

Mirugia Richardson

Taxpayers' Right to
Defence in the EU
Law and European
Convention on Human
Rights Regimes

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71

Taxpayers' Right to Defence in the EU Law and European Convention on Human Rights Regimes

Why this book?

Within the regimes of EU law and the European Convention on Human Rights (ECHR), this book examines taxpayers' right to defence and the right to a fair trial in tax matters. The reach and content of the EU and the ECHR rights of the defence principles provide the basis for this examination. In criminal proceedings, these rights are the minimum guarantees of the accused, and they ensure fair trial rights as well as procedural fairness. Procedural fairness requires a coherent and predictable legal framework in national law in order to provide legal certainty to the interfering authority and the individual affected by the public interest interference. In administrative law proceedings, including in the area of tax and taxation, the rights of the defence principle similarly provide minimum guarantees that apply as rights of the defence.

Since EU Member States are party to the European Union as well as the ECHR, this book adopts a broad, European law, approach, by debating the application of the EU and the ECHR rights of the defence principles in tax matters. Exploring this issue supports the academic debate on taxpayers' right to defence in EU Member States. The practical contribution of the book aims to support both the taxpayers' knowledge of taxpayers' right to defence in European law and the actual implementation of the right to a fair trial in tax matters in EU Member States' national legal systems. The book clarifies various issues, including how article 6 of the ECHR on the right to a fair trial can support fairness in tax matters.

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Mirugia Richardson

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Preface

Human rights protection can be found on multiple levels in law. At the international level, there are documents and treaties with supreme authority, such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). In the sphere of the EU legal order, human rights, or rather fundamental rights, are included in the EU Treaties, recognized and developed by the Court of Justice of the European Union (ECJ) and forcefully conveyed by the Charter of Fundamental Rights of the European Union (EU Charter). In addition, the EU Member States' own national constitutions support human rights. In the Member State where I live and work, the Netherlands, taxpayers can exhaust the available international, European and national legal sources to justify their claim that national tax law and the acts and conduct of the tax authorities do not meet human rights requirements. For instance, a taxpayer can argue that a tax provision should not be applied, or perhaps executed in a different, more beneficial manner. An illustrative example is a 2015 income tax case before the Supreme Court of the Netherlands, *Hoge Raad der Nederlanden*,¹ wherein the taxpayer, Mr De Lange, was of the opinion that a Dutch tax provision, article 6.30 of the 2001 Law on Income Tax, concerning a tax deduction for training expenditure, embodied age discrimination. He believed that this taxation scheme therefore violated not only the Dutch Constitution, but also the ECHR and the ICCPR. The Supreme Court dismissed his argument that the tax scheme in question contravened these treaties. Instead, the Supreme Court questioned whether a European directive, namely Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, was applicable, or possibly the principle of non-discrimination on grounds of age, as a general principle of EU law. For this reason, it decided to stay the proceedings and refer questions to the ECJ for a preliminary ruling. In its judgment in 2016,² the ECJ found that the Directive is applicable to the tax dispute, because the taxation scheme at issue comes within the material scope of the Directive. The ECJ then considered that the Directive does not preclude the taxation scheme in so far as, first, that scheme is objectively and reasonably justified by a legitimate objective relating to employment and labour market policy and, second, the means of attaining that

1. NL: *Hoge Raad der Nederlanden* [Supreme Court], 16 Oct. 2015, Case ECLI:NL:HR:2015:3022, para. 4.

2. NL: ECJ, 10 Nov. 2016, Case C-548/15, *J.J. de Lange v. Staatssecretaris van Financiën*, para. 36.

objective are appropriate and necessary. The national court had to determine whether that is the case. Subsequently, in its following judgment in 2017,³ the Supreme Court came to the conclusion that this indeed was the case and therefore dismissed Mr Lange's claim that the tax scheme includes a forbidden discrimination.

Besides disagreements over issues such as solely the amount of a certain tax deduction or tax credit, other (more severe) tax disputes occur that may have resulted in punitive tax surcharges or even criminal proceedings regarding tax offences. Human rights protection could then be essential for taxpayers to defend themselves in their dealings with the tax authorities and possibly the Public Prosecutor's Office. For the taxpayer in Europe it may, however, not be clear which rights anchored in EU law and in the ECHR can serve the taxpayer as rights of the defence in tax matters, regarding the state's national tax law and the acts and conduct of the national (tax) authorities, in administrative tax proceedings and in criminal proceedings. When considering in tax matters the fundamental human right to a fair trial, it is the European Court of Human Rights's settled case law that article 6 of the ECHR on the right to a fair trial does not apply in "pure" tax cases when solely a question of tax or taxation is at issue, without a punitive measure or sanction that qualifies as a criminal charge or a civil matter. Furthermore, EU law only provides solace in the areas of law that are categorized as matters of EU competence and fall within the scope of EU law. In the field of EU tax law, direct taxes are for the most part not regulated by the EU legislator and therefore fall outside the scope of EU law. The fundamental human rights embedded in the EU Member States' national constitutions, EU law and ECHR result in a plurality of layers of human rights protection in the European geographic area, which raises issues on the primacy of EU law versus national constitutions and the ECHR. Moreover, for the rights found specifically in the ECHR and in the EU Charter, it is not directly evident how these rights for taxpayers serve as "taxpayers' right to defence". There are no provisions specifically for taxpayers included in these documents for guaranteeing a "fair tax trial". In the EU Charter, the provisions on the right to a fair trial are found in its article 47. This article is in part based on article 6 of the ECHR. Of interest is how the EU Charter becoming primary EU law has affected taxpayers' right to defence for supporting a fair trial in tax matters. Another point of interest, for the ECHR, is how the rights in the Convention other than article 6, such as article 14 of the ECHR, which prohibits discrimination, serve as taxpayers' right to defence and how these

3. NL: *Hoge Raad der Nederlanden* [Supreme Court], 19 May 2017, Case ECLI:NL:HR:2017:911, paras. 2.1.-2.6.

other (substantive) rights relate to the fair trial requirements of article 6 ECHR in tax matters. My research therefore examines within the context of taxpayers' right to defence in the EU law and ECHR regimes the right to a fair trial in tax matters. This book aims to contribute to more knowledge of, and further debate on, taxpayers' right to defence.

