The Requirements of Union Law for Tax Legislation*

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I. The legal basis

European Union law contains a diverse set of requirements for the national tax codes of the Member States. These emerge, at least prima facie, from secondary legislation. Especially in the field of indirect taxation, and above all in the field of value-added tax, the harmonisation of tax legislation has made great progress: By and large, the assessment basis for value-added tax has been harmonised. Here, the Member States' fiscal margin of discretion is limited primarily to the - certainly by no means irrelevant - determination of tax rates. Such comprehensive harmonisation does not exist in the field of direct taxation. Nevertheless, selective secondary legislation provisions do limit the Member States' margin of discretion: For instance, directives pertaining to interest, dividends and royalties severely curtail the otherwise prevailing fiscal autonomy of the Member States.[1]

Primary legislation, however, is particularly important. Although the provisions are concise and in most cases do not expressly refer to tax law, the European Court of Justice ("ECJ" or "the Court") has further elaborated on these in decades of case law. The Court of Justice ascribes a certain meaning to them, which results in a whole series of requirements for the legislators of the Member States. The present paper will mainly focus on this in the following. Meanwhile, these requirements are so many and varied that the present paper can only single out a few examples and cannot, in any way, address them in full. Nevertheless, I will try to demonstrate the far-reaching impact of the requirements in Union law on the basis of a few rules. Beyond the wording of the provisions, the ECJ has developed general principles against which national legislation must be reviewed. First I would like

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[1] Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments; Directive 2003/49/EG of 03 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States; Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

to focus on a few requirements for which the Treaty itself provides clearly identifiable foundations, and then proceed with a few further principles essentially attributable to the case law of the ECJ and its law-developing ability, to then conclude with some tenets which, though occasionally addressed - by the case-law itself - the ECJ has so far failed to develop into generally applicable principles.

II. The requirements that ECJ derives from express provisions of Union law

1. Fundamental freedoms

So far, the fundamental freedoms have played the greatest role in the tax case law of the ECJ on primary legislation. Already since the 1970s, the Court has made it clear that it does not limit itself to declaring unlawful national regulations which distinguish on the basis of nationality.[2] Since nationality hardly plays a role in most national tax codes, it is rarely the subject-matter of differentiating provisions. Therefore, had the Court developed a merely formal understanding - as it is still the case today in the case law of most national courts regarding the interpretation of the discrimination prohibitions of double taxation conventions ("DTCs")[3] - the fundamental freedoms would have remained largely toothless in tax law.

The ECJ has developed a much differentiated case law on the admissibility of the different treatment of residents and non-residents: In many constellations, the Court viewed non-residents as being either legally or factually in a comparable position as residents.[4] The same applies to cross-border situations and purely internal situations.[5] The Court accepts the different treatment only when this is justified. In this context, the measure applied by the Court - at least initially - appeared to be very strict. In those cases - still rare in the earlier years - in which it sees different treatment as being justified, it subjects the respective national provision under review to a proportionality assess-

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[2] ECJ 12 February 1974, 152/73, *Sotgiu*, ECLI:EU:C:1974:13, para. 11; ECJ 8 April 1990, C-175/88, *Biehl*, ECLI:EU:C:1990:186, para. 13; ECJ 12 April 1994, C-1/93, *Halliburton*, ECLI:EU:C:1994:127, para. 15; ECJ 14 February 1995, C-279/93, *Schumacker*, ECLI:EU:C:1995:31, para. 28 et seq.; ECJ 11 August 1995, C-80/94, *Wielockx*, ECLI:EU:C:1995:271, para. 16; ECJ 27 June 1996, C-107/94, *Asscher*, ECLI:EU:C:1996:251, para. 36.

[3] See, for instance BFH, judgment of 19 November 2003 - I R 22/02, para. 24; BFH, judgment of 17 November 2004 - I R 20/04, para. 10 et seqq.

[4] ECJ 14 February 1995, C-279/93, *Schumacker*, ECLI:EU:C:1995:31; ECJ 27 June 1996, C-107/94, *Asscher*, ECLI:EU:C:1996:251, para. 48; ECJ 8 March 2001, Joined Cases C-397/98 and C-410/98, Metallgesellschaft, *Hoechst*, ECLI:EU:C:2001:134, para. 43 et seqq.

[5] ECJ 12 September 2006, C-196/04, *Cadbury Schweppes and Cadbury Schweppes Overseas*, ECLI:EU:C:2006:544; ECJ 4 June 2009, Joined Cases C-439/07 and C-499/07, *KBC Bank and Beleggen, Risicokapitaal, Beheer*, ECLI:EU:C:2009:339.

ment.[6] The ECJ hardly left Member States any possibilities to partition their tax system in a protectionist manner and favour residents or domestic investments.

The measure applied by the ECJ, however, is also subject to fluctuations. Those national legislators and courts that attempt to comply with the requirements developed by the ECJ and do not want to wait until the infringement of EU law by a provision of their state is also established by the ECJ itself, are faced with demanding and often nearly unmanageable tasks. In retrospect, it turns out that national courts sometimes acted "holier than the pope." This is often due to the fact that the ECJ is diluting what was originally a stringent standard. For instance, in 2001, it was clear for the Austrian Administrative Court ("VwGH") that on the basis of the case law of the ECJ available at the time, losses incurred with foreign permanent establishments must be deducted in the state of residence in case of corporate gains exempted under DTCs, because it would otherwise constitute an unjustifiable differentiation to domestic losses.[7] The VwGH did not even consider it necessary to refer this question to the ECJ for a preliminary ruling. Now the ECJ attaches much greater importance to coherence and symmetry considerations and, since the *Marks & Spencer* judgment rendered in late 2005, only final losses of foreign subsidiaries and permanent establishments must be deductible in such cases.[8] The ECJ has diluted even this case-law beyond recognition, so that today it is more a question of judicial pride that the ECJ has not completely abandoned this case law but formally continues to hold on to it.[9] Finally, the ECJ now accepts the exclusion of the deduction of foreign losses in almost all cases.

So it is not surprising that in 2005, the ECJ no longer found the strength to apply its case law on fundamental freedoms - but also to cases of the horizontal comparability test. It would seem obvious from an internal market point of view that tax law provisions that distinguish between residents of different other Member States are equally disruptive as provisions that favour nationals over foreigners or complicate foreign investments as compared to domestic investments. Against the background of the fundamental freedoms, the ECJ saw it as adequate if such differentiation was attributed to a provision in the DTCs.[10] To this day, however, the ECJ has not yet generally rejected

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[6] *Michael Lang*, 2005 – Eine Wende in der steuerlichen Rechtsprechung des ECJ zu den Grundfreiheiten? In: FS *Wolfgang Spindler*, Köln 2011, p.297 et seqq., p.307.

[7] VwGH 25 September 2001, 99/14/0217.

[8] ECJ of 13 December 2005, C-446/03, *Marks & Spencer*, ECLI:EU:C:2005:763.

[9] *Michael Lang*, Has the Case Law of the ECJ on Final Losses Reached the End of the Line?, ET 2014, p. 530 et seqq.

