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Bosal Holding BV V. Staatssecretaris Van Financien: The ECJ Moves the EU Closer to Unlegislated Harmonization of Corporate Taxes

I. INTRODUCTION

In 1993, Bosal Holding BV, a company engaged in holding, financing, and licensing/royalty related activities, and subject to corporate income tax in the Netherlands, wished to offset its profits taxable there with costs incurred in the financing of its holdings in nine other European Union Member States.¹ The Dutch taxing authority refused Bosal's claim based on the Dutch requirement that costs related to subsidiaries are only deductible if they are indirectly instrumental in making profits that are taxable in the Netherlands.² The company brought an action before the Gerechtshof te Arnhem ("Court of Justice-Arnhem, Netherlands"), which upheld the taxing authority's decision. Bosal then appealed to the Hoge Raad der Nederlanden ("Supreme Court of the Netherlands").³ The appellate court decided that a referral to the European Court of Justice ("ECJ" or "Court") was necessary to determine whether Article 13(1) of the Netherlands law, upon which the Dutch taxing authority relied, could be upheld in light of the freedom of establishment contained in Articles 43 and 48 of the European Community (EC) Treaty.⁴

In deciding this case, the ECJ went further than it ever had in striking down a national tax law as violative of the basic freedoms contained in the Treaty. This case represents a step toward the unlegislated harmonization of corporate taxes in the European

1. Case C-168/01, *Bosal Holding BV v. Staatssecretaris van Financien*, 2003 E.C.R. I-9409, para. 9.

2. *Id.* at para. 8.

3. *Id.* at para. 10.

4. *Id.* at para. 11.

Union (“EU”), a goal that many EU members strongly disagree with. In striking down the Dutch legislation, the Court rejected several strong arguments put forth by the European Commission and the governments of the Netherlands and the UK.⁵ This article will examine those arguments, as well as the Court’s analysis of them. Additionally, it will illustrate a path that the Court could have taken to uphold the ability of Member States to determine their own tax policy. Section II discusses some important background information: the EU Treaty itself and the union that it created, the relationship between EU law and the law of Member States, and the specific laws at issue in this case. Section III contains analysis of the case itself and some important counterarguments to the Court’s reasoning. Section IV describes the policy considerations behind the argument against this decision, and proposes how the Member States can assure the sovereignty of their tax laws.

II. LEGAL BACKGROUND

A. Background of the EU and the Role of the Court

In 1957, the Treaty of Rome was signed, creating the European Communities and establishing the ECJ.⁶ The treaty was revised in 1985 and 1992, culminating in the creation of the European Union in 1994.⁷ Since the mid-1980s, the ECJ has asserted that the Treaties represent the constitutional charter of the Union, and that it is the Court’s role to supervise compliance with this “constitution.”⁸ Decisions of the ECJ are binding on the Member States, and require Member States to set aside domestic laws that are inconsistent with Union law as interpreted by the Court.⁹

5. *See id.*, at paras. 17-21.

6. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Dec. 24, 2002, O.J. (C-235) 1 (2002) [hereinafter EC TREATY].

7. PAUL B. STEPHAN ET AL., INTERNATIONAL BUSINESS AND ECONOMICS LAW AND POLICY 72 (3d ed. 2004).

8. Gráinne de Burca, *The Institutional Development of the EU: A Constitutional Analysis*, in THE EVOLUTION OF EU LAW 57 (Paul Craig & Gráinne de Burca eds., 1999).

9. Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, 2 INT’L J. CONST. L. 633, 654 (2004).