I am grateful that I have completed this dissertation. I would like to thank the Vrije Universiteit Brussel and my supervisor Prof. Dr Michel Maus and the oral defence members of the jury Prof. Dr Elly van de Velde, Prof. Dr Daniel de Wolf, Prof. Dr Stefaan Smis and Prof. Dr Sylvie de Raedt. I would also like to thank my former colleagues at the Supreme Court of the Netherlands, in particular Andrea Detweiler, Theo Groeneveld and Cees Schaap. They have elevated my thoughts on tax matters and taxpayers' rights to a higher level. Furthermore, they taught me that if I express my opinions, someone might indeed listen. My most special thanks go to my family, my dear daughter Eveline (you are my sunshine!), my "second" Italian daughter Maria Elena in Avezzano (*un bacio per te!*), my mother Theresa, my brother Leroy, in memory of my father Elmando and my sweet godchild Chloe. Furthermore, I thank my close friends in the Netherlands, Aruba and Italy that are always supportive, some of whom I have known for many years, and my babysitters for Eveline: Cisca (you are a champion!), Handan, Christine, Saida, Bianca, Minuska, Ngoc, Bojoura, Cheryl and Emily, Mrs Zarr, Antonino, Luana and Raffaele, Naomi and Rosaline. Thank you all!

Mirugia Richardson
Brussels, August 2022

Abbreviations and acronyms

AMD	Armenian dram
CHF	Swiss franc
Commission	European Commission
DAC	Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC
EAW	European arrest warrant
ECHR	European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)
ECJ	Court of Justice of the European Union, per 1 December 2009 or Court of Justice of the European Communities, before 1 December 2009
ECtHR	European Court of Human Rights
EC	European Community
ECSC	European Coal and Steel Community
ECU	European Currency Unit
EEC	European Economic Community
EP	European Parliament
Euratom	European Atomic Energy Community
EU Charter	Charter of Fundamental rights of the European Union of 7 December 2000
European Taxpayers' Code	Guidelines for a Model for a European Taxpayers' Code
FIM	Finnish Mark
FISC	European Parliament Subcommittee on Tax Matters
FRA	European Union Agency for Fundamental Rights
FRF	French Franc
FSV	<i>Fraude Signalering Voorziening</i>
GAAR	General anti-avoidance rule
GBP	Pound sterling
GC	Grand Chamber
GDPR	General Data Protection Regulation
HRK	Croatian kuna
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFA	International Fiscal Association
OECD	Organisation for Economic Co-operation and Development

Abbreviations and acronyms

OHCHR	Office of the High Commissioner for Human Rights
OLAF	European Anti-Fraud Office
SEA	Single European Act
SEK	Swedish kronor
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights

Chapter 1

General Introduction

1.1. Introduction

In the Charter of Fundamental Rights of the European Union of 7 December 2000 (EU Charter), amended on 12 December 2007, the European Union recognizes the rights, freedoms and principles stated in this document. Since the entry into force of the Lisbon Treaty on 1 December 2009, the foundation of the European Union is based on the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). From that moment, the EU Charter became legally binding on the EU institutions and the EU Member States. Article 6(1) of the TEU (first sentence) provides that the EU Charter has the same legal value as the EU Treaties. The TEU, the TFEU and the EU Charter therefore constitute the constitutional legal sources of EU law.¹ EU law includes general principles of law, such as fundamental rights, which exist as written sources of law as well as unwritten rules.² The Court of Justice of the European Union (ECJ or Court) has, in its case law, in addition to the development of the principles of the EU legal order (in particular, Community law, succeeded by EU law, as a new legal order with principles such as the direct effect of EU law provisions³ and EU law taking precedence over national legal provisions),⁴ recognized and developed general principles and fundamental rights.⁵ The EU Charter and these general principles of EU law do not apply, however, in cases outside the scope of application of EU law.⁶

1. R. Barents & L.J. Brinkhorst, *Grondlijnen van Europees Recht* [Basics of European Law] sec. 1.3 (Kluwer 2012); and K.-D. Borchardt, *The ABC of European Union law* p. 90 (Publications Office of the European Union 2017).

2. P.S.R.F. Mathijsen, *A Guide to European Union Law* pp. 45-47 (Sweet and Maxwell Limited 2004); and LT: ECJ, 20 June 2018, Case C-108/17, *UAB Enteco Baltic v. Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos*, para. 50, Case Law IBFD. Note: Court of Justice of the European Union since 1 Dec. 2009, before 1 Dec. 2009 Court of Justice of the European Communities. For referring to the Court's case law the abbreviation ECJ is consistently used. For the Grand Chamber the abbreviation GC is applied.

3. NL: ECJ, 5 May 1963, Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, Case Law IBFD.

4. IT: ECJ, 15 July 1964, Case 6/64, *Flaminiano Costa v. E.N.E.L.*, Case Law IBFD.

5. DE: ECJ, 12 Nov. 1969, Case, 29/69, *Erich Stauder v. City of Ulm – Sozialamt*.

6. DE: ECJ: 13 July 1989, Case 5/88, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, para. 19, Case Law IBFD; IT: ECJ, 6 Mar. 2014, Case C-206/13,

As the EU customs union is based on EU customs legislation, which encompasses a uniform system of customs duties on imports from outside the European Union,⁷ and indirect taxes have been partially harmonized by EU measures and therefore fall within the scope of application of EU law, namely VAT and excise duties on alcohol, tobacco and energy products, in principle all administrative and punitive decisions regarding customs duties and the aforementioned indirect taxes are covered in the EU legal order by the rights to defence that are recognized and developed by the ECJ and those rights to defence in EU legislation. These rights to defence form the “EU right to defence” principle. On the other hand, the European legislation on direct taxes has been more limited. Only specific issues of (corporate) income taxation have been addressed by the EU legislator, such as cross-border intra-group payments of dividends, interest and royalties.⁸ However, in order to attain the EU single market, positive integration as well as negative integration is used. The latter occurs when EU law prohibits discriminatory national rules in the EU Member States’ national legislation.⁹ Direct taxes may therefore also enter the scope of application of EU law via negative integration: they may impede the exercise of the EU freedom of movement rights,¹⁰ which would engage the EU Charter as well as the general principles of EU law.¹¹ Moreover, in 2016, the Council (of the European Union) adopted the Anti-Tax Avoidance Directive requiring the EU Member States to provide for controlled foreign company rules, interest deduction limitations, exit taxation, the neutralization of hybrid mismatches

Cruciano Siragusa v. Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo, para. 21; and AT: ECJ, 30 Apr. 2014, Case C-390/12, *Robert Pflieger and Others*, para. 33.

7. Treaty on the Functioning of the European Union, arts. 28-33 (2007), Primary Sources IBFD [hereinafter TFEU].

8. Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, OJ L 157 (26 June 2003), Primary Sources IBFD; and Council Directive 2011/96/EU of 30 Nov. 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 345/8 (2011), Primary Sources IBFD. Currently the other directives that concern direct taxes are Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193 (19 July 2016), Primary Sources IBFD; and Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, OJ L 265, Primary Sources IBFD.