[10] ECJ 5 July 2005, C-376/03, *D*, ECLI:EU:C:2005:424.

the horizontal comparability test. Therefore, it must be assumed that the Court would not readily grant absolution to national provisions which distinguish between residence in other states and are rooted in national law - and not in DTCs.[11]

In diluting the measure the ECJ itself had established, the Court operated on all levels of the doctrine of the fundamental freedoms: First, since year one, the ECJ has developed its case law on fundamental freedoms in tax law in the form of a comparability test - and not as a prohibition on restrictions. If one understands the argument of a prohibition on restrictions merely as a conceptually or linguistically abbreviated comparability test, there is no difference between both of them. After all, establishing a restriction also requires a measure which can only be seen in a provision applicable to other situations.[12] In the early phase of its case law, the ECJ for the most part simply accepted comparability without any in-depth justification. At a later stage, it delved deeper into this part of its review of fundamental freedoms and often justified conformity with fundamental freedoms with the lack of comparability.[13] The justification reasons have acquired an even greater significance. In this case, the ECJ sometimes introduced new justifications, but sometimes combined previously rejected justifications, only to then accept them as a package.[14] Even in the application of its comparability test, the ECJ has significantly diluted the measure in some cases and no longer demands the most moderate interference from the national legislators in all cases.[15]

This development in case law, however, took a distinctly more complex course, since an easing of the measure was not observed *in all areas*. At the same time when the ECJ began to scale back the measure developed from the fundamental freedoms in its case law, it also really began developing its case law in relation to the non-member

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[11] *Michael Lang*, Jüngste Tendenzen zur „horizontalen" Vergleichbarkeitsprüfung in der steuerlichen Rechtsprechung des ECJ zu den Grundfreiheiten, SWI 2011, p. 154 et seqq., p. 162 et seq.

[12] *Michael Lang*, Kapitalverkehrsfreiheit und Doppelbesteuerungsabkommen, in: Kapitalverkehrsfreiheit und Steuerrecht, published by *Eduard Lechner/Claus Staringer/ Michael Tumpel*, Vienna 2000, p. 181 et seqq., p. 190 et seq.

[13] ECJ 12 July 2005, C-403/03, *Schempp*, ECLI:EU:C:2005:446, para. 35; ECJ 5 July 2005, C-376/03, *D*, ECLI:EU:C:2005:424, para. 61; ECJ 8 September 2005, C-512/03, *Blanckaert*, ECLI:EU:C:2005:516, para. 49 et seqq.; ECJ 25 February 2010, C-337/08, *X Holding BV*, ECLI:EU:C:2010:89, para. 40.

[14] ECJ 13 December 2005, C-446/03, *Marks & Spencer*, ECLI:EU:C:2005:763, para. 51.

[15] ECJ 13 December 2005, C-446/03, *Marks & Spencer*, ECLI:EU:C:2005:763, para. 59; see *Michael Lang*, Die Rechtsprechung des ECJ zu den direkten Steuern, in: Bilanz und Perspektiven zum europäischen Recht, published by *Alice Wagner/Valentin Wedl*, Vienna 2007, p.113 et seqq., p.124 et seq.

countries.[16] At first, this applies to the three other European Economic Area ("EEA") States. In essence, the standards developed by the ECJ for situations within the EU apply here, albeit the Court occasionally eased this measure slightly on matters of detail.[17] Above all, however, the free movement of capital is of importance: It is not only applicable within the Union, but in some cases even on national provisions concerning investments in non-member countries or residents in these. Although the relevant case law with regard to these requirements for a distinction between the free movement of capital and the other fundamental freedoms is not yet fully consolidated, one thing is clear: The free movement of capital remains an absolutely formidable scope of application in relationships to non-member countries.[18] Special treaties with non-member countries - such as the agreement with Switzerland on the free movement of persons - further expand the scope of other fundamental freedoms to certain constellations of non-member countries.

2. *The Charter of Fundamental Rights and general legal principles*

For some time now, however - even in the field of tax law - the fundamental rights protection guaranteed under Union law goes far beyond the primarily economic nature of the fundamental freedoms: Since the Treaty of Lisbon, the Union also expressly recognises "the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties." In addition, the "fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

Pursuant to Article 51, the Charter of Fundamental Rights ("CFR") also applies to the Member States "when they are implementing Union law". Although there is controversy over how this phrase should be understood in detail,[19] it is clear that the CFR is - at least - also relevant when secondary legislation provisions like 'directives'

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[16] *Karoline Spies*, Die Kapitalverkehrsfreiheit in Konkurrenz zu den anderen Grundfreiheiten, Vienna 2015 (cit.: Kapitalverkehrsfreiheit), p.55 et seq.

[17] ECJ 9 November 2009, C-540/07, *Commission/Italien*, ECLI:EU:C:2009:717; ECJ 28 October 2010, C-72/09, *Établissements Rimbaud*, ECLI:EU:C:2010:645; ECJ 5 May 2011, C-267/09, *Commission/Portugal*, ECLI:EU:C:2011:273.

[18] *Spies*, Kapitalverkehrsfreiheit (Fn. 16), p.247 et seqq.

[19] *Julia Schmoll*, Unionsgrundrechte, innerstaatliche Grundrechte und die nationalen Höchstgerichte, ZÖR 2011, p.461 et seqq., p.467 mwN; *Rudolf Müller*, Verfassungsgerichtsbarkeit und Europäische Grundrechtecharta, ÖJZ 2012, p.159 et seqq., p.161 et seq.

are to be applied. Therefore, the CFR is comprehensively relevant in the field of legislation on value-added tax, and, at least in some sections, in the field of direct taxes.[20]

This can be demonstrated on the basis of a case decided by the Austrian Administrative Court on 23 January 2013:[21] The case involved the value-added tax claim to input tax deduction, which the applicant had asserted but was denied by the authorities. Although the court of second instance having jurisdiction at the time, the Independent Tax Tribunal (UFS), did conduct an oral hearing upon the applicant's request, the applicant had not been duly summoned. Under Austrian procedural law, such a constellation is tantamount to the omission of an oral hearing. In this particular case, however - again under purely national law - this would not have been a material procedural error leading to a revocation of the decision. Due to the applicability of the CFR in value-added tax law, which is largely harmonized on the basis of directives, a different assessment took effect: Pursuant to Article 47 para. 2 CFR, the applicant was granted the right to an oral hearing and to the participation in these appellate proceedings under Union law.

Notably, the ECJ judgment in the *Åkerberg Fransson* case gave rise to an intense debate as to whether the fundamental rights protection guaranteed by the CFR is even more extensive.[22] This case dealt with the *Ne bis in idem* principle: The taxpayer, who had evaded taxes, was subjected to both administrative penalties and judicial sanctions. The main focus of the proceedings was value added tax evasion, which ultimately established a connection to harmonized secondary legislation. The ECJ, however, issued only general statements, giving rise to speculations over whether the fundamental rights protection reaches far beyond the scope of secondary legislation:[23] "Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of EU law, situations cannot exist which are covered in that way by EU law without those fundamental rights being applicable. The applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter". *Zorn* concluded therefrom that the scope of the CFR "covers all

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[20] *Cécile Brokelind*, Case Note on Åkerberg Fransson (Case C-617/10), ET 2013, p.281 et seqq., p.284.

[21] VwGH 23 January 2013, 2010/15/0196.

[22] ECJ 26 February 2013, C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105; see *Brokelind*, ET 2013 (fn. 20), p.281 et seqq.; *Nikolaus Zorn*, Überlegungen zu unionsrechtlichen Grundrechten, ÖStZ 2013, p.342 et seqq.; *Christoph Safferling*, Der ECJ, die Grundrechtecharta und nationales Recht: Die Fälle Åkerberg Fransson und Melloni, NStZ 2014, p.545 et seqq., p.547 et seqq.; *Christoph Ohler*, Grundrechtliche Bindungen der Mitgliedstaaten nach Art. 51 GRCh, NVwZ 2013, p.1433 et seqq., p.1436.