B. Directives

Directives are a form of legislative pronouncement that declare a desired result, and allow the Member States to decide individually how they will enact laws which lead to that result. As such, it is the result which is binding on the members, and not the means chosen.¹⁰

C. Direct Taxation

Direct taxation is not specifically addressed in the EC Treaty. As such, it technically does not fall within the jurisdiction of the ECJ, and is left to the Member States.¹¹ However, through precedent, the ECJ established the rule that “although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with Community law.”¹²

D. EU and Domestic Law

The EU law at issue in this case includes Treaty provisions and a Council Directive. The Treaty section involved is the freedom of establishment, announced in Article 43 and Article 48 of the EC Treaty.¹³ Article 43 declares that “restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited.”¹⁴ Furthermore, Council Directive 90/435/EEC (“Directive”) was under consideration. The preamble to the Directive indicates that its purpose is to eliminate the disadvantage experienced by parent companies having subsidiaries in different Member States.¹⁵ Article 4 of the Directive reads: “However, each Member State shall retain the option of providing that any charges relating to the holding and any losses resulting from the distribution of the profits of the subsidiary may not be deducted from the taxable profits of

10. PAULO MENGOZZI, EUROPEAN COMMUNITY LAW 125 (Patrick Del Duca trans., Kluwer Law Int'l 2d ed. 1999).

11. Richard Palmer, *Tax: Owing Me, Owing You*, THE LAWYER, Aug. 9, 2004 at 18.

12. C-35/98, *Staatssecretaris van Financiën v. B.G.M. Verkooijen*, 2000 E.C.R. I-4071, at para. 32. *See also* Case C-279/93, *Finanzamt Kvlm-Altstadt v. Schumacker*, 1995 E.C.R. I-225, at para. 21; Case C-80/94, *Wielockx v Inspecteur der Directe Belastingen*, 1995 E.C.R. I-2493.

13. EC TREATY, *supra* note 6.

14. EC TREATY, art. 43.

15. Council Directive 90/435, 1990 O.J. (L 225/6) [hereinafter Directive].

the parent company.”¹⁶

The Netherlands law challenged in *Bosal Holding* is Article 13(1) of the Wet op de Vennootschapsbelasting 1969 (“Law on Corporation Tax”), which directs that only costs which are “indirectly instrumental in making profit that is taxable in the Netherlands” is deductible to a Netherlands parent company.¹⁷ The allegation is that this law violates the Freedom of Establishment provided by the EC Treaty.

III. ANALYSIS

A. *The Arguments*

Bosal argued that Article 13(1) restricted the freedom of establishment by penalizing parent companies for establishing subsidiaries in Member States other than the Netherlands.¹⁸ The Netherlands, supported by the UK and the Commission of the European Communities, countered that the law was not contrary to the freedom of establishment at all, and if it was, it was justified.¹⁹

The Netherlands first argued that Article 13(1) did not discriminate at all, because the subsidiaries of parent companies established in the Netherlands make profits in that Member State, and those which do not are not in an objectively comparable position.²⁰ This argument is premised on the fact that the first group of companies (where parent and subsidiaries all make a profit in the Netherlands) is subject to tax in the Netherlands, while the second group (with subsidiaries earning profits in other Member States) is not. The Netherlands, therefore, believed that a distinction between the two groups was appropriate and did not violate the freedom of establishment.

In the alternative, the Netherlands argued that if their refusal to allow deduction of costs for holdings in other Member States did violate the Treaty, it was justified. The Netherlands first asserted that the infringement was justified by the need to

16. *Id.* art. 4.

17. Art. 13(1) WET OP DE VENNOOTSCHAPSBELASTING (Law on Corporations Tax of 1969, 1993 version) (Neth.) [hereinafter NETHERLANDS LAW].

18. *Bosal Holding BV*, 2003 E.C.R. at para. 12.

19. *Id.* at para. 17-19.

20. *Id.*

maintain the coherence of their system of taxation.²¹ Coherence of a Member State's tax regime has been recognized by the ECJ as an acceptable justification for infringement of an EU freedom.²² The Netherlands further argued that their tax scheme was justified in infringing the freedom of establishment because it was necessary to avoid an erosion of the tax base going beyond a mere diminution in tax receipts.²³ Finally, the Netherlands pointed out that Article 4 of Council Directive 90/435 authorized Member States to prohibit parent companies from deducting holding costs from taxable income completely. Therefore, the Netherlands contended that Article 13(1) should be sustained as merely an implementation of the option contained in the Directive.²⁴

B. Summary of Holding

Rejecting the arguments asserted on behalf of the Netherlands, the Court ruled that the Dutch law violated the freedom of establishment by discouraging parent companies from establishing subsidiaries in other Member States.²⁵ In reaching this conclusion, the Court rejected the Netherlands two asserted justifications: coherence of the tax system, and the need to prevent an erosion of the tax base.