9. P. Craig & G. de Búrca, *EU Law, Text, Cases and Materials* ch. 19, sec. 1 (Oxford University Press 2015).

10. Title II free movement of goods and title IV free movement of persons, services and capital, TFEU.

11. W.B. van Bockel & P. Wattel, *New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after Åklagaran v Hans Åkerberg Fransson*, 38 *European Law Review* 6 (2013).

and a general anti-avoidance rule (GAAR).¹² This further expands the scope of application of EU law into the field of direct taxes and therefore also the scope of the EU Charter in direct tax matters. In addition, it is settled case law of the ECJ that national direct taxation legislation must comply with EU law. The powers retained by the EU Member States regarding direct taxation must be exercised consistently with EU law.¹³ The case law of the European Court of Human Rights (ECtHR or Court) shows that the rights and guarantees listed in the Convention for the Protection of Human Rights and Fundamental Freedoms, referred to as the European Convention on Human Rights (ECHR), also can be applicable in tax matters. The rights to defence embedded in the ECHR and applied by the ECtHR embody the “ECHR right to defence” principle. In particular, article 6 of the ECHR provides for the right to a fair trial.

The research of this book focuses on how human rights, or fundamental rights, in the EU law and ECHR regimes support a natural person or legal person (legal entity) in tax matters in EU Member States, regarding the obligations for a person that derive from national tax law, the enforcement of tax provisions by the tax administration and the acts and conduct of the State’s authorities in tax matters. EU law and the ECHR are two separate regimes, even though they can overlap in Europe. The choice was made to explore both regimes because it is of interest to examine to what extent the human (fundamental) rights of a person remain present, or manifest themselves, when a person acts as a “taxpayer” or is otherwise involved in a certain tax case or tax matter. It can be argued that human (fundamental) rights are by nature, inherently, attached to a person in whatever capacity the person interacts with the state’s authorities, including as a taxpayer.¹⁴ In contradiction to this belief, it can be argued that such rights have no bearing on tax matters, considering tax law in a state’s national law as a separate legal sub-system, or a sub-branch of financial law: it regulates the mandatory tax contributions to the state for funding public spending, and therefore has no, or a limited, connection to the objectives that human

12. Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (2016/1164/EU). The Directive is part of the European Commission’s (Commission) Anti-Tax Avoidance Package. See Commission, *The Anti Tax Avoidance Package – Questions and Answers (Updated)*, MEMO/16/2265 (21 June 2016).

13. DE: ECJ, 20 Oct. 2011, Case C-284/09, *Commission of the European Communities v. Federal Republic of Germany*, para. 44, Case Law IBFD; and BE: ECJ, 23 Jan. 2014, Case C-296/12, *Commission v. Belgium*, para. 27, Case Law IBFD.

14. S. van Thiel, *Is There a Need for International Enforcement of Human Rights in the Tax Area?*, in *Human Rights and Taxation in Europe and the World* sec. 9.5. (G. Kofler, M. Poiars Maduro & P. Pistone eds., IBFD 2011), Books IBFD.

rights and fundamental rights in principle pursue, namely serving freedom, security, justice and peace.¹⁵ For this study, the standpoint is adopted that taxpayers indeed have human (fundamental) rights support as “taxpayers’ right to defence”. The viewpoint is that a person as a taxpayer is not merely a subject who provides a financial contribution to the state, but is part of the state’s tax system. In this tax system, particularly in the tax relationship with the tax administration, the taxpayer cannot participate without the right to defence. The tax system should therefore entail mutual rights and obligations for the parties involved, in which taxpayers, and others engaged in tax and taxation matters, and the state’s legislator and national (tax) authorities, are equal participants.

There are several ways in which this topic can be approached. For example, a comparative law study between two or more EU Member States on the implementation of the right to defence for taxpayers could be conducted. Alternatively, a study could be carried out on how a certain aspect of the right to defence for taxpayers is implemented in a particular EU Member State. This study chooses to review this issue at the European level, concerning the EU law and ECHR regimes for the EU Member States. The reasons for this choice are primarily that: (i) the EU Member States hold their membership of the European Union while also being party to the ECHR; (ii) for a considerable length of time, since the 1950s, the ECHR has existed as a binding human rights instrument, while the EU Charter became legally binding for the EU Member States (and the EU institutions) in 2009; (iii) in the EU law regime, the document Guidelines for a Model for a European Taxpayers’ Code (European Taxpayers’ Code) was introduced for the EU Member States in 2016, which holds recommendations on the rights of taxpayers but is not a binding instrument for the EU Member States; and (iv) the European Union has not acceded to the ECHR, even though becoming a party to the European Union is prescribed by article 6(2) of the TEU, and article 6(3) of the TEU explicitly recognizes that the fundamental rights guaranteed by the ECHR (and by the EU Member States’ constitutional traditions) constitute general principles of EU law. These circumstances do not indicate how the human (fundamental) rights in the EU law and ECHR regimes are applicable in tax matters, and furthermore, it is not evident how

15. T. Georgopoulos, *Tax Treaties and Human/Constitutional Rights: Bridging the Gap? Tax relief in a cosmopolitan context*, New York University Law article, sec. 1.1. (2004); and I.A. Tsindeliani, *Tax Law System*, 11 International Journal of Environmental & Science Education 10, p. 3938 (2016). In the preamble of the ECHR it is stated that the members of the Council of Europe reaffirm their profound belief in those fundamental freedoms “which are the foundation of justice and peace in the world”. The preamble of the EU Charter stipulates that the Union places the individual at the heart of its activities, by establishing EU citizenship and by creating “an area of freedom, security and justice”.

human (fundamental) rights are also a manifestation of taxpayers' right to defence in tax matters. The research will explore the claim that taxpayers have human (fundamental) rights support as "taxpayers' right to defence". These rights are embedded in the EU and ECHR right to defence principles. In particular, it will be explored how these rights enforce a "fair tax trial" in tax matters. Accordingly, the objective of the research is to contribute to the implementation and further development of taxpayers' right to defence in the EU Member States.

Sever points out that typical of administrative matters is the supremacy of public interest over the parties' private interests, placing citizens and business in a subordinate and weaker position.¹⁶ For tax and taxation, it is evident that the public interest concerns primarily the budgetary function, in order to finance public expenditure. This common, general interest in a society, however, does not oppose the individual taxpayer applying the right to defence in tax matters or make the ability of a taxpayer to defend himself in a procedure tenuous. Over the years, legal scholars have written articles and doctoral theses on (certain aspects of) the right to defence of taxpayers in European law.¹⁷ Although, to the author's knowledge, there

16. T. Sever, *Procedural Safeguards under the European Convention on Human Rights in Public (Administrative) Law Matters*, 9 DANUBE: Law, Economics and Social Issues Review 2, sec. I (2018).