[23] ECJ 26 February 2013, C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105, para. 21.

situations which potentially restrict market freedoms"[24] further specifying that "probably every cross-border situation" is hence covered.[25] He pointed out, in particular, that the ECJ derives the right to general free movement of Union citizens from Article 21 of the Treaty on the Functioning of the European Union ("TFEU") (Union citizenship).[26] Other authors did not draw such far-reaching conclusions from this case law[27], pointing out that this judgment continues to allow a distinction between different situations.[28] They all agree, however, on the potential impact of this case law, and, even today, the significance of the CFR in general, and in tax law in particular, is not yet conclusively clear.

After all, at issue is also the fundamental question as to which extent the high courts of the Member States are still in control of establishing the standards of fundamental rights protection in their case law on the fundamental rights guarantees of each Member State, and to how far they must bow to the requirements of the ECJ. In the aforementioned *Åkerberg Fransson* case, the ECJ made it quite clear that, in this area too, it assumes the primacy of its own case law:[29] "Where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised (see, in relation to the latter aspect, Case C-399/11 *Melloni* [2013] ECR, paragraph 60)".

The CFR guarantees various fundamental rights which, against the background of the case law described above, may be of significance for large sections of tax legislation. These include, for instance, the right to equality before the law, non-discrimination, and the right to an effective remedy and to a fair trial.

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[24] *Zorn*, ÖStZ 2013 (fn. 22), p.343.

[25] *Zorn*, ÖStZ 2013 (fn. 22), p.343, fn. 16 with further reference.

[26] *Zorn*, ÖStZ 2013 (fn. 22), p.343.

[27] Inter alia, *Katharina Pabel*, Der Einfluss der Charta der Grundrechte der EU auf das nationale Strafrecht, in: Finanzstrafrecht 2014, published by *Roman Leitner*, Vienna 2015, p.215 et seqq., p.216 et seqq.

[28] *Michael Holoubek*, Keine mittelbare Drittwirkung für „Grundsätze" der GRC, DRdA 2015, p.21 et seqq., p.24.

[29] ECJ of 26 February 2013, C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105, para. 29.

3. State aid law

State aid law is turning out to be an increasingly sharp sword in Union law: The ECJ made it clear at an early stage that favourable tax treatment can be seen as state aid.[30] It makes no difference whether a state grants direct aid to one or several undertakings or confers an economic advantage on these undertakings by relieving them from a burden to which their competitors are subjected. State aid must be notified to the Commission in advance, which will then approve where appropriate. Therefore, tax provisions that are classified as state aid must be notified to the Commission. Unless this has been done, such state aid may not be granted. In the case of some tax provisions, this can mean that, despite their due publication in the law gazette, these must not be observed by any administrative authority or any court.[31] The ECJ interprets and continuously develops the relevant criteria for the definition of state aid. For this reason, and because there is a growing sensitivity to the importance of state aid law in tax legislation, in many cases the awareness that a provision may constitute state aid only sharpens after its publication. As a rule, however, this happens because those responsible did not even think about a notification of the legal provision - during the legislative process. Where an authority or a court in a pending case suspects that the favourable provision may constitute state aid, and this suspicion is confirmed by the ECJ after an application by the court for a preliminary ruling, the favourable provision not only may no longer be applied as of that moment, but the standstill obligation shall be applied at least to all proceedings pending. This will eventually lead to the unwinding of any benefits already granted. Under certain circumstances, it is possible that the failure to notify the Commission cannot be remedied for previous grants of state aid, even if the Member State submits the notification at a later stage and the Commission approves the granting of the aid.[32] Should the Commission refuse to grant approval, this may even lead to recoveries going further back in time, upon the request of the Commission.[33] Consequently, even if an undertaking acts in agreement with the competent tax authority and both taxpayer and authority are convinced that the benefit was rightly granted, it cannot be sure that it

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[30] ECJ of 23 February 1961, C-30/59, *De gezamenlijke Steenkolenmijnen*, ECLI:EU:C:1961:2.

[31] Regarding the standstill obligation, see *Franz Philipp Sutter*, Das EG-Beihilfenverbot und sein Durchführungsverbot in Steuersachen, Vienna 2005, p.166 et seqq.

[32] See *Michael Lang*, Die Auswirkungen des gemeinschaftsrechtlichen Beihilferechts auf das Steuerrecht, 17. ÖJT Band IV/1, Vienna 2009 (cit.: Auswirkungen), p.81 et seqq. with further reference.

[33] *Alexander Zeiler*, Mögliche Folgen einer Beihilferechtswidrigkeit der Firmenwertabschreibung des § 9 Abs 7 KStG, SWI 2014, p.360 et seqq., p.367 et seq.

can keep the tax benefit once granted. According to the case law of the ECJ, any considerations with regard to the protection of legitimate expectations must be largely disregarded in such constellations:[34] The taxpayer cannot use the argument that the authority did not signal any doubt as to the lawfulness of the benefit granted, so as to avoid the consequences of the standstill obligation.

Due to the sharp procedural sword described above, the time when an aid is granted is relevant: Article 107 para. 1 TFEU contains the following provision: "Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market." According to the case law of the ECJ, a measure is qualified as state aid if each of the four cumulative criteria, on which this provision is based, is met: These criteria refer to the financing of the measure by the State or through State resources (first criterion), its conferring of an advantage on an undertaking (second criterion), the selectivity of that measure (third criterion), and the effect of the measure on trade between Member States and the distortion of competition resulting from the measure (fourth criterion).[35]

When examining tax provisions as to their state aid character, selectivity is usually of central importance. The older case law of the ECJ placed the primary focus on the search for the "normal taxation".[36] A measure was considered a state aid if it constituted an exception to the general system of taxation. In its more recent case law, however, the ECJ recognised that this approach does not yield satisfactory results:[37] In reality, anyone who distinguishes "normal taxation" from exception by allowing other tax provisions to apply, is making a distinction between at least two provisions that have a different scope and which provide for different legal consequences.[38] According to what criteria can one determine which of those provisions is the rule and which the exception? Whether the legislator expressly designates one of the two

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[34] ECJ 20 September 1990, C-5/89, *Commission/Germany*, ECLI:EU:C:1990:320; ECJ 11 July 1996, C-39/94, *SFEI/La Poste*, ECLI:EU:C:1996:285; ECJ 20 March 1997, C-24/95, *Rheinland Pfalz/Alcan*, ECLI:EU:C:1997:163; ECJ 7 March 2002, C-310/99, *Italy/Commission*, ECLI:EU:C:2002:143.

[35] ECJ 8 September 2011, Joined Cases C-78/08 to C-80/08, *Paint Graphos*, ECLI:EU:C:2011:550, para. 43.

[36] See *Clair Micheau*, Tax selectivity in state aid review: a debatable case practice, ECTR 2008, 276 (277 et seq.).

[37] ECJ of 15 November 2011, Joined Cases C-106/09P und C-107/09P, *Commission and Spain/Gibraltar and United Kingdom*, ECLI:EU:C:2011:732.