C. The Court's Analysis

1. Compliance with the Directive

The Court began by analyzing the Netherlands law for compliance with the Directive.²⁶ It noted that the Netherlands was basically arguing that the greater power granted by the Directive of prohibiting the deduction of holding costs altogether necessarily implied the lesser power of limiting such deductions to situations where the costs were associated with earning taxable profits in the

21. *Id.*

22. See Case C-204/90, *Bachman v. Belgium*, 1992 E.C.J. 583; Case C-300/90, *Comm'n v. Belgium*, 1992 E.C.R. I-305.

23. *Bosal Holding*, 2003 E.C.R. at para. 20. The Court had previously rejected the argument that protection from a *mere diminution* of tax revenue could justify infringement of a Treaty freedom in Case C-264/96, *Imperial Chemical Industries plc v. Colmer*, 1998 E.C.R. I-4695, I-4723 (emphasis added).

24. *Bosal Holding*, 2003 E.C.R. at para. 21.

25. *Id.* at para. 27.

26. *Id.* at para. 22.

Netherlands. The Court initially acknowledged that Article 13(1) comported with the Directive insofar as it was merely implementing the option provided by Article 4(2) of the Directive.²⁷ The ECJ, however, cited settled law, holding that even if the Dutch law was merely an implementation of the Directive, it must conform to “fundamental provisions of the Treaty.”²⁸ That brought the ECJ to the issue at hand—whether the Netherlands law violated the freedom of establishment found in Article 43 (formerly Article 52) of the Treaty, and if so, whether there were any justifications for the infringement.

2. Violation of the Freedom of Establishment

The Court found a violation of the freedom because Article 13(1) might dissuade a parent company from establishing or operating a subsidiary in another Member State.²⁹ Thus, the Court turned to the issue of whether the Netherlands could justify this intrusion.

The Court’s analysis and rejection of the justifications put forward by the Netherlands and UK governments as well as the Commission shows a narrowing of the acceptable justifications for freedom infringement, and deserves special attention. This narrowing is a step towards requiring the harmonization of corporate income taxes across EU Member States - a requirement that many Member States vehemently oppose. Sections 3-6 will discuss the Court’s analysis and present counterarguments, which suggest an alternative path. This path would have upheld the freedom of establishment while preserving the Member States’ sovereignty over direct taxation.

3. Coherence Justification

a. Coherence and the Direct Link Requirement

Demonstrative of its opposition to harmonization, the Netherlands put forth the argument that the infringement was justified by a need to maintain the coherence of its tax code.³⁰ The coherence argument was accepted by the ECJ in the 1992 cases of

27. *Id.* at para. 25.

28. *Id.* at para. 26. For a brief discussion of Directives, see MENGOZZI, *supra* note 10.

29. *See Bosal Holding*, 2003 E.C.R. at para. 27.

30. *Id.* at para. 19.

Bachmann v. Belgium and *Commission v. Belgium*.³¹ These cases upheld a Belgian law that allows deduction of insurance premiums and pension contributions only if the insurer was established in Belgium. Specifically, where the deduction of contributions was linked to the eventual taxation of any distributions under such contract they were not in violation of the EC Treaty. The Court recognized that forcing Belgium to allow deductions for foreign insurers would remove the crucial link between the tax benefit and its related tax liability.³² Proving such a link is the key to a successful coherence justification argument.

According to the Court in this case, there was no such direct link, which would allow the coherence argument to stand.³³ To invalidate the link, the Court inferred a “same taxpayer” requirement that had never been a part of the direct link analysis before. The Court cited *Baars v. Inspecteur* for the proposition that there can be no direct link where the law involves two different taxpayers, or two different taxes.³⁴

In *Baars*, the issue was whether a cohesion argument could stand where a resident of the Netherlands had a wealth tax exemption for substantial amounts of equity held in a company established in the Netherlands, but no similar exemption existed for holdings in companies established in other Member States.³⁵ The Court rejected the cohesion argument made by the Netherlands, holding that since the wealth tax was a totally separate tax, and indeed completely unrelated to the distribution of already taxed corporate profits, there was no link between the tax relief (for personal wealth tax) and the tax liability (for corporate income tax).