17. See J.L.M. Gribnau, *Rechtsbetrekking en rechtsbeginselen in het belastingrecht: rechtstheoretische beschouwingen over navordering, toezegging en fiscale vaststellingsovereenkomst* [Legal relationship and legal principles in tax law: legal theoretical considerations on additional tax assessment, commitment and tax settlement agreement], Doctoral Thesis, Erasmus University Rotterdam (1998); R.L.N. Westra, *Fiscale fraudebestrijding: grenzen aan sturing* [Combating tax fraud: limits to steering], Doctoral Thesis, University of Leiden (2006); M.H.W.N. Lammers, *De toepassing en gevolgen van het verdedigingsbeginsel* [The application and impact of the right to defence principle], Europese Fiscale Studies, ch. 1 (2011/2012); A.K.J.M. van Steenbergen, *Legitimiteit en fiscale rechtshandhaving* [Legitimacy and Tax Law Enforcement], Doctoral Thesis, Tilburg University (2013); A. Van de Vijver, *Een verkenning van de grondslagen van het ne bis in idem beginsel in het Belgisch belastingrecht* [An exploration of the foundations of the ne bis in idem principle in Belgian tax law], Doctoral Thesis, University of Antwerp (2014); E. Poelmann, *Some Fiscal Issues of the Charter of Fundamental Rights of the European Union*, 43 Intertax 2 (2015); J.M. van der Vegt, *Krijgt het verdedigingsbeginsel tanden? [Is the right to defence principle becoming powerful?]*, Maandblad Belastingbeschouwingen 11 (2015); A.E. Keulemans, *Het Unierechtelijke verdedigingsbeginsel: een update* [The EU right to defence principle: an update], Weekblad Fiscaal Recht 73 (2016); S. De Raedt, *De draagwijdte van het recht op privéleven bij de informatie-inzameling door de fiscale administratie* [The scope of the right to privacy in relation to the gathering of information by the tax administration], Doctoral Thesis University Gent (2017); P. Valente, *A European Taxpayers' Code*, 45 Intertax 12 (2017); Editorial, *Fake Tax Transparency? Leaks and Taxpayer Rights*, 46 Intertax 2 (2018); K. Boer & J.L.M. Gribnau, *Legal Aspects of Behaviourally Informed Strategies to Enhance Tax Compliance*, in *Tax and Trust, Institutions, Interactions and Instruments* (S. Goslinga et al. eds., Eleven International

have been no recent studies in which specifically this theme, positioned in the fields of EU tax law, EU criminal law, EU constitutional law and the human (fundamental) rights in the EU law and ECHR regimes, is explored in depth. In the 2000s, Westra's research on the tax criminal law procedures in the Netherlands explored the legal area in which the fight against tax fraud occurs, and Lammers's research on taxation concerns the legitimacy of the Dutch tax authorities. In the 2010s, presumably fueled by the EU Charter becoming a legally binding instrument in 2009, taxpayers' rights have gained more coverage in scholarly literature. Poelmann discusses certain fiscal (tax) issues regarding the EU Charter. Currently, further in-depth research is desirable.

The following section of this general introduction on the research into taxpayers' right to defence (section 1.2.) first addresses the protection that human (fundamental) rights can provide in tax matters, in order to clarify the context of taxpayers' right to defence. Subsequently, the research problem (section 1.3.), the research questions (section 1.4.), the methodology and limitations of the research (section 1.5.) and the structure of this book (section 1.6.) are discussed. This chapter ends by presenting its conclusions (section 1.7.).

1.2. Human (fundamental) rights protection in tax matters

In the literature, legal scholars have described the concept of human rights as the rights that one has because one is human. These rights represent certain values in a society and have been formally recognized in legal instruments, such as treaties and laws.¹⁸ They are inherent to all human beings, whatever their nationality, place of residence, sex, national or ethnic origin, colour, religion, language or any other status. Human rights therefore create a body of universal standards and values at the service of human dignity, equality, non-discrimination and human freedoms, and human beings are all equally entitled to these rights.¹⁹ To have a right, in the sense of entitlement,

Publishing 2019); M.M. Julicher et al., *Protection of the EU Charter for Private Legal Entities and Public Authorities? The Personal Scope of Fundamental Rights within Europe Compared*, 15 Utrecht Law Review 1 (2019); and P. Pistone, *Tax Procedures* ch. 3 (IBFD 2020), Books IBFD.

18. M. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* p. 3 (University of California Press Ltd 2008); and J. Donnelly, *Universal Human Rights in Theory and Practice* p. 7 (Cornell University Press 2013).

19. J. Symonides ed., *Human Rights: Concept and Standards*, Preface (Routledge Taylor & Francis Group Ltd 2016).

constitutes being entitled to something: the right is owed or belongs to the right holder, who can claim the right. For human beings their human rights can be put to use when they are at issue, which occurs when the enjoyment of a human right is questioned, threatened or denied.²⁰ In tax matters, the enjoyment of a human (fundamental) right could be hampered by the legal obligations deriving from national tax law. Van de Heyning points to a multi-layered protection of human rights on the European continent, where at the European level the fundamental rights in the EU Treaties, the EU Charter and developed through the case-law of the ECJ coexist with the human rights in the ECHR.²¹ The argument can therefore be made that taxpayers as human beings already receive human rights protection in their status as European citizens, which makes identifying and implementing the concept of taxpayers' right to defence in the EU Member States' national legislation and policies redundant. Another argument is that in modern, democratic society, the people acting through their legislative representatives have created a binding legal system to be followed in order to enhance society's welfare and wellbeing, and that tax legislation is an inseparable part of this system for financing public expenditure.²² These arguments can be countered by reasoning that the legislator and policymakers identifying and subsequently implementing the concept of taxpayers' right to defence may stimulate (new) national legislation and policies in the fields of tax law and/or criminal law to support the right to defence in tax matters. Exemplary is how in the field of criminal law at the EU level the so-called Roadmap for procedural rights concentrated on advancing procedural rights for suspected or accused persons in criminal proceedings, compelling the EU legislator to act on this issue.²³

Human rights are universal in content.²⁴ Regarding European human rights instruments and norms, the EU and ECHR right to defence principles are specifically principles of EU law and the ECHR, respectively.²⁵ An exami-

20. Donnelly, *supra* n. 18, at pp. 7-9.

21. C. Van de Heyning, *Grondwettelijke conversaties: een meerwaarde voor de bescherming van fundamentele rechten? De interpretatie en toepassing van fundamentele rechten in een complexe context van gelaagde bescherming* [Constitutional conversations: an added value for the protection of fundamental rights? The interpretation and application of fundamental rights in a complex context of layered protection], 67 *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 7, p. 395 (2012).