[38] *Michael Lang*, State Aid and Taxation: Recent Trends in the Case Law of the ECJ, EStAL 2012, p.411 et seqq., p.419.

provisions as the rule and the other as an exception cannot be of any relevance, since this would either depend on coincidences in law-making methodology, or it would be left to the discretion of the legislators to decide whether there is a "suspicion of state aid" merely based on the choice of their formulations - and without changing the scope and the legal consequences of the two provisions.[39] Examining the intention of the legislator would not yield any better results either:[40] The terminology used by the authors of laws or materials does not change the fact that their ultimate aim is to have one or the other legal consequence apply under certain circumstances. Finally, those asking which provisions have a large scope and which ones a smaller scope, so as to distinguish the rule from the justifiable exception on the basis of this assessment, are equally doomed to fail:[41] Legal provisions offer only an abstract definition of the group they are addressing. The number of taxpayers actually affected is not foreseeable. Records on how many taxpayers were affected by this rule in the past do not provide any clues for the future. The approach recently taken by the ECJ in its *Hervis* judgment, i.e. to establish a discrimination for the purposes of the fundamental freedoms when a provision applies to non-residents "in the majority of cases"[42] has not played any role in state aid law to this date, and is dogmatically anything but convincing even in the field of fundamental freedoms. Even assuming that there are corresponding predictions as to the possible number of cases that will be affected by the one or the other provision in the future, there is no reason to apply the selectivity criterion only under the condition that the minority will be privileged over the majority. Therefore, it was for good reason that the ECJ did not rely exclusively on the rule-exception approach in the past, and does even less so today. In his opinion in Case C-487/06 *British Aggregates/Commission*, Advocate General *Mengozzi* rightly summarized the previous case law as follows:[43] "With particular reference to State measures of a fiscal nature, the case-law shows [. . .] that even measures which are selective, in that they differentiate between undertakings, may escape being classified as aid, if that differentiation is justified by the nature or structure of the tax regime of which they form part [. . .]. It follows, according to the Court, that, in order to determine whether or not a measure is

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[39] ECJ of 22 December 2008, C-487/06P, *British Aggregates/Commission*, ECLI:EU:C:2008:757, para. 89.

[40] *Lang*, Auswirkungen (fn. 32), p.25.

[41] *Michael Lang*, Seminar J: Steuerrecht, Grundfreiheiten und Beihilfeverbot, IStR 2010, p.570 et seqq., p.576.

[42] ECJ 5 February 2014, C-385/12, *Hervis*, ECLI:EU:C:2014:47, para. 39.

[43] Advocate General *Paolo Mengozzi* 17 July 2008, C-487/06P, *British Aggregates/Commission*, ECLI:EU:C:2008:419, para. 83.

selective [. . .], 'it is appropriate to examine whether, within the context of a particular legal system, that measure constitutes an advantage for certain undertakings by comparison with others which are in a comparable legal and factual situation'."

Not only general rules can have a state aid character: When the authority of a State does not abide by its own legal regulations and unlawfully favours an undertaking, this also constitutes a state aid.[44] According to earlier case law, this can be considered an unjustifiable exception to normal taxation. The state aid character of such unlawful benefits also becomes evident against the background of more recent case law: Undertakings subjected by law to a tax obligation find themselves in a similar situation. When individual undertakings are favoured through the non-application of tax laws, the result is an unjustifiable unequal treatment of what in essence are similar situations.

A Member State, however, cannot avoid the state aid accusation by drafting provisions in a manner that grants extensive room for manoeuvre to the authority. When the provision is so faintly binding for the authority that the latter can treat undertakings in a similar situation differently and favour individual undertakings over others without violating the legal basis, this very legal basis proves to be an illicit state aid. It is very difficult to draw the line: Legal provisions almost always grant room for manoeuvre to the authority, since the objective of tax proceedings, just as any other administrative proceedings, is to specify general-abstract rules. It is therefore relevant as to how far-reaching the legal obligation must be to avoid even raising the suspicion of state aid. In this context, it is interesting to see if under the perspective of state aid law an administrative practice once chosen - within the room for manoeuvre allowed by the law - carries with it a self-obligation for the authority to interpret the law in exactly the same manner for similar cases in the future. If the authority uses this room for manoeuvre differently each time, this may be seen as an inadmissible preferential treatment of the favoured undertaking. Then the question arises, however, as to which extent regionally differentiated administration practices can be problematic in a state aid law that is in itself based on the effect of the measure and not on the intention of the authority.

These considerations show that state aid law increasingly narrows the margin of manoeuvre of the Member States, leaving them ever fewer possibilities of implementing economic and regional policies through tax provisions or administrative practice without the Commission's approval. Fiscal state aid law has not yet been sufficiently per-

[44] See, for instance, Commission decision 1999/509/EC of 14 October 1998, Magefesa, OJ L 198/15, 30 July 1999.

meated by jurisdiction and science. The provisions under Union law have the potential of limiting the Member States' room for manoeuvre even further.

III. The requirements that ECJ implicitly derives from Union law

1. Legal certainty

Over the years, the ECJ has also developed a few principles of Union law which are not explicitly found in primary legislation, and for the development of which the Court was occasionally accused of judicial activism.[45] The principle of legal certainty is well-suited to illustrate such case law by example: The joined *S.N.U.P.A.T.* cases dealt inter alia with the revocation of exemptions from the countervailing charge for scrap metal.[46] The proceedings raised the question whether benefits can be withdrawn once they are granted. The ECJ answered in the negative, citing the following reasons:[47] "That allegation disregards the fact that the principle of respect for legal certainty, important as it may be, cannot be applied in an absolute manner, but that its application must be combined with that of the principle of legality. The question which of these principles should prevail in each particular case depends upon a comparison of the public interest with the private interests in question [. . .]. Furthermore, according to the law of all the member states, retroactive withdrawal is generally accepted in cases in which the administrative measure in question has been adopted on the basis of false or incomplete information provided by those concerned". Although the ECJ downplayed the importance of the principle of legal certainty in this judgment and stressed that it should be weighed against other principles, it is decisive that the Court already assumed the existence of this principle at all - even if without justification - in a judgment it issued already back in 1961. With its qualification, the ECJ acknowledged this principle in the first place, thus raising it to the level of Union law - Community law at the time. At all events, it is also important for the dogmatic deduction that the ECJ also incidentally pointed out - though in the context of the qualification of the principle of legal certainty - to the "law of all Member States."

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[45] *Cécile Brokelind*, Introduction, in: Principles of Law: Function, Status and Impact in EU Tax Law, published by *Cécile Brokelind*, Amsterdam 2014, p.1 et seqq., p.2 et seq.

[46] ECJ 22 March 1961, Joined Cases 42 and 49/59, *SNUPAT/High Authority*, ECLI:EU:C:1961:5.

[47] ECJ 22 March 1961, Joined Cases 42 and 49/59, *SNUPAT/High Authority*, ECLI:EU:C:1961:5.

The ECJ then already very self-evidently spoke of "a general principle of legal certainty which is inherent in the Community legal order".[48] In its judgment in the *Gondrand Frères* case, which dealt with monetary compensatory amounts according to the common customs tariff, the ECJ held that[49] "The principle of legal certainty requires that rules imposing charges on the taxpayer must be clear and precise so that he may know without ambiguity what are his rights and obligations and may take steps accordingly". The judgment in the case *Ireland vs Commission*, which dealt with questions on the Community financing via the European Agricultural Guidance and Guarantee Fund, contains the following statement:[50] "Moreover, as the court has repeatedly held, community legislation must be certain and its application foreseeable by those subject to it. That requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which they impose on them". The ECJ held a similar opinion in the *Commission vs France and Great Britain* judgment concerning Community levies:[51] "Furthermore, it must be pointed out that, according to the case-law of the Court (see the judgment of 9 July 1981 in Case 169/80 *Administration des douanes v Gondrand frères* ((1981)) ECR 1931), the principle of legal certainty requires that rules imposing charges on the taxpayer be clear and precise so that he may know without ambiguity what are his rights and obligations and may take steps accordingly".

