2. Harmonization in a Globalizing Market Place

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1. INTRODUCTION

It seems obvious that all authors in this *liber amicorum* share with Piet Jan Slot a passion for European Law. Next to that I assume most authors will share Piet Jan Slot’s passion for food and wine (especially for very good wines) and may have had concrete experience of these passions, as Slot shares his wines and cooks excellent dinners. Therefore it seems logical to focus on one of these passions – in this case, wine – in a contribution written in his honour. As this *liber amicorum* is a *festschrift* or *feestbundel*, since it celebrates his retirement or *emiritaat*, the appropriate wine is of course champagne. In this contribution, the Community's export of its rules on the use of the name “champagne” is used to illustrate the impact of globalization on harmonization of laws.¹

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According to secondary Community law, the famous French sparkling wine produced in the region of Champagne enjoys *within the Community* the protected designation “quality wine produced in special regions”. ² There is however another wine (which was) called champagne: non-sparkling wines from the commune of Champagne in the Swiss canton of Vaud. These were also sold under the name “champagne”. In 1999 the European Community and Switzerland concluded seven bilateral agreements; ³ one of these agreements regulates the trade in agricultural products, amongst which wines. ⁴ Article 5 of Annex 7 to that agreement, provides for the obligation for the contracting parties to ensure mutual protection of designated “quality wines produced in special regions” produced in the European Community and Switzerland. Homonymous geographical indications are in principle respected, “provided the consumer is not misled as to the actual origin of the wine-sector products”. ⁵ The exception to this mutual recognition of homonyms is the so-called Champagne clause of Article 5(8) of the Annex. According to that provision, the exclusive protection of the name “champagne” shall apply only to the sparkling wine produced in the French region Champagne. As a consequence the Swiss champagne can no longer be marketed under the name “champagne” in the European Community or in Switzerland.⁶

As the producers of the Swiss champagne were obviously “not happy” with this Champagne clause, they initiated an action for annulment against the decision of the Council and the Commission approving the 7 agreements on behalf of the European Community ⁷ and an action for compensation of damages. ⁸ The Court of

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⁵ Art. 5(4) a of the Annex: “where two indications protected under this Annex are homonymous, protection shall be granted to both of them, provided the consumer is not misled as to the actual origin of the wine-sector products”; Art. 5(5) a of the Annex: “where two expressions protected under this Annex are homonymous, protection shall be granted to both of them, provided the consumer is not misled as to the actual origin of the wine-sector products”.

⁶ The Swiss wine formally known as champagne is now sold on the common market under the appellations Libre-Champ and Bonvillas.

⁷ Decision 2002/309/EC, Euratom of the Council and of the Commission as regards the Agreement on Scientific and Technological Cooperation, of 4 April 2002 on the conclusion of seven Agreements with the Swiss Confederation (O.J. 2002, L 114/1).

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First Instance ordered that the action for annulment was inadmissible. As for the action for compensation of damages, the Court of First Instance rejected the claim as manifestly unfounded in law.

The Champagne clause in the agreement between Switzerland and the European Community is illustrative for sharing harmonized legislation with third countries. In a globalizing economy the sharing of harmonized legislation with third countries increases.

GLOBALIZATION AND HARMONIZATION

In his article in 1996, Slot did not link harmonization to globalization. In his thorough Dutch article on harmonization in 2003, which he wrote together with Staetmans, however explicit reference is made to globalization and harmonization. By way of introduction they indicate that "the internal harmonization policy within the EC comes more and more under pressure of advancing globalization of the economy".

In their article the focus on globalization is mainly on international obligations which are used as a reason, – or an excuse (schaamlap) as the authors call it, – to harmonize legislation within the common market and the troubles these give in respect of the competence of the European Community and its Member States to conclude international agreements on the basis of Article 133 EC. To demonstrate this, Slot and Staetmans make reference to the General Agreement on Trade in Services (GATS) and the Trade Related Intellectual Property Services (TRIPS) concluded within the framework of the World Trade Organization (WTO) and the Cartagena Protocol on Biosafety. I would describe this as the "import of norms".