22. Y.M. Edrey, *Taxation and Human Rights*, *European Tax Studies* 2, sec. 1 (2014).

23. See sec. 2.7. on the EU's legislative competence in the field of criminal law, in which the Roadmap is discussed.

24. United Nations, *Universal Declaration of Human Rights*, art. 1 (1948).

25. E. Poelmann, Kamino. *Infringement of the right to be heard. Legal consequences of non-observance of the rights of the defence*. *Court of Justice, Highlights & Insights on European Taxation* 9, Note, p. 12 (2014); and E. Cape et al., *Effective Criminal Defence in Europe, Executive Summary and Recommendations* ch. 1 (Intersentia 2010).

nation of international human rights law is therefore not part of the book's research scope. As far as this aspect is concerned, it can be noted that the existence and legality of sources of international human rights law are perceptible in the ECJ's and the ECtHR's case law when a reference to an international human rights instrument is made.²⁶ Similarly, the ECtHR applies in its judgments for instance the case law of the International Court of Justice and the United States Supreme Court.²⁷ International human rights law is appropriately referred to by the ECJ in cases concerning an area's freedom, security, justice and external relations.²⁸ Human rights are furthermore all interrelated, interdependent and indivisible. This means that the enjoyment of one right requires the enjoyment of other rights; the rights are in a mutual relationship or connectedness, and are incapable of being divided. Consequently, improving a certain right facilitates improving other rights, and likewise, depriving a person of a right adversely affects the application of other rights.²⁹ Regarding the concept and acknowledgement of human (fundamental) rights in EU law, Van Elsuwege, Devisscher and Van Bossuyt observe that the legally binding status of the EU Charter, as primary EU law, is the final chapter of a long process of evolution towards an EU fundamental rights catalogue.³⁰ Though, Douglas-Scott stresses on this point that the process for the protection of fundamental rights in EU law has evolved in an ad hoc, confusing, incremental way and that there exists no clear, conceptual underpinning to the rights protected under EU law.³¹

When discussing the relevance of human (fundamental) rights for tax matters, the following definitions of "tax" and "taxation", the category

26. UK: ECJ, 12 July 2006, Case T-49/04, *Hassan v. Council and Commission*, para. 127. See also, e.g., DE: ECJ (GC), 2 Mar. 2010, Case C-135/08, *Rottmann v. Freistaat Bayern*, para. 14. The UDHR was proclaimed by the United Nations General Assembly on 10 Dec. 1948 (General Assembly resolution 217 A (III)).

27. UK: ECtHR, 7 July 2011, Application 27021/08, *Al-Jedda v. the United Kingdom*, paras. 48-54.

28. ECJ (GC), 14 June 2016, Case C-263/14, *European Parliament v. Council of the European Union*, para. 52. See also, e.g., HU: ECJ, 25 Jan. 2018, Case C-473/16, *F v. Bevándorlási és Állampolgársági Hivatal*, para. 62.

29. D.J. Whelan, D.J., *Untangling the Indivisibility, Interdependency, and Interrelatedness of Human Rights*, University of Connecticut, Economic Rights Working Paper Series, Working Paper 7, pp. 1-6 (Apr. 2008); and L. Minkler & S. Sweeney, *On the Indivisibility and Interdependence of Basic Rights in Developing Countries*, 33 *Human Rights Quarterly* 2, sec. I (2011).

30. P. Van Elsuwege, P. Devisscher & A. Van Bossuyt, *Het Handvest van de Grondrechten van de Europese Unie: implicaties voor de nationale rechtsorde* [*The Charter of Fundamental Rights of the European Union: implications for the national legal order*], 47 *Tijdschrift voor privaatrecht* 2, sec. 1 (2010).

31. S. Douglas-Scott, *The European Union and Human Rights after the Treaty of Lisbon*, 11 *Human Rights Law Review* 4, p. 649 (2011).

“taxpayer” and “tax administration” are used. Taxes are mandatory contributions, based on (tax) legislation, from citizens to a state’s government, without an individual demonstrable good or service in return. Therefore, the legal definition of tax is that tax is what the legislator has stated to be a tax, or what is referred to by the law as tax. Since paying tax does not lead directly to an individual claim to a specific good or service, tax could also be defined economically as all mandatory contributions to the government, other than fines and penalties, based on (tax) legislation, for which there is no individual demonstrable good or service in return, with as main goal financing public spending.³² A tax can also be described concisely as a compulsory unrequited payment to the government.³³ Taxation, the means by which the government imposes taxes, has its legal basis in tax law, the body of rules governing taxation. Consequently, a taxpayer is an individual natural person, or a legal person (legal entity),³⁴ who pays tax or is liable for a tax when tax liability occurs. For VAT, this concerns the “taxable person”. The state’s tax administration, or revenue body, is the administrative system for ensuring compliance with tax legislation and collecting the full amount of taxes and duties payable. In order to implement the power to tax, a state’s law provides the tax administration with administrative powers that are exercised over the taxpayer. Administrative (tax) legislation therefore creates a tax relationship between the taxpayer and the tax administration, obligating the taxpayer to, in addition to having the main obligation of paying tax, fulfil other formal duties, which mostly concern collaborating with the tax administration in the different procedures carried out for applying tax legislation.³⁵

The questions whether tax and taxation can interfere with human (fundamental) rights, and whether taxpayers require human (fundamental) rights protection in their dealings with the state’s (tax) authorities, have been discussed in scholarly literature. The general consensus among legal scholars in the field of tax law is that the answer to these questions is affirmative. Van Thiel concludes that the basic principles of domestic constitutional law and international human rights law, which seek to protect the individual against

32. W. Koetzier, *Belastingrecht in perspectief* [Tax law in perspective] p. 1 (Sdu uitgevers 2009).

33. Organisation for Economic Co-operation and Development (OECD), Centre for Tax Policy and Administration, available at <http://www.oecd.org/ctp/glossaryoftaxterms.htm> (accessed 4 Apr. 2021).

34. *Id.* Generally, corporations, joint-stock companies and limited liability companies are regarded for tax purposes as having an existence separate from that of their shareholders.