The principle of legal certainty, however, is not only relevant with regard to Community levies but also when national tax provisions must comply with the requirements of secondary legislation:[52] "Furthermore, inasmuch as the Hellenic Republic acknowledges that the distinction between 'actual taxation' and being 'subject to' duty was not clearly made in the transfer rules at issue and may have led to a degree of confusion, it should be added that, in any event, such rules do not satisfy the requirements established by the case-law concerning transposition of directives. According to that case-law, it is particularly important, in order to satisfy the requirement for legal certainty, that individuals should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights and, where appropriate, to rely on them before the national courts ([. . .]).

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[48] ECJ 27 March 1980, Joined Cases 66, 127 and 128/79, *Amministrazione delle Finanze/Salumi*, ECLI:EU:C:1980:101, para. 10.

[49] ECJ 9 July 1981, 169/80, *Gondrand Frères*, ECLI:EU:C:1981:171, para. 17.

[50] ECJ 15 December 1987, 325/85, *Ireland/Commission*, ECLI:EU:C:1987:546, para. 18.

[51] ECJ 22 February 1989, Joined Cases 92 and 93/87, *Commission/France and United Kingdom*, ECLI:EU:C:1989:77, para. 22.

[52] ECJ 7 June 2007, C-178/05, *Commission/Greece*, ECLI:EU:C:2007:317, para. 33.

The rules cannot be regarded as establishing a clear and precise legal situation of that kind."

Especially in its more recent case law, the ECJ attaches importance to the principle of legal certainty also in the scope of application of the fundamental freedoms. The *SIAT* judgment dealt with the recognition of operating expenses, which was far more difficult in the scope of a special rule than under the general provision.[53] The special rule was to be applied when the remuneration is paid to a service provider established in another Member State in which that provider is not subject to tax on income or "is subject there, as regards the relevant income, to a tax regime which is appreciably more advantageous than the applicable regime in Belgium". In para. 27 of its judgment, the ECJ held that "the scope of that special rule is not delimited with sufficient precision at the outset and, in a situation where the service provider is established in a Member State other than the Kingdom of Belgium and is subject there to a tax regime which is more advantageous than the applicable regime in Belgium, there is uncertainty as to whether the foreign regime will be considered to be a 'regime which is appreciably more advantageous' and whether, as a result, the special rule will apply". Although the ECJ held the distinction required by the special rule as "suitable for attaining the objectives of preventing tax evasion and avoidance and of preserving both the effectiveness of fiscal supervision and the balanced allocation between Member States of the power to impose taxes" against the background of the freedom to provide services, it intervened with regard to the proportionality assessment:[54] "It must be stated that, as has been noted in paragraph 27 above, a rule framed in such terms does not make it possible, at the outset, to determine its scope with sufficient precision and its applicability remains a matter of uncertainty. Such a rule does not, therefore, meet the requirements of the principle of legal certainty, in accordance with which rules of law must be clear, precise and predictable as regards their effects, in particular where they may have unfavourable consequences for individuals and undertakings (see, to that effect judgments of 7 June 2005, *VEMW and others*., C-17/03, [2005] ECR I-4983, paragraph 80, and Joined Cases C-72/10 and C-77/10 *Costa and Cifone* [2012] ECR, paragraph 74). [. . .] As it is, a rule which does not meet the requirements of the principle of legal certainty cannot be considered to be proportionate to the objectives pursued."

Similarly, the ECJ regarded the differentiation as justified in the *Itelcar* case, in which the Court had to examine a national rule on the

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[53] ECJ 5 July 2012, C-318/10, *Siat SA*, ECLI:EU:C:2012:415.

[54] ECJ 5 July 2012, C-318/10, *Siat SA*, ECLI:EU:C:2012:415 para. 57 et seqq.

basis of the free movement of capital:[55] "By providing that certain interest paid by a resident company to a company established in a non-member country, with which it has special relations, is not to be deductible for the purposes of determining the taxable profit of that resident company, rules such as those at issue in the main proceedings are capable of preventing practices the sole purpose of which is to avoid the tax that would normally be payable on profits generated by activities undertaken in the national territory. It follows that such rules are an appropriate means of attaining the objective of combating tax evasion and avoidance (see, by analogy, Case C-524/04 *Test Claimants in the Thin Cap Group Litigation*, paragraph 77)." The rule, however, eventually proved to be in violation of the fundamental freedoms at the level of the proportionality assessment:[56] "That being so, the rules in question do not make it possible, at the outset, to determine their scope with sufficient precision. Accordingly, they do not meet the requirements of legal certainty, in accordance with which rules of law must be clear, precise and predictable as regards their effects, especially where they may have unfavourable consequences for individuals and companies. As it is, rules which do not meet the requirements of the principle of legal certainty cannot be considered to be proportionate to the objectives pursued (see *SIAT*, paragraphs 58 and 59)." This case law demonstrates that the ECJ obviously requires national law to generally comply with certain minimum rule-of-law standards. Although the rule is not contrary to Union law simply because it does not meet the specificity requirements, when a differentiation falling within the scope of application of a fundamental freedom is scrutinized by the ECJ, the lack of specificity of a rule will come at the expense of the respective Member State, even if the differentiation per se was justified. The ECJ thus indirectly increases the pressure on the Member States to comply with the principle of legal certainty in their legislation.

This principle acquires an even greater significance against the background of state aid law. In the *P Oy* case, the ECJ recently presented the following considerations on the criterion of selectivity which is essential for the definition of state aid:[57] "According to the case-law of the Court, a measure which, although conferring an advantage on its recipient, is justified by the nature or general scheme of the system of which it is part does not fulfil the condition of selectivity ([. . .]). Thus, a measure which constitutes an exception to the application of the general tax system may be justified if the Member State

[55] ECJ 3 October 2013, C-282/12, *Itelcar*, ECLI:EU:C:2013:629, para. 35.
[56] ECJ 3 October 2013, C-282/12, *Itelcar*, ECLI:EU:C:2013:629, para. 44.
[57] ECJ 18 July 2013, C-6/12, *P Oy*, ECLI:EU:C:2013:525, para. 22 et seqq.

concerned can show that that measure results directly from the basic or guiding principles of its tax system ([. . .]). The fact that an authorisation procedure exists does not in itself preclude such justification. Justification is possible if, under the authorisation procedure, the degree of latitude of the competent authorities is limited to verifying the conditions laid down in order to pursue an identifiable tax objective and the criteria to be applied by those authorities are inherent in the nature of the tax regime. So far as concerns the power of the competent authorities, it has been established by the Court's case-law that discretion which enables those authorities to determine the beneficiaries or the conditions under which the financial assistance is provided cannot be considered to be general in nature (see, to that effect, Case C-256/97 *DM Transport* [1999], I-3913, paragraph 27 and the case-law cited). Thus, the application of an authorisation system which enables losses to be carried forward to later tax years, such as that in question in the present case, cannot, in principle, be considered to be selective if the competent authorities have, when deciding on an application for authorisation, only a degree of latitude limited by objective criteria which are not unrelated to the tax system established by the legislation in question, such as the objective of avoiding trade in losses. On the other hand, if the competent authorities have a broad discretion to determine the beneficiaries or the conditions under which the financial assistance is provided on the basis of criteria unrelated to the tax system, such as maintaining employment, the exercise of that discretion must then be regarded as favouring 'certain undertakings or the production of certain goods' in comparison with others which, in the light of the objective pursued, are in a comparable factual and legal situation (see, to that effect, *Commission and Spain v Government of Gibraltar and United Kingdom*, paragraph 75)." Ultimately, this means that rules granting too much room for manoeuvre to the authority can be characterised as selective, and thus, qualify as state aid. In all those cases in which the decision-making powers of the authority are not adequately determined, the latter has the possibility of introducing inappropriate considerations into its decision making. Due to the above-mentioned standstill obligation, the consequence would be the non-applicability of such rules. The sharp sword of state aid law, may therefore ultimately result in a comprehensive enforcement of the principle of legal certainty in the national legislation of the Member States.