Slot and Staetmans conclude their chapter on harmonization and globalization by indicating that "globalization also leads to the increasing sharing of the results of harmonization within the Community with third countries". This concluding remark gives another focus on harmonizing measures in a globalizing world: harmonizing third country legislation with secondary Community law

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9. As (i) the contested decision does not produce any legal binding effect in Switzerland and therefore does not affect the position of the producers when marketing their wines in Switzerland (it is the ratification by Switzerland of the Champagne clause which does that) (paras. 95 and 96 of the Champagne case, supra note 7); (ii) as the Champagne clause does not change their legal position with regard to the marketing of their wines in the Community, since Regulation No. 753/2002 already provided for the protected designation within the Community of champagne produced in the French region of Champagne (para. 145 of the Champagne case, supra note 7) and; (iii) the Swiss champagne producers are not individually concerned as the Champagne clause is a general measure (paras. 190 and 191).

10. As (i) in the territory of the Community the Swiss producers already could not market their champagne (paras. 204 and 205 of the Champagne case, supra note 7) and (ii) for lack of jurisdiction of the CFI insofar as it concerns the damage allegedly suffered in the Swiss territory (para 213 of the Champagne case, supra note 7).

11. Slot and Staetmans, op. cit. supra note 1, para 202 et seq of the Champagne case, ibid.

12. Ibid. para 202; the original text is in Dutch; translation by the author.

13. Ibid. para 212; the original text is in Dutch; translation by the author.
(although the article of Slot and Straetmans does not further elaborate on this point). I would describe that as the "export of norms".

The Champagne clause illustrates this process of the sharing of the results of harmonization within the Community with third countries. The reasons for sharing harmonized legislation might be various. In the case of the Champagne clause, it seems that negotiating power of the European Community forced Switzerland to accept this French protectionist measure; at least that is what the Swiss Federal Council has indicated.\(^\text{14}\) In that case it is rather imposing harmonized norms than exporting harmonized norms for protectionist reasons. Another reason for exporting harmonized norms to third countries is to stop (harmful) competition between States on regulatory systems; to stop the race to the bottom.

3. GLOBALIZATION, THE RACE TO THE BOTTOM AND INTERNATIONAL COOPERATION

It is common to state that globalization leads to regulatory competition resulting in lower standards,\(^\text{15}\) often called a race to the bottom, or the Delaware effect.\(^\text{16}\) Genschel and Plümper have indicated that "[s]ometimes, competing States manage to stop their competition through collective action. The deregulatory spiral is then countered by a cooperative turnaround."\(^\text{17}\) Harmonization (as a means of a cooperative turnaround) therefore is a way to stop regulatory competition. Besides and contrary to the general trend that regulatory competition leads to a race to the bottom, Vogel has demonstrated that regulatory competition might also have an upwards pressure on regulation, which is called the California effect.\(^\text{18}\)

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14. Response of the Swiss Federal Council of 27 Aug. 2008 to the interpellation of O. Freyssinger, member of the Swiss Parliament/Federal Assembly, of 13 Jun. 2008: "Champagne. Protection de nos AOC et de nos homonymies communales" (ref. 08.3397): "Au cours des négociations de l’accord du 21 juin 1999 entre la Confédération suisse et la Communauté européenne relatif aux échanges de produits agricoles (RS 0.916.026.81), la délégation suisse a tout tenté afin de permettre une coexistence en Suisse et dans l’UE des deux désignations Champagne dans le domaine des produits vitivinicoles. Au terme de ces négociations longues et difficiles et afin de ne pas mettre en échec la conclusion des accords bilatéraux I, la Suisse a dû se plier aux exigences de la France qui refusait toute solution autre qu’une période transitoire à l’expiration de laquelle la dénomination Champagne ne pourra plus être utilisée par les producteurs vitivinicoles suisses... La France avait reçu le soutien des institutions communautaires et des autres États membres de la CE".


18. D. Vogel, Trading Up: Consumer and Environmental Regulation in a Global Economy, (Harvard University Press, Cambridge, Mass, 1995). This is called the California effect, due
With regard to regulatory competition Scharpf makes a distinction between the
types of objects and the types of State action in order to identify the extent of
certainty (lesser or greater) about regulatory competition. States compete to attract
mobile elements, such as capital. The mobility of capital in Europe is guaranteed
by Article 56 EC which ensures the free movement of capital. As this provision has
external effect the free movement of capital from the internal market to third
countries and back is also guaranteed. This fundamental freedom increases mobi-
licity of capital. In addition, the recent technological developments, such as the Inter-
et, increase the cross-border mobility of capital as well. The actions to compete on
are related to the type of objects on which States compete to attract them. An
important area of policy is taxation of mobile sources of income, such as capital.
The race to the bottom is in that case illustrated by decreasing tax rates.