Unlike the situation in *Baars*, the tax relief provided in *Bosal Holding* is directly linked to a corresponding tax liability. The tax relief and the tax liability in this case both involve the same tax (corporate income). The link, however, is even stronger than that—the premise underlying the allowance of a deduction for business expenses in an income tax is that the expenses represent

31. *Bachman*, 1992 E.C.R. at 571; *Belgium*, 1992 E.C.R. at I-318.

32. *Bachman*, 1992 E.C.R. 575; *Belgium*, 1992 E.C.R. at I-319.

33. *Bosal Holding*, 2003 E.C.R. at para. 32.

34. Case C-251/98, *C. Baars v Inspecteur der Belastingen Particulieren/Ondernemingen Gorinchem*, 2000 E.C.R. I-2787, I-2819.

35. *Id.* at 2814

the cost of earning taxable profits.³⁶ Therefore, there is a direct link between the deduction of the holding costs and the liability for income tax, which the *Bosal Holdings* Court should have recognized.

Still citing to *Baars*, the Court went on to state that since parent companies and their subsidiaries are separate legal entities, there can be no link, apparently inferring a “single taxpayer” requirement from *Baars*.³⁷ However, the Court in *Baars* did not rely on a distinction between the individual taxpayer and the company in which he held a substantial interest as two separate legal entities. Instead, the *Baars*’s decision turned on the fact that the two taxes involved were completely unrelated and had no impact on one another.³⁸ The ECJ’s reliance on *Baars* here is misplaced because in *Bosal Holding*, unlike in *Baars*, the benefit and the liability were offsetting parts of the same tax.

Article 13(1) is analogous to the law upheld in the consolidated cases of *Bachmann v. Belgium* and *Commission v. Belgium*.³⁹ In that case, allowing the deduction of contributions to insurance policies outside of Belgium would have forced Belgium to incur the deduction, without the corresponding tax inflow when the policies paid out, since disbursements outside of Belgium were beyond the reach of the Belgian taxing authority.⁴⁰ Similarly, allowing deductions for costs of earning profits abroad would cause the Netherlands to incur only the deduction, while losing the corresponding revenue since the profits earned as a result of the costs would only be taxable in the Member State where the subsidiary is located, and not in the Netherlands.

There is a direct link between a nation’s grant of a deduction for holding costs of a subsidiary located abroad, and that nation’s ability to tax the profits obtained as a result of the operation of the subsidiary. By failing to recognize this link, the ECJ in *Bosal Holdings* has forced EU Member States to incur only the deductions, without the ability to tax the related profits. This is directly counter to the Court’s rationale in *Bachmann v. Belgium* and *Commission v. Belgium*, and demonstrates an expanding view of the freedom of establishment in regards to direct taxation.

36. See *INDOPCO, Inc. v. Commissioner*, 503 U.S. 79, 84 (1992).

37. *Bosal Holding*, 2003 E.C.R. at para. 62.

38. *Baars*, 2000 E.C.R. at I-2819.

39. See *Bachman*, 1992 E.C.R. at 583; *Belgium*, 1992 E.C.R. at 305.

40. *Id.*

b. Does the Direct Link Requirement Include a Temporal Element?

In the analysis above, the Court inferred a “same taxpayer” requirement to invalidate the direct link in this case. Similarly, the ECJ also created a temporal requirement not found in earlier precedent. Still discussing the direct link requirement, and still relying on Baars, the Court declared that the deductibility of costs under Article 13(1) did not depend on whether or not the subsidiary earned a profit in the relevant tax year. Therefore, there was no direct link.⁴¹ The Court seems to be inferring a temporal requirement from Baars that the liability and benefit must arise in the same year. This would be an extremely restrictive reading of the cohesion justification’s direct link requirement. No such requirement existed in Baars.