2. *Protection of legitimate expectations*

The principle of legal certainty is closely linked to that of the protection of legitimate expectations. This was made clear by the ECJ in

its *Duff* judgment:[58] The principle of the protection of legitimate expectations, "which is part of the Community legal order ([. . .]), is the corollary of the principle of legal certainty, which requires that legal rules be clear and precise, and aims to ensure that situations and legal relationships governed by Community law remain foreseeable. It is settled case-law that in the sphere of the common organization of the markets, whose purpose involves constant adjustments to meet changes in the economic situation, economic agents cannot legitimately expect that they will not be subject to restrictions arising out of future rules of market or structural policy (see, in particular, the judgment in Case C-177/90 *Kuehn v Landwirtschaftskammer Weser-Ems* [1992] ECR I-35, paragraph 13). According to paragraph 14 of that judgment, the principle of the protection of legitimate expectations may be invoked as against Community rules only to the extent that the Community itself has previously created a situation which can give rise to a legitimate expectation". Even if the ECJ did not see any legitimate expectations in need of protection in the specific judgment, its arguments confirmed the protection of legitimate expectations as an important principle of Union law.

The ECJ also linked legal certainty and the protection of legitimate expectations in its *Elmeka* judgment.[59] In addition, it attributed importance to the principle of the protection of legitimate expectations - in the field of value-added tax harmonised through secondary legislation - also with regard to the national law of the Member States and the authorities of the Member States. "Under the settled case-law of the Court, the principles of protection of legitimate expectations and legal certainty form part of the Community legal order. On that basis, these principles must be respected by the institutions of the Community, but also by Member States in the exercise of the powers conferred on them by Community directives (see in particular Case C-381/97 *Belgocodex* 1998, I-8153, paragraph 26, and Case C-376/02 *Goed Wonen* [2005], I-3445, paragraph 32). It follows that national authorities are obliged to respect the principle of protection of the legitimate expectations of economic agents. As regards the principle of protection of the legitimate expectations of the beneficiary of the favourable conduct, it is appropriate, first, to determine whether the conduct of the administrative authorities gave rise to a reasonable expectation in the mind of a reasonably prudent economic agent (see, to that effect, Joined Cases 95/74 to 98/74, 15/75 and 100/75 *Union nationale des coopératives agricoles de céréales and Others v Commission*

[58] ECJ 15 February 1996, C-63/93, *Duff*, ECLI:EU:C:1996:51, para. 20.

[59] ECJ 14 September 2006, Joined Cases C-181/04 to C-183/04, *Elmeka*, ECLI:EU:C:2006:563.

and Council [1975], 1615, paragraphs 43 to 45, and Case 78/77 *Lühr*s [1978], 169, paragraph 6). If it did, the legitimate nature of this expectation must then be established."

The *Plantanol* judgment also dealt with value-added tax harmonized through directives.[60] In this case, the ECJ chose even more general formulations to emphasize the importance of the protection of legitimate expectations: "It is clear from the Court's settled case-law that any economic operator on whose part the national authorities have promoted reasonable expectations may rely on the principle of the protection of legitimate expectations. However, where a prudent and circumspect economic operator could have foreseen that the adoption of a measure is likely to affect his interests, he cannot plead that principle if the measure is adopted. Furthermore, economic operators are not justified in having a legitimate expectation that an existing situation which is capable of being altered by the national authorities in the exercise of their discretionary power will be maintained (see, to that effect, in particular, Joined Cases C-37/02 and C-38/02 *Di Lenardo and Dilexport* [2004] ECR I-6911, paragraph 70 and the case-law cited, and Case C-310/04 *Spain v Council* [2006] ECR I-7285, paragraph 81). [. . .] As regards the expectation which a taxable person might have as to the application of a tax advantage, the Court has already held that when a directive on fiscal matters gives wide powers to the Member States, a legislative amendment adopted under the directive cannot be considered to be unforeseeable ([. . .])."

The protection of legitimate expectations is of great significance for the finality of administrative decisions. In *Kühne & Heitz*, the ECJ clearly held that the national bodies are not obliged to ignore this element of the protection of legitimate expectations in order to comply with other requirements under Union law:[61] "Legal certainty is one of a number of general principles recognised by Community law. Finality of an administrative decision, which is acquired upon expiry of the reasonable time-limits for legal remedies or by exhaustion of those remedies, contributes to such legal certainty and it follows that Community law does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which has become final in that way."

In its *Kapferer* judgment, the ECJ further substantiated this principle and specified the resulting consequences:[62] "In that regard, attention should be drawn to the importance, both for the Community legal order and national legal systems, of the principle of res judicata. In

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[60] ECJ 10 September 2009, C-201/08, *Plantanol*, ECLI:EU:C:2009:539.

[61] ECJ 13 January 2004, C-453/00, *Kühne & Heitz*, ECLI:EU:C:2004:17, para. 24.

[62] ECJ 16 March 2006, C-234/04, *Kapferer*, ECLI:EU:C:2006:178, para. 20 et seq.

order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question([. . .]). Therefore, Community law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement of Community law by the decision at issue ([. . .])."

The ECJ took this opportunity to confirm that the legislators of the Member States are free to regulate the enforcement of legal claims under Union law through national law, as long as they apply the principles of equivalence and effectiveness:[63] "By laying down the procedural rules for proceedings designed to ensure protection of the rights which individuals acquire through the direct effect of Community law, Member States must ensure that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and are not framed in such a way as to render impossible in practice the exercise of rights conferred by Community law (principle of effectiveness) ([. . .]). However, compliance with the limits of the power of the Member States in procedural matters has not been called into question in the dispute in the main proceedings as regards appeal proceedings."

Considerations regarding the protection of legitimate expectations, however, are not always significant: The ECJ does not take this principle into account in state aid law.[64] For understandable reasons: Typically, the favoured undertaking and the authority granting the advantage are working together. The tax authority and the taxpayer are acting in agreement. If the undertaking could count on not having to pay back the state aid, this would defeat the purpose of state aid law. Apart from these special cases, the protection of legitimate expectations always plays an important role when Institutions of the Union or authorities of the Member States are acting under national law governed by Union law.

3. Proportionality

Another immanent principle of Union law - according to the case law of the ECJ - is that of proportionality. This principle plays a major

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[63] ECJ 16 March 2006, C-234/04, *Kapferer*, ECLI:EU:C:2006:178, para. 22.