35. M.T. Soler Roch, *Tax Administration versus Taxpayer – A New Deal?*, 4 World Tax Journal 3, sec. 1.1. (2012), Journal Articles & Opinion Pieces IBFD.

an over-intrusive state, are fully applicable and operational in the tax area.³⁶ Vadapalas seems to support this conclusion. His analysis is that the protection of taxpayers' rights in modern society should be regarded as a criteria of rule of law and an important part of the protection of human rights, even if current international and EU instruments of human rights protection do not contain specific provisions on taxpayers' rights. Welfare of society and welfare of its members are closely linked by mutual respect regarding taxpayers' duties, rights and legitimate interests.³⁷ Furthermore, interactions between the tax authorities, more specifically the tax administration, and taxpayers impact the confidence and trust of the community. It can even be advocated, as Noroozi does, that the ultimate owner of the tax system is the community.³⁸ It is therefore essential that taxpayers experience that they have rights that are protected, and accordingly, taxpayers' right to defence is part of the culture of the tax administration.³⁹ Considering that states could aim to maximise the expected net revenue, which is the tax revenue less administration costs,⁴⁰ the cost of administrative measures for carrying out taxpayers' right to defence ought to be included in budgetary considerations on the operation of the tax administration. In view of the above, the theory that human (fundamental) rights also serve taxpayers, in essence that human beings in their capacity as taxpayers are accompanied by taxpayers' right to defence, is well founded. In other words, taxpayers are persons and therefore holders of rights in the EU legal order, rather than mere objects of the exercise of taxing powers by the tax authorities.⁴¹ This conclusion calls on the EU Member States to identify and implement the concept of taxpayers' right to defence in their national legislation and policies, and on the European Union to support this effort.

The application of the right to a fair trial in tax matters accordingly implies that in a state's judicial system, the protection of a "fair tax trial" is

36. Van Thiel, *supra* n. 14, at sec. 9.5. See further N. Diepvens & F. Debelva, *The Evolution of the Exchange of Information in Direct Tax Matters: The Taxpayer's Rights under Pressure*, 24 EC Tax Review 4, sec. 3.4. (2015).

37. V. Vadapalas, *Protection of the taxpayer in the European Union: recent case-law of the European Court of Justice*, Eurolex, p. 1 (2017).

38. A. Noroozi, A., *The Role of Inspector-General of Taxation in Australia*, Australian Government Inspector-General of Taxation, International Conference on Taxpayer Rights, sec. 1 (18-19 Nov. 2015).

39. S. Vesperman, *Contemporary Tax Administration – More Science than Art*, Australian Government Australian Taxation Office, International Conference on Taxpayer Rights, p. 5 (18-19 Nov. 2015).

40. L.P. Feld & B.S. Frey, *The Tax Authority And The Taxpayer An Exploratory Analysis*, University of Zurich, p. 3 (21 Dec. 2003).

41. P. Pistone, *EU Cross-Border Tax Disputes Settlement*, in *European Tax Law* sec. 4.1. (S.C.W. Douma, R. Freudenthal & A. Rijkers eds., Wolters Kluwer 2018).

established for the “taxpayer” in its legislation and policies for guaranteeing a fair trial and an effective remedy. There is, however, not necessarily a consensus view on how to define the concept of taxpayers’ rights, or more specifically, taxpayers’ right to defence. Bentley indicates that the term “taxpayers’ rights” is used in contexts that include political, economic, behavioural and relational contexts, as well as to describe standard legal definitions. As such, it is claimed by different interest groups, among others the state’s government, tax administration and courts, which ascribe to it different textures of meaning.⁴² Taxpayers’ rights may even be seen as a special branch of human rights issues.⁴³ Accordingly, a specific right of taxpayers regarding the tax due is the right to pay no more than the correct amount of tax.⁴⁴ Peeters observes this essential aspect of taxpayers’ rights, by articulating that at a time when – also at a European level – tax administrations are increasingly developing a strong legal framework to fight tax fraud and tax evasion, as well as rules against tax avoidance practices, more cooperation in the field of exchange of information and more mutual assistance for the recovery of claims relating to taxes, it is necessary to pay sufficient attention to the protection of taxpayers’ rights.⁴⁵ Human rights therefore influence the tax relationship between the taxpayer and the tax administration both materially and formally. Materially, human rights affect the settings of fair taxation within limits that allow the effective enjoyment of the basic, fundamental rights of persons balanced with the adequate financing of state activity for providing essential public services. From a formal standpoint, human rights allow the recognition of taxpayers’ positions regarding tax claims and therefore their right to participate and defend their (tax) position in administrative and judicial proceedings related to the assessment of the tax liability. In tax law, the division can also be made between material tax law and formal tax law.⁴⁶ Research has shown that, in general, tax administrations

42. D. Bentley, *Revisiting rights theory and principles to prepare for growing globalisation and uncertainty*, International Conference on Taxpayer Rights, Part I (18-19 Nov. 2015).

43. A. Hultqvist, *Taxpayers’ Rights in Sweden*, 7 *Revenue Law Journal* 1, p. 45 (1997).

44. European Commission, *Guidelines for a Model for A European Taxpayers’ Code*, Ref. Ares(2016)6598744 (24 Nov. 2016).

45. B. Peeters, *Towards a More Coordinated Approach of the Relation Between the Taxpayer and Tax Administrations: The European Taxpayers’ Code*, 26 *EC Tax Review* 4, p. 178 (2017).

46. K. Tipke, *Steuerrecht als Wissenschaft [Tax Law as a Science]*, Festschrift für Joachim Lang Gestaltung der Steuerrechtsordnung, sec. V (Dr. Otto Schmidt 2010); IBFD, *Observatory on the Protection of Taxpayers’ Rights, 2015-2017 General Report on the Protection of Taxpayers’ Rights* sec. 1.1. (26 Apr. 2018); K. Tipke & J. Lang, *Steuerrecht, ein systematischer Grundriss [Tax law, a systematic outline]* chs. 5 and 21-24 (Otto Schmidt 2020); and P.G.H. Albert, *Status aparte voor het belastingrecht [A separate status for tax law]*, *Nederlands Juristenblad* 1714, no. 27, sec. *Fiscale rechtsbescherming* [Protection in tax matters] (2021).

(or revenue bodies) operate with a formal set of taxpayers' rights set out in law or other statutes, or in administrative documents.⁴⁷

The discussion in this section on how human (fundamental) rights relate to taxpayers' rights provides a strong argument for the viewpoint that applying taxpayers' right to defence in national tax legislation and policies facilitates a balanced tax relationship in which obligations and rights for the taxpayer coexist in a legal framework. For instance, regarding the Belgian VAT tax law, Peeters stresses that specific protective guarantees for an individual taxpayer who is inspected for VAT seem rather poor.⁴⁸ He reflects on the few guarantees that the Belgian Law *Wetboek van de belasting over de toegevoegde waarde* holds, such as that for visiting private houses, a time slot and a prior judicial approval apply (article 63 of that Law). Deák's position on this issue, which the research of this book also adopts, is that taxpayers' rights can be exercised effectively in a well-established system of tax law.⁴⁹

1.3. Research problem

The reach and content of the EU and ECHR right to defence principles are the basis of the research questions of this book. The right to defence principle comprises the principle of respecting defence rights. Croquet describes rights to defence in criminal proceedings as the “minimum guarantees” of the accused, ensuring “fair trial rights” and “procedural fairness”. Procedural fairness requires a coherent and predictable legal framework in national law, in order to provide legal certainty to the interfering authority and to the individual affected by the public interest interference.⁵⁰ Michalek also points to the right to defence being the guarantee of legality, the minimum of every legal procedure or the minimum guarantee for access to justice. The reference to legality, which is “the principle of legality”, requires of

47. OECD, *Tax Administration 2019: Comparative Information on OECD and other Advanced and Emerging Economies* p. 110 (OECD 2019).