Tax competition is however often described as harmful. As McCarthy, Van
Doorn and Unger put it: “tax competition results in a dangerous situation, and is
not only degrading to the State, but destructive, wasteful and socially inequitable.
Because budgets must be balanced, lower corporate taxes imply higher labour
taxes must be levied to make up the difference, and so tax competition inevitably
produces a situation which punishes the immobile (labour) factors of production
to the fact that California imposed higher environmental standards for cars, which became a
federal standard later on. According to Vogel the “ratcheting upward of regulatory standards”
has three components: “First, to the extent that stricter regulations represent a source of com-
petitive advantage for domestic firms, the latter may be more likely to support them. Second,
rich nations which have enacted greener product standards force foreign producers to adjust to
them in order to continue to enjoy market access, thus helping in turn to raise foreign product
standards. Third, agreements to reduce trade barriers can provide richer and more powerful
greener nations with the opportunity to pressure other nations into adopting stricter product and
production standards” (pp. 259 and 260). Jordan and Majnoni would describe that as the
“dominant neighbor” case, where a State takes over the norms of its large(r) neighbouring
State to improve the access of domestic firms to the larger market of the neighbouring State; this is
different from the “trade induced” case, where “a tight network of trade relationships has
induced governments to promote a stronger form of integration”, such as the European Com-
unity; C. Jordan, G. Majnoni, “Financial Regulatory Harmonization and the Globalization of
calls this “replication” and concludes that the end result is the same as for the “exportation”
of EC norms; Harding, op. cit. supra note 1. For an example of the EC as a “dominant neighbour”
or “replication” of EC norms see A. Björkahl, “Norm-maker and Norm-taker: Exploring the


20. According to Scharpf, with regulatory competition States try to attract mobile elements: mobile consumer demand in the world market for goods and services, mobile capital for investment in
production facilities, and mobile tax bases.


22. Scharpf identifies the types of action that might be more or less vulnerable to international competition, namely: product and process regulations, taxes on consumption, taxes on immo-
ible sources of income and taxes on mobile sources of income.
for being immobile.”23 As tax competition is harmful, the Council has tried to stop such competition amongst Member States, and harmonized tax rules on saving interests in relation to strict banking secrecy regimes.

4. THE CASE OF HARMFUL TAX COMPETITION AND THE SAVINGS DIRECTIVE

At an informal meeting of the ECOFIN Council in Verona in April 1996, harmful tax competition was put on the agenda. Part of the discussion on harmful tax competition was the taxation of savings. Finally in 2003 the Council concluded a tax package to tackle harmful tax competition.24 The tax package consisted of three measures: (i) a Code of Conduct for direct business taxation, requiring a “rollback” (Member States shall amend laws/practices that are characterized as harmful) and a “standstill” (Member States shall refrain from introducing harmful tax measures);25 (ii) Directive on intragroup interest and royalties payments26 and; (iii) Directive 2003/48/EC, the Savings Directive.27

The goal of the Savings Directive is to combat the avoidance/evasion of taxation of savings income. Without harmonization, residents of Member States were able to avoid any form of taxation in their Member State of residence on interest they received on bank accounts in another Member State.28 This was especially true for accounts which were held in States which guarantee banking secrecy, such as Luxembourg, but also third countries such as Switzerland. Banking secrecy attracts money. As Chaikin puts it: “Switzerland’s pre-eminent position in offshore private banking is linked to its system of bank secrecy which has attracted both legal and illegal monies.”29

24. The European Commission also supported the fight against harmful tax competition by intensifying its procedures against fiscal State aid. As a result the Commission opened 11 formal investigation procedures and proposed in 4 further cases appropriate measures (cf. press release of the Commission of 11 Jul. 2001, “Commission launches large scale State aid investigation into business taxation schemes” (IP/01/982)).
28. 5th Consideration of the preamble of the Savings Directive.
As banking secrecy was not to be abolished by the Savings Directive and decisions on harmonization in the field of taxation are still voted under unanimity, two sets of alternative rules were developed to satisfy the Member States with banking secrecy (and to prevent them from vetoing the Directive), while allowing effective taxation of savings, or as the Commission put it: "a compromise solution known as the 'coexistence model'" 30 (Slot would qualify this as alternative harmonization, which is very rare). 31 The Member States in which the savings account is held (the source State) could either disclose information to the Member State of residence (the resident State) on the interest paid, or the source State could withhold a tax on the interest paid and share the revenues with the resident State on a name basis. The result of the latter rule is that banking secrecy is maintained, whilst taxation is not avoided.