[64] ECJ 20 September 1990, C-5/89, *Commission/Germany*, ECLI:EU:C:1990:320; ECJ 11 July 1996, C-39/94, *SFEI/La Poste*, ECLI:EU:C:1996:285; ECJ 20 March 1997, C-24/95, *Rheinland Pfalz/Alcan*, ECLI:EU:C:1997:163; ECJ 7 March 2002, C-310/99, *Italy/Commission*, ECLI:EU:C:2002:143.

role in the already mentioned assessment on the basis of the fundamental freedoms.[65] Yet the ECJ attaches great importance to this principle in other areas of Union law as well. This was demonstrated in the *Testa* judgment, which dealt with the interpretation of a regulation issued by the Community legislator on unemployment benefits, which seemed to grant a great deal of discretion to the responsible authority:[66] "Finally, it must be emphasized that the second sentence of article 69 (2) [of the regulation], which provides that in exceptional cases the three month period laid down by article 69 (1) (c) may be extended, ensures that the application of article 69 (2) does not give rise to disproportionate results. As the court ruled in its judgment of 20 march 1979 (*Coccioli*, cited above) an extension of the period is permissible even when the request is made after that period has expired. Whilst, as the court held in the judgment cited above, the competent services and institutions of the states enjoy a wide discretion in deciding whether to extend the period laid down by the regulation, in exercising that discretionary power they must take account of the principle of proportionality which is a general principle of community law. In order correctly to apply that principle in cases such as this, in each individual case the competent services and institutions must take into consideration the extent to which the period in question has been exceeded, the reason for the delay in returning and the seriousness of the legal consequences arising from such delay." It is questionable whether the emphasis on the principle of proportionality is actually necessary to reach this interpretation result. After all, the ECJ did nothing else than to give contours to a provision that was seemingly vague according to its wording, taking into account its teleology. In doing so, the Court was treading on the familiar ground of interpretation. Nevertheless, the ECJ took the opportunity to stress the independence of the principle of proportionality and highlight it as a "general principle of community law".

The *Schräder* judgment illustrates that the ECJ is willing to apply this principle also in the field of tax law:[67] Schräder, an undertaking which was required to pay the "co-responsibility levy" challenged the collection of this levy paid into the Community budget using various arguments. Schäfer claimed, among others, that the principle of proportionality was violated because the co-responsibility levy was neither suited nor required to achieve the objective of a stabilization

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[65] *Adam Zalasinski*, The Principle of Proportionality and (European) Tax Law, in: Principles of Law: Function, Status and Impact in EU Tax Law, published by *Cécile Brokelind*, Amsterdam 2014, p.303 et seqq.

[66] ECJ 19 June 1980, Joined Cases 41, 121 and 796/79, *Testa*, ECLI:EU:C:1980:163, para. 21.

[67] ECJ 11 July 1989, C-265/87, *Schräder*, ECLI:EU:C:1989:303.

of the market as stipulated in Article 39 para. 1(c) of the EEC Treaty. It argued that, in reality, only 50% of the cereals destined for animal feed were subject to the levy as a result of the exemptions provided for in Article 1 para. 2(2) of Regulation No. 2040/86. It added that the levy was having a negative impact on the sales of cereals, since the resulting increase in the price of processed cereals was causing a drop in demand.

In this context, the ECJ maintained a general tenor in its explanations:[68] "The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, measures imposing financial charges on economic operators are lawful provided that the measures are appropriate and necessary for meeting the objectives legitimately pursued by the legislation in question. Of course, when there is a choice between several appropriate measures, the least onerous measure must be used and the charges imposed must not be disproportionate to the aims pursued."

As regards the possibilities of the Community legislator to create levies, however, the ECJ in turn qualified this stringent standard:[69] "However, with regard to judicial review of compliance with the abovementioned conditions, it must be stated that, in matters concerning the common agricultural policy, the Community legislator has a discretionary power which corresponds to the political responsibilities imposed by Articles 40 and 43. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution intends to pursue ([. . .])." Even so, the ECJ thus also recognised the significance of the proportionality principle, at least in the case of a manifest unsuitability of the measure to achieve the objective stipulated under Union law. Although the legal basis for the unlawfulness of this levy is to be found in Article 39 EC Treaty itself - in the light of Articles 40 and 43 EC Treaty -, the ECJ examined the conformity of the levy with the proportionality principle independently and seemingly without any reference to Article 39 EC Treaty.[70]

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[68] ECJ 11 July 1989, C-265/87, *Schräder*, ECLI:EU:C:1989:303, para. 21.
[69] ECJ 11 July 1989, C-265/87, *Schräder*, ECLI:EU:C:1989:303, para. 22.
[70] These rules largely correspond to the present Articles 39, 40 and 43 TFEU.

IV. Requirements discussed in literature but not yet derived from Union law by the ECJ

1. The ability-to-pay principle?

Time and again, scholars discuss whether the ability-to-pay principle could be founded in Union law.[71] Some authors point out to the general principle of equality, from which it would follow that the tax burden should be distributed fairly, and to the principles of social solidarity and social justice.[72] In addition, reference is occasionally made to the constitutional traditions common to the Member States, although far from all constitutions of the Member States even address this principle at all.[73] In those cases in which this principle is considered important at a constitutional level, often very different meanings are ascribed to it. This then becomes manifest in the sometimes diametrically opposed conclusions drawn by some authors with regard to the adjustment of ordinary legislation.[74]

The ECJ has so far declined to take up the proposals to raise the ability-to-pay principle to the level of Union law, and quite rightly so. There is no legal basis for postulating an ability-to-pay principle in Union law. All Member States are free to organize their tax systems. From the perspective of Union law, no rule exists that would force a Member State to make the income tax rate progressive or to allow expenses to be deducted at all. Income tax legislation exclusively covering revenue which does allow deductions at all would not violate the fundamental freedoms or any other requirement of Union law. Similarly, Union law does not force Member States to exempt the subsistence level from taxes[75] or to deduct certain unavoidable private expenses.

The *Schumacker* judgment, occasionally cited as proof that the tax case law of the ECJ is characterised by ability-to-pay considerations[76], does not support any other conclusion. It was the following explanations of the ECJ that gave rise to misunderstandings:[77] "In a situation

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[71] *Frans Vanistendael*, Ability to Pay in European Community Law, EC Tax Review 2014, p.121 et seqq.; *Joachim Englisch*, Ability to Pay, in: Principles of Law: Function, Status and Impact in EU Tax Law, published by *Cécile Brokelind*, Amsterdam 2014 (cit.: Principles), p.439 et seqq.; *Chiara Bardini*, The Ability to Pay in the European Market: An Impossible Sudoku for the ECJ, Intertax 2010, p.2 et seqq.

[72] *Englisch*, Principles (fn. 71), p.448; *Marc Bourgeois*, Constitutional Framework of the Different Types of Income, in: The Concept of Tax, published by *Bruno Peeters*, Amsterdam 2005, p.79 et seqq., p.83 et seqq.

[73] *Englisch*, Principles (fn. 71), p.452.

[74] See *Wolfgang Gassner/Michael Lang*, Das Leistungsfähigkeitsprinzip im Einkommens- und Körperschaftsteuerrecht, 14. ÖJT Volume III/1, Vienna 2000, 33 et seqq.

[75] See, however, *Englisch*, Principles (Fn. 71), p.449 et seq.

[76] As in *Vanistendael*, EC Tax Review 2014 (fn. 71), p.122 et seqq.

