Pigouvian rates on alcohol excise duties and tobacco excise duties: € 1,500 per hectolitre of absolute alcohol and € 480 per kilogramme of tobacco as compensation for the external costs caused by alcohol consumption (€ 125 billion) and smoking (€ 130 billion). The additional revenue can be used to reduce taxes on labour and enterprise. This rate revision forms an important step in eliminating the differences in rates between the Member States and making the internal market for goods subject to excise duties internally neutral. The liquidation of the tobacco market regulations should form the starting signal for the introduction of a uniform community Pigouvian rate for tobacco excise duty. The coming revision of the wine market regulations must be the vehicle for financing the new wine market regulations from now on
with the proceeds of the wine excise duty and furthermore are a reason to agree a uniform community Pigouvian rate for alcohol excise duty for all alcoholic beverages.

6.9 **European Payments Tax**

‘(...) the EPT takes on the form of a flat tax (...) with highly minor implementation costs’

The European Payments Tax (EPT) is a digitally levied excise duty given form by European regulation with only one basis (financial services), one measure of levying (the nominal amount of a digital payment), one taxable event (the debiting and crediting of a digital payment account) and one rate (0.4%), without exemptions or any other tax differentiation whatsoever. With this the EPT takes on the form of a flat tax.

The EPT can be used as a revenue-generating tax with highly minor implementation costs to neutralise the VAT on financial services in a way which is neutral for the budget, in order to have the administrative burden pressure of the taxes on labour and business disappear and encourage employment and enterprise by making the disruptive taxes on labour and enterprise redundant.