In that case, the individual was responsible for the wealth tax based on the size of his holdings in a company.⁴² Therefore, his liability was totally independent of the profitability of the company. Thus, the Court in that case said “whether or not the company makes a profit does not in any event affect liability to wealth tax.”⁴³ The situation the ECJ referred to in Baars is easily distinguished from the facts of Bosal Holding. The only reason a parent company incurs costs in operating a subsidiary is in anticipation of earning profits at some point. This is a much stronger link than the one invalidated in Baars.

There was also no temporal requirement in the link recognized in *Bachmann v. Belgium*.⁴⁴ The deduction given in *Bachmann* included “sickness and invalidity insurance contributions.”⁴⁵ The direct link there was not premised on Belgium’s recovery of taxable distributions in the same year that the deduction was taken, but rather on the relationship between the deduction given, and the ability of Belgium to tax distributions, when and if they occurred.⁴⁶ Similarly, in *Bosal Holding*, the link is premised on the relationship between holding costs and profits taxable in the Netherlands.

41. *Bosal Holding*, 2003 E.C.R. at para. 35.

42. *Baars*, 2000 E.C.R. I-2814.

43. *Id.* at I-2819.

44. *Bachman*, 1992 E.C.R. at 583.

45. *Id.* at 559.

46. Notice that receipt of any revenue under these policies was conditioned on the insured becoming sick or disabled, and was therefore by no means assured. *Id.*

Additionally, for the statement from *Baars* to apply to this case, it would have to be said that whether or not the subsidiary makes a profit does not in *any* event affect the parent company's liability to income tax. This would be an inaccurate statement. There are circumstances, such as when a permanent establishment in another Member State is converted into a subsidiary, where profits of a foreign subsidiary are taxable to the Netherlands parent company.⁴⁷

4. Over, or Under-Taxation?

The ECJ additionally decided that the condition in Article 13(1) amounted to over-taxation since the "limitation" was not compensated for by a corresponding "advantage."⁴⁸ This, however, seems to assume the conclusion that the parent companies were *entitled* to the deduction in the first place. This circular reasoning added nothing to the opinion, since the Netherlands would merely view the opposite situation as under-taxation, as it would be forced to allow a deduction with no corresponding tax liability.

5. Objectively Comparable

The next argument put forth by the Netherlands that the ECJ addressed was that parent companies with subsidiaries in the Netherlands, and those with subsidiaries in other Member States are not in objectively comparable situations. If the Court found that the two groups were not comparably situated, then Article 13(1) would not be discriminatory.⁴⁹ The Court declared this distinction irrelevant since the difference in tax treatment concerned the parent companies, and the profits of the subsidiaries were not taxable in the hands of the parents regardless of where the subsidiaries were located.⁵⁰ The Court appears to have decided that even if the subsidiaries are not comparably situated, the parent companies are, since they are all established in the Netherlands and are totally separate taxpayers from their

47. MINISTRY OF FINANCE, GOVERNMENT OF THE NETHERLANDS, TAXATION IN THE NETHERLANDS 2001 §3.3.5, at 24, available at http://www.minfin.nl/default.asp?CMS_TCP=tcpAsset&id=A5AC250C5B6745B5B67B94342DDDBEB21.

48. *Bosal Holding*, 2003 E.C.R. at para. 33.

49. Case C-250/95, *Futura Participations SA v. Administration des contributions*, 1997 E.C.R. I-2471, para. 22.

50. *Bosal Holding*, 2003 E.C.R. at para. 39.

subsidiaries. This appears to be a restatement of the previously discussed “same taxpayer” requirement, which until this case has never been a requirement at all.⁵¹