48. B. Peeters, *The existing Belgian administrative and criminal legal landscape against VAT tax fraud*, 9 *Studi Tributari Europei*, sec. 3 (2019).

49. D. Deák, *Neutrality and Legal Certainty in Tax Law and the Effective Protection of Taxpayers' Rights*, 49 *Acta Juridica Hungaria* 2, p. 177 (2008).

50. N.A.J. Croquet, *The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' jurisprudence?*, 11 *Human Rights Law Review* 1, sec. 1 (2011).

the EU Member States that their acts have a legal basis, hence are provided for by law, and are in accordance with the legal limits determined by law.⁵¹

The right to defence principle similarly provides in administrative law proceedings, including the area of tax and taxation, minimum guarantees that apply as rights to defence. The right to defence principle can therefore be applied as a broad concept and dissected into several (connected or separate) elements of rights or guarantees, which include the right to be heard, the right of access to the file and the right to legal aid or assistance.⁵² Moreover, access to justice obliges states to guarantee each individual's right to go to court (or an alternative dispute resolution body), which is the right to a fair trial, and to obtain a remedy if it is found that the individual's rights have been violated. For this reason, access to justice and the right to a fair trial assist individuals in enforcing other rights.⁵³ These other rights also serve as rights to defence to defend someone against, for instance, privacy violations (article 7 of the EU Charter and article 8 of the ECHR, respectively) or discriminatory practices (article 21 of the EU Charter and article 14 of the ECHR, respectively) by the national authorities.

The threat and possible impact of an over-intrusive state on the lives and (economic) activities of taxpayers, necessitates the protection of the taxpayer in a state's tax system. The state's national (tax) authorities have administrative powers. Taxpayers who are subjected to those administrative powers must be able to rely on guarantees that provide that tax disputes are handled fairly, a "fair tax trial", for which taxpayers can invoke the right to defence to defend their position in the tax dispute. Furthermore, the taxpayer must be able to challenge intrusive acts as such as being in violation of substantive rights. This viewpoint broadens the perspective on applying the right to defence in tax matters as "taxpayers' right to defence". Hence, notably, human rights can provide points of reference for exploring and debating a state's autonomy in making tax legislation and tax policy, and

51. M. Michalek, *Right to Defence in EU Competition Law: The Case of Inspections* p. 27 (University of Warsaw CARS 2015). BG: ECJ, Opinion of Advocate General De la Tour, 9 Dec. 2020, Case C-414/20 PPU, *MM*, para. 78; and S.B. Cornieltje, *Cursus Belastingrecht Europees Belastingrecht* sec. 7.5.2.F. (Wolters Kluwer 2021).

52. Lammers, *supra* n. 17, at ch. 1; and V. Costa Ramos, M. Luchtman & G. Munteanu, *Improving Defence Rights*, Eurocrim 3, sec. 2(b) (2020).

53. European Union Agency for Fundamental Rights (FRA), *Access to justice in Europe: an overview of challenges and opportunities* sec. 1.3. (Publications Office of the European Union 2011); FRA and Council of Europe, *Handbook on European law relating to access to justice* p. 16 (Publications Office of the European Union 2016); and J.H. Gerards & L.R. Glas, *Access to Justice in the European Convention on Human Rights system*, 35 *Netherlands Quarterly of Human Rights* 1, sec. 2.1. (2017).

exploring how the fair trial rights as well as substantive rights can support taxpayers in tax matters. Exemplary are Crawford and Spivack's discussion of the taxation of menstrual hygiene products for women as a gender equality and human rights issue, and Gerverdinck's discussion of applying the right to property to the right to a tax refund or reimbursement.⁵⁴ Accordingly, the fair trial rights as well as substantive rights are as basic, human (fundamental) rights the foundation of the right to defence principle in tax matters.

The right to defence is a right in itself, while the right to defence principle can also be implemented through various other rights. A question that then arises is whether the right to defence and the right to a fair trial are completely parallel to each other or if there can be a violation of the right to defence without the right to a fair trial being breached. This research therefore looks into how human (fundamental) rights in the EU law and ECHR regimes serve as the right to defence in tax matters, comprising "taxpayers' right to defence", and in particular how these rights support for taxpayers a fair trial in administrative tax proceedings and criminal proceedings. In this manner, a contribution can be made to the implementation and further development of taxpayers' right to defence in the EU Member States.

Since the EU Charter became legally binding, ample has been written on the growing importance of the EU Charter and the ECJ's task to apply and interpret this Charter's provisions. The ECJ's case law on the EU Member States acting within the scope of EU law in tax matters has also been examined and commented upon.⁵⁵ Torres Pérez highlights the aim of drafting the EU Charter, namely to render rights more visible to the citizens and enhance the

54. A. Christians, *Fair Taxation as a Basic Human Right*, University of Wisconsin Legal Studies Research Paper 1066, sec. III (2009); B.J. Crawford & C. Spivack, *Tampon Taxes, Discrimination and Human Rights*, Wisconsin Law Review 491, sec. III.E (2017); H. Hodgson & K. Sadiq, *Gender equality and a rightsbased approach to tax reform*, in *Tax, Social Policy and Gender Rethinking Equality and Efficiency* sec. I.4. (M. Stewart ed., ANU Press 2017); and T.C. Gerverdinck, *Eigendomsgrondrecht en belastingen [Right to property and taxes]*, Fiscale Monografieën 161, sec. 11.3. (Wolters Kluwer 2020).