[77] ECJ 14 February 1995, C-279/93, *Schumacker*, ECLI:EU:C:1995:31, para. 41.

such as that in the main proceedings, the State of residence cannot take account of the taxpayer's personal and family circumstances because the tax payable there is insufficient to enable it to do so. Where that is the case, the Community principle of equal treatment requires that, in the State of employment, the personal and family circumstances of a foreign non-resident be taken into account in the same way as those of resident nationals and that the same tax benefits should be granted to him." When considered separately, these phrases may lead to the conclusion that the ECJ assumes Community legislation means that, even in cross-border situations, a Member State must always take into account the personal and family circumstances of the taxpayer. These explanations, however, can only be interpreted in the context in which they were made: The *Schumacker* case dealt with the fundamental freedoms, and these statements referred to the comparability assessment. The ECJ analysed the conditions under which non-residents and residents are in a comparable situation, also including the income situation in the other Member State - and was strongly criticised for it[78]. To this day, the *Schumacker* case law is a foreign body in the ECJ's case law on fundamental freedoms. Its dogmatic foundations are equally unclear as the limits of its scope.[79] It is by no means possible to attribute to it the importance of having postulated a general ability-to-pay principle in Union law.

2. *Fairness?*

Another principle put forward for discussion most recently by *Hemels* was that of fairness.[80] This principle was repeatedly addressed in ECJ proceedings, and reference is occasionally made to it in secondary legislation instruments. The ECJ, however - and *Hemels* points out to this - has so far declined to embrace this principle. In those cases in which parties to the proceedings put forward the argument of fairness, the ECJ then regularly justified its decision with the respective relevant legal bases.

An illustrative example for this approach is the judgment in *Macchiorlati Dalmas e Figli*, which already dates back to 1965:[81] In this case, the respondent High Authority of the ECSC had imposed surcharges for delay in payment. The High Authority had put forward

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[78] See *Michael Lang*, Ist die Schumacker-Rechtsprechung am Ende?, RIW 2005, p.336 et seqq., p.337 et seqq. with further reference.

[79] For more detail, see *Lang*, RIW 2005 (fn. 78), p.339 et seqq.

[80] Sigrid *Hemels*, Fairness: A Legal Principle in EU Tax Law?, in: Principles of Law: Function, Status and Impact in EU Tax Law, published by *Cécile Brokelind*, Amsterdam 2014, p.413 et seqq.

[81] ECJ 31 March 1965, 21/64, *Macchiorlati Dalmas e Figli*, ECLI:EU:C:1965:30.

the argument of fairness to emphasize that it would not be justifiable toward other undertakings acting in compliance with the law if the Authority would have to withdraw the surcharge it had imposed on the defaulting undertaking. The ECJ, did not consider this argument but contented itself with pointing out that the "aggregate amount of the said surcharges, [. . .] is not excessive compared with the size of the debt in respect of principal or disproportionate to the economic capacity of a medium-sized undertaking".

3. Prohibition of abuse?

On the other hand, it was the case law of the ECJ itself that sometimes conveyed the impression that a prohibition of abuse existed as an underlying principle of Union law. The *Halifax* case involved the interpretation of a value-added tax directive that did not contain an express abuse provision:[82] "It must be borne in mind that, according to settled case-law, Community law cannot be relied on for abusive or fraudulent ends ([. . .]). [. . .] The application of Community legislation cannot be extended to cover abusive practices by economic operators, that is to say transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law ([. . .]). [. . .] That principle of prohibiting abusive practices also applies to the sphere of VAT."

In the same judgment, the ECJ summarised the conditions for the application of this prohibition of abusive practices as follows:[83] The establishment of an abusive practice requires "that, first, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions. [. . .] Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage. As the Advocate General observed in point 89 of his Opinion, the prohibition of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of tax advantages." Therefore, the case law requires both that the arrangement chosen by the taxpayer is inconsistent with the objective pursued by the rule, and that the motivation behind the arrangement is the attainment of tax advantages. As a result, objective and subjective criteria are combined.

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[82] ECJ 21 February 2006, C-255/02, *Halifax*, ECLI:EU:C:2006:121, para. 68 et seqq.
[83] ECJ 21 February 2006, C-255/02, *Halifax*, ECLI:EU:C:2006:121, para. 74 et seq.

In my opinion, the case law is based on methodically incorrect premises: It conveys the impression that, in general, legal provisions must be "formally" applied and that their objective and purpose can be taken into account only when the taxpayer pursues the objective of saving taxes. The risk that the interpretation of tax provisions runs counter to its objective exists only against the background of an interpretation according to the wording of the law. Meanwhile, however, the current state of the art in methodology suggests that the wording of a provision stands at the beginning and not at the end of interpretation.[84] Using an interpretation guided by the objective and purpose of the provisions, it should be established whether an evasion attempt is still or no longer covered by the actually or allegedly circumvented provision. The teleological interpretation must not be limited to those cases in which one can claim that the taxpayer's intention was to minimize taxes. The objective and purpose of a rule must always be taken into account in its interpretation. This will then render it unnecessary to invoke a prohibition of abuse.

In addition, a superficial analysis of Union law reveals that, even in secondary legislation, the trend is by no means moving toward the development of a common abuse principle: The Common Consolidated Corporate Tax Base ("CCCTB") draft directive published a few years ago also contains a provision on abuse which, although derived from previous ECJ case law, still differs from it.[85] The European Parliament and the Danish Presidency subsequently amended this proposed regulation, with the obvious intention of making the application of these rules easier for the tax authorities.[86] In a recommendation on 6 December 2012, the Commission proposed a text to the Member States, which in turn deviates from these proposals.[87] Therefore, today we are as far from a common definition of abuse in Union law as ever before.

In the end, the ECJ itself emphasized that the scope of the principle it postulated has its limits:[88] "Finally, in any event, it is clear that no

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[84] More on this by *Michael Lang/Christian Massoner*, Die Grenzen steuerlicher Gestaltung in der österreichischen Rechtsprechung, in: Die Grenzen der Gestaltungsmöglichkeiten im Internationalen Steuerrecht, published by *Michael Lang/Josef Schuch/Claus Staringer*, Vienna 2009, p.15 ff, p.47 et seq.

[85] *Michael Lang*, The General Anti-abuse Rule of Article 80 of the Draft Proposal for a Council Directive on a Common Consolidated Corporate Tax Base, ET 2011, p.223 et seqq., p.224 et seq.

[86] Report of the European Parliament of 28 March 2012 on the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) (COM [2011] 0121 – C7-009 2/2011 – 2011/0058 [CNS]), p. 21.

[87] Commission Recommendation of 6 December 2012 on aggressive tax planning (COM[2012] 8806 final); see *Michael Lang*, „Aggressive Steuerplanung" – eine Analyse der Empfehlung der Europäischen Commission, SWI 2013, p.62 et seqq., p.66 et seqq.

[88] ECJ 29 March 2012, C-417/10, *3M Italia*, ECLI:EU:C:2012:184, para. 32.

general principle exists in European Union law which might entail an obligation of the Member States to combat abusive practices in the field of direct taxation and which would preclude the application of a provision such as that at issue in the main proceedings where the taxable transaction proceeds from such practices and European Union law is not involved."

V. Assessment

The above analysis has shown that the harmonisation of the law of the Member States is far from being advanced. Especially in the area of direct taxation, harmonization took place only in certain areas. The examples of Union law requirements singled out here, however, reveal the influence that Union law now already has on the laws of the Member States. The ECJ remains the driving force behind these developments. After all, it is up to the Court to decide whether to further develop some of these not yet determinative principles and thus further limit the fiscal room for manoeuvre of the Member States.