Finally, it was decided by the Council that exchange of information should be the rule and only Austria, Belgium and Luxembourg (the Member States with banking secrecy) could benefit from the withholding-tax-and-revenue-sharing-rules. 32 The withholding tax rate is set at 15 percent for the first three years, 20 percent for the four years thereafter and 35 percent after that. 33 The source State shall transfer 75 percent of their revenues to the resident State. 34

The European Community concluded bilateral agreements with 5 third countries: 35 Andorra, 36 Liechtenstein (Liechtenstein was not bound to the Savings Directive through the Agreement on the European Economic Area – nor were Iceland and Norway –, as tax policy is not part of that agreement), 37 Monaco, 38 San Marino 39 and Switzerland 40 and 10 relevant dependent or associated territories. 41 All third countries apply the withholding-tax-and-revenue-sharing-rules.

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31. Slot op. cit., supra note 1; the other methods of harmonization are total harmonization, optional harmonization, partial harmonization, minimum harmonization and mutual recognition of national rules or controls.
33. Art. 11(1) of the Savings Directive.
34. Art. 12(1) of the Savings Directive.
35. "This marks the first time ever that the Commission has received a mandate to negotiate with countries outside the Union on taxation matters."; Results of the Council of Economics and Finance Ministers, Luxembourg, 16 Oct. 2001, ref. MEMO/01/330 of 17 Oct. 2001.
41. The Netherlands and the United Kingdom committed themselves to introduce, within the framework of their constitutional arrangements, measures equivalent to the Directive in Aruba and the Netherlands Antilles, Guernsey, Isle of Man, Jersey, Anguilla, British Virgin Islands, Cayman Islands, Montserrat and the Turks & Caicos Islands (cf. 2181st ECOFIN Council meeting of 25 May 1999 (PRES/99/165) and the written implementation guarantees as included in the Follow-up of 31 May 2005 to ECOFIN-Council on 12 Apr. 2005 (9536/05)).
As long as the third countries with banking secrecy have not signed an agreement to exchange information with the Member States, Austria, Belgium and Luxembourg are not forced to exchange information and can apply the withholding-tax-and-revenue-sharing-rules.  

Although this might read as a success story, it is worth mentioning that the first proposal for a Savings Directive was already made by the Commission in 1967 and several proposals were made thereafter. Nevertheless, the Savings Directive is illustrative of how to stop a race to the bottom by harmonizing norms both within the European Community and in third countries.

5. CONCLUSION

Slot and Staetmans concluded that “globalization also leads to increasing sharing of the results of harmonization within the Community with third countries”. One of the – perhaps main – reasons for this conclusion is that globalization leads to regulatory competition which leads to lower norms: a race to the bottom. To stop this “deregulatory spiral”, harmonization of the norms competed on is a feasible solution.

The Savings Directive demonstrates how harmonization can target such competition within the European Community. As regulatory competition does not stop at the Community borders and mobile targets such as capital are easily moved to third countries (especially since the free movement of capital also applies to capital movements to third countries), harmonization within the European Community is not sufficient. Exporting harmonized community norms to third countries does really stop the race to the bottom. Furthermore, without the rare method of alternative harmonization I assume the Savings Directive would never have been adopted, as Luxembourg did not want to give up its banking secrecy, while running risk of a flight of capital to third countries maintaining banking secrecy, such as Switzerland.

And that brings us back to the retirement of Slot. Many pensioners will probably not like the Savings Directive, as it might affect the amount of interest they receive on savings in Swiss bank accounts. Nevertheless, when they are in Switzerland to withdraw money or enjoy a holiday in the Swiss Alps (snowboarding or enjoying the view from the mountain, for instance), they are guaranteed when buying something called champagne that it is the genuine French article.

42. Art. 10(2) of the Savings Directive.