To further its argument rejecting the justifications, the Court analogized a judgment issued in 2001 in the joined cases of *Metallgesellschaft Ltd and Others* and *Hoechst AG v. Commissioners of Inland Revenue*.⁵² In those cases, the UK allowed subsidiaries established in the UK with parent companies in the UK to opt out of a prepayment of corporate taxes, whereas subsidiaries in the UK having a parent outside of the UK were required to make the prepayment.⁵³ The ECJ found an infringement of the freedom of establishment, which was unjustified since all of the subsidiaries, regardless of the location of their parent company, were eventually subject to mainstream corporations tax.⁵⁴ The advantage in *Metallgesellschaft Ltd and Others* and *Hoechst AG v. Commissioners of Inland Revenue* was merely a deferment of taxes owed, rather than a complete avoidance of tax on the profits. The situation is different where, as in *Bosal Holding*, the issue is not whether the deduction will be taken now or later, but whether it can be taken at all. The revenue loss to the Netherlands is much greater if forced to allow deduction of costs for profits earned abroad, than it was to the UK in *Metallgesellschaft Ltd and Others* and *Hoechst AG v. Commissioners of Inland Revenue* where it was required to allow the deferment regardless of the location of the parent company.

6. Erosion of Tax Base Justification

To argue that this revenue loss was a justification for the infringement in this case, the Netherlands government and the Commission asserted that the loss would represent an erosion of the tax base going beyond a mere diminution of tax revenue.⁵⁵ The ECJ has previously rejected the argument that protection from a mere diminution of tax revenue justifies infringement of the freedom of establishment.⁵⁶ The Court in *Bosal Holding*, without

51. See discussion of *Baars*, *infra* p. 7-8.

52. Joined Cases C-397/98, *Metallgesellschaft Ltd and Others*, and C-410/98, *Hoechst AG v. Commissioners of Inland Revenue*, 2001 E.C.R. I-1727, para 30.

53. *Id.*

54. *Id.*

55. *Bosal Holding*, 2003 E.C.R. at para. 20.

56. *Imperial Chemical Industries plc*, 1998 E.C.R. at 4695.

discussion, ruled that a justification relying on tax base erosion *going beyond a mere diminution* in revenue does not differ from a justification involving revenue losses amounting to a *mere diminution*.⁵⁷ The two circumstances, however, are easily distinguishable.

I.C.I. v. Colmer involved a UK parent company deducting, pro-rata, its share of losses incurred by a UK subsidiary owned through a holding company, which also owned subsidiaries in other Member States.⁵⁸ The loss of revenue complained of (and rejected by the ECJ) amounted to a mere diminution because the losses would offset profits taxable in the UK whether charged to the subsidiary or to the parent, since both were established in the UK.⁵⁹ The diminution is much greater where, as in the present case, a parent company is deducting costs which are incurred to earn profits taxable only outside of the Netherlands. By refusing to draw a distinction between the two situations, the ECJ has ruled that an infringement upon a basic freedom cannot be justified by an erosion of the tax base, no matter how large. This is a further narrowing of the arguments available to Member States to justify their tax policies, and could lead to large diminutions in the national tax bases.

IV. POLICY CONSIDERATIONS

A. Judicial Harmonization

“The decision [in *Bosal Holdings*] makes it clear that not a single political authority, when signing the EC Treaty, could have surmised what its impact would be on the levy of corporate income tax in the various Member States.”⁶⁰ This statement by a Dutch journalist describes the surprised reaction by many Member States to the ruling. By invalidating all of the Netherlands proposed justifications for its policy, the Court has clearly indicated that it intends to pursue harmonization of corporate tax codes in the EU. This is an objective that is hotly contested within the EU, and one that should only be pursued through the democratic process, if it is

57. *Bosal Holding*, 2003 E.C.R. at para. 42.

58. *Imperial Chemical Industries plc*, 1998 E.C.R. at para. 3-5.

59. *Id.* at para. 30.

60. Gerard T.K. Meussen, Netherlands: *Bosal Holding Case* and the Freedom of Establishment: A Dutch Perspective, 44 EUROPEAN TAXATION 59, 63 (2004).

to be achieved at all.

