EU Law: The impact on national tax law

European tax law: basics of EU law

- European Union
- no state
- no power to create jurisdiction
  (no competence to decide on its own competence, no competence-competence)
- especially no EU tax
- ‘union of states’
  principle of conferral
  Art 4(1), Art 5(1), (2) TEU
European tax law: basics of EU law

Objective: internal market

Avoidance of distortion of competition

Tax harmonisation (approximation of laws)

- Art 3(3) TEU, Art 26 TFEU, Art 4(2)(a) TFEU
- Protocol no. 27, Art 51 TEU

EU tax law: harmonisation vs sovereignty

Harmonisation (approximation of laws)

- only as far as it is necessary to ensure the functioning of the internal market, Art 114(1) TFEU
- EU competence

sovereignty of the Member States, ‘national identity’

- Art 4(2) TEU
- Regime competition

no ‘tax Union’

- but yet: Art 114(2) TFEU
**EU tax law: harmonisation and limits**

- Turnover taxes, excise duties, other forms of indirect taxation
  - Direct taxes
  - No power of harmonisation, Art 114(2) TFEU
    - Mandate to tax harmonisation
      - Art 113 TFEU
        - The Council – special legislative procedure – unanimously

**EU tax law: areas of harmonisation**

- Indirect taxes
  - Directive on VAT: turnover tax
  - Excise Duty Directive: taxes on energy, alcohol and tobacco
  - Directive on raising of capital taxes
    - no harmonisation
      - exceptions:
        - Merger Directive
        - PSD
        - IRD
        - MAD etc.
        - Arbitration Convention
        - ECJ jurisdiction

- Direct taxes
  - not harmonized: taxes on betting, insurances, air traffic, nuclear fuel, alcopops, coffee, financial transactions
EU tax law

Jurisdiction of the ECJ

Fundamental Freedoms

- Free movement of goods
- Freedom of establishment
- Free movement of capital
- Freedom to provide services
- Free movement for workers
- Right to national treatment
  - no discrimination on the ground of nationality

Direct taxes

Competence of the Member States

but:

Exercise of competences consistently with EU law

esp. with full respect for fundamental freedoms
### EU tax law

#### Jurisdiction of the ECJ

**Testing scheme: infringement of fundamental freedoms**

<table>
<thead>
<tr>
<th>Scope of protection</th>
<th>a) personal</th>
<th>b) material</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Interference</th>
<th>a) overt discrimination</th>
<th>b) covert discrimination</th>
<th>c) restriction</th>
</tr>
</thead>
</table>

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<tr>
<th>Justification</th>
<th>Treaty justication</th>
<th>Rule of reason</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>law and order, national security, public health</td>
<td>casuistry: compelling reasons of public interest</td>
</tr>
</tbody>
</table>

#### Justification

**of prejudices of fundamental freedoms by national tax law**

**Rule of reason** (inherent limitation)

- effective fiscal supervision
- combating the tax evasion
- coherence of the tax system
- balanced allocation of the powers to tax

**Proportionality**

**Means (= tax provisions):**

- non-discriminatory
- suitable
- necessary
- proportional

**not recognised esp.:**

- fiscal concerns
- fiscal simplification and the like
- compensation
- insignificance
EU tax law

Enforcement of fundamental freedoms by ECJ

Priority of EU law

esp. obligation of
• legislator
• tax authorities

preliminary ruling,
Art. 267 TFEU

Tax assessment

Federal Fiscal Court
Fiscal courts

Objection, action

constitutional complaint,
if necessary