The Court's pursuit of harmonization is visible in its recent tax jurisprudence. Since 1990, the ECJ has increasingly asserted power over matters of direct taxation, an area traditionally and textually reserved to the Member States.⁶¹ Through its decisions, the ECJ is achieving harmonization through what some have deemed "the back door,"⁶² because of the lack of explicit EU authority over tax harmonization. By eliminating justifications for Treaty infringement, the Court is eroding the national tax bases, and moving Member States towards a single-market tax system, contrary to the wishes of many Member States.⁶³

EU Member States, especially smaller and less developed states, are strongly against this harmonization.⁶⁴ These countries rely on tax advantages to attract investment in their growing economies. If they lose the ability to offer tax incentives to corporations, it is possible that their fragile economies will falter.⁶⁵

It is not only these younger members that oppose harmonization. The UK Chancellor of the Exchequer publicly encouraged resistance to harmonization of the corporate tax codes.⁶⁶ The movement does have its proponents, however. Some older, more established Member States, such as France and Germany, do favor harmonization. It would allow them to compete more effectively with the emerging economies of the east without adopting more market-friendly tax structures.⁶⁷

While these few states do support harmonization of corporate taxes, the disagreement over this issue indicates that it should be left to the political process, rather than judicial intervention. The European Commission itself acknowledged that "a piecemeal approach to tax obstacles by way of litigation could lead to new problems in Member States' tax legislation. . . ."⁶⁸ The ECJ should

61. Mark Persoff, *The Impact of EU Developments on Member States' Tax Systems*, 15 INT'L TAX REV. 10, 11-12 (2004), available at 2004 WLNR 500338.

62. Ed Crooks, *EU Court Rulings Raise Worries for Tax Revenues and Business*, FIN. TIMES, Dec. 4, 2003 at 3.

63. See Persoff, *supra* note 61.

64. ANDREAS HAUFLE, TAXATION IN A GLOBAL ECONOMY 20 (Cambridge University Press 2001); See *EU Corporation Tax Harmonization Plans Will "Slowly Die," Polish Minister Says*, WORLD NEWS CONNECTION, Sep. 17, 2004, 2005 WL 4587083.

65. See Daniel Altman, *Turning the Tables on Reform with Interest*, INT'L HERALD TRIB., Sept. 18, 2004, at 10.

66. Persoff, *supra* note 61, at 11.

67. Altman, *supra* note 65.

68. Persoff, *supra* note 61 at 11-12.

have upheld the Netherlands law in this case to allow the Member States to settle this dispute politically.

B. A Political Solution

Through an amendment to the EC Treaty, the Member States could enshrine their right to protect domestic tax revenues. By formalizing the right in the treaty, it would be protected from challenge based on other Treaty sections (such as Articles 43 & 48). This path is not without challenge, however, as the fractious environment within the EU is likely to hamper any agreement.⁶⁹ Absent amendment, states may follow Spain's lead, and simply refuse to refer tax cases to the ECJ.⁷⁰ This, however, represents a breakdown in the system, rather than a constructive solution. Instead, the ECJ should exhibit restraint in this area, and allow the political process to work.

V. CONCLUSION

The Court in *Bosal Holding* struck down the Netherlands tax law as violative of the freedom of establishment. To reach this conclusion, the Court engaged in legal reasoning which indicated a desire to arrive at a particular result: harmonization of corporation taxes in the EU. Had it not had this result in mind, the Court could have easily distinguished the facts in *Bosal Holding* from the precedent relied on.

The ECJ also failed to adequately consider the policy justifications for upholding the Netherlands law. The countries of the EU reserved power over direct taxation to themselves at the formation of the EU, and consensus over harmonization of corporate taxation has not yet been reached. Rather than allowing that consensus to occur through experience and negotiation, the ECJ has marched towards harmonization through precedent. With the decision in *Bosal Holding*, a significant step has been taken towards extinguishing all justifications for infringement of EC freedoms based on national tax sovereignty. Ironically, this may provide the impetus needed for an amendment to the Treaty, forcing the Court to accept the outcome of the political process.

69. See Crooks, *supra* note 62 at 11.

70. Lee A. Sheppard, *Responding to Marks & Spencer, or Not*, 104 TAX NOTES 1489.

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