55. V. Scalia, *Protection of Fundamental Rights and Criminal Law*, Eurocrim 3, Introduction (2015); B. Schima, *EU fundamental rights and Member State action after Lisbon: putting the ECJ's case law in its context*, 38 Fordham International Law Journal 4, secs. II and III (2015); A. Lenaerts & V. Vanovermeire, *De toepassing van het Handvest van de grondrechten van de Europese Unie op handelingen van de lidstaten: een analyse in het licht van het arrest C-617/10 van het Hof van Justitie van 26 februari 2013 inzake Åkerberg Fransson [The application of the Charter of Fundamental Rights of the European Union to acts of the Member States: an analysis in the light of the judgment C-617/10 of the Court of Justice of 26 February 2013 in Åkerberg Fransson]*, 16 Tijdschrift voor Bestuurswetenschappen en Publiekrecht 1, secs. 1-3 (2016); I. Lejeune, L. Vermiere & N. Dutr , *De grondrechten van de unie en de bescherming van de belastingplichtige [The EU*

perception of the legitimacy of the European Union, in order to enable equal protection of all EU citizens across the States, but does not address what this development entails for the right to defence of taxpayers. Since the EU Charter does not refer to tax matters or the rights of a taxpayer, taxpayers' right to defence is not straightforwardly visible in the EU Charter. Lukić and Čučković, as other legal scholars including Torres Pérez, have discussed in *Melloni* (2013),⁵⁶ concerning the reference for a preliminary ruling made in relation to the interpretation of the right to a fair trial, as guaranteed by article 47 of the EU Charter and by the Spanish Constitution. The focus in their discussion of this case is the ECJ in its ruling emphasizing the primacy of EU law surpassing the right to defence guaranteed by the constitution of an EU Member State (Spain).⁵⁷ However, it is not apparent whether, as a consequence, the taxpayer ultimately suffers the loss of (certain guarantees of) the right to defence, in particular the right to a fair trial, due to the primacy of EU law, since EU law enforces general principles and fundamental rights that, *because* of the primacy of EU law, provide fundamental rights protection to EU citizens across the EU Member States. Exemplary is the VAT case *Webmindlicences* (2015),⁵⁸ in which the ECJ clarifies that the use by the tax authorities of evidence that was obtained by another authority in a manner that violated the State's law must comply with the EU Charter's provisions. Another factor in the discussion of the right to defence of taxpayers in the European Union is the distinction between direct taxes and indirect taxes regarding EU legislative competence in the area of tax and taxation. Article 113 of the TFEU provides the EU competence to harmonize legislation concerning indirect taxation to the extent that harmonization is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition. Under this article, binding acts can be adopted by the European Union. On the contrary, because the TFEU lacks such a provision for direct taxation, direct taxation in principle falls within the EU Member States' legislative competence.⁵⁹ The primacy

fundamental rights and the protection of the taxpayer], *Algemeen Fiscaal Tijdschrift* 6-7, sec. 1 (2016); and A. Torres Pérez, *The federalizing force of the EU Charter of Fundamental Rights*, 15 *International Journal of Constitutional Law* 4, sec. 1 (2017).

56. ES: ECJ (GC), 26 Feb. 2013, Case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, para. 35 and further. See further on this case sec. 2.5.3.

57. M. Lukić & B. Čučković, *A decade of balancing with EU human rights protection: between national and international competences and sources of law, individual and systemic interests*, EU and comparative law issues and challenges series (ECLIC 4), vol. 4, ch. 2 (2020).

58. HU: ECJ, 17 Dec. 2015, Case C-419/14, *WebMindLicences Kft. v. Nemzeti Adó és Vámhivatal Kiemelt Adó és Vám Főigazgatóság*, para. 61, Case Law IBFD, and further. This case is further discussed in sec. 2.13. on the subject of unlawfully obtained evidence.

59. NL: ECJ, 11 Aug. 1995, Case C-80/94, *G.H.E.J. Wielockx v. Inspecteur der Directe Belastingen*, para. 16, Case Law IBFD. See further H. Kube, E. Reimer & C. Spengel, *Tax*

of EU law, the EU Charter and the competence of the EU legislator in the fields of tax law and criminal law shape the reach of the EU right to defence principle in tax matters.

The restricted protection that article 6 of the ECHR can provide a taxpayer has also been discussed in scholarly literature. Since the 2001 case *Ferrazzini* (2001),⁶⁰ it is clear for tax matters that “pure” tax disputes do not fall within the scope of article 6 of the ECHR. According to the ECtHR, article 6 of the ECHR does not apply under its civil part because tax issues do not concern the determination of civil rights and obligations, while Article 6 ECHR does not apply under its criminal part because tax in itself cannot be qualified as a criminal charge. Article 6 ECHR can only apply in tax matters if the tax dispute includes an issue that concerns a civil right or obligation, or if the taxpayer is confronted with a tax surcharge (fine or penalty) that qualifies as a criminal charge or faces criminal proceedings for a tax offence. Legal scholars have argued that the ECtHR’s ruling in *Ferrazzini* is unfortunate for tax matters, since it deprives taxpayers who fulfil their tax obligations in accordance with the law of article 6 of the ECHR’s guarantee of a fair trial. A tax fraudster who is caught by the tax authorities and consequently undergoes a punitive tax surcharge or faces criminal proceedings can rely on article 6 of the ECHR, while this article does not serve taxpayers in general.⁶¹ Pauwel and Kruijer entered into a debate in 2008 on the issue of whether the ECtHR at some point, in the case of *Burden and Burden*,⁶² abandoned its stance in *Ferrazzini* that article 6 of the ECHR is not applicable in tax matters.⁶³ In *Burden and Burden*, the tax dispute concerns the question of what happens if the levy of an inheritance tax violates article 14 of the ECHR, which prohibits discrimination, read in conjunction with article 1 of Protocol no. 1 of the ECHR (article P1-1 of

Policy: Trends in the Allocation of Powers Between the Union and Its Member States, 25 EC Tax Review 5/6, sec. 2 (2016).

60. IT: ECtHR (GC), 12 July 2001, Application 44759/98, *Ferrazzini v. Italy*, paras. 29-31, Case Law IBFD.

61. T. Bender & S.C.W. Douma, *Ferrazzini en de fiscale mensenrechten: nog steeds geen fair trial in belastingzaken* [*Ferrazzini and tax human rights: there is still no fair trial in tax matters*], Weekblad Fiscaal Recht 903, sec. 5 (2003); and R. Attard, *The Classification of Tax Disputes, Human Rights Implications*, in *Human Rights and Taxation in Europe and the World* (G. Kofler, M. Poyares Maduro & P. Pistone eds., IBFD 2011), Books IBFD.

62. UK: ECtHR, 12 Dec. 2006, Application no. 13378/05, *Burden and Burden v. the United Kingdom*, paras. 53-61. This case was referred to the Grand Chamber. UK: ECtHR (GC), 29 Apr. 2008, Application no. 13378/05, *Burden v. the United Kingdom*, paras. 58-66.

63. H.S.M. Kruijer, *Art. 6 EVRM is van toepassing verklaard op belastingheffing* [*Art. 6 ECHR has been declared applicable to taxation*], Weekblad Fiscaal Recht 750, secs. 1-3 (2008); and M.R.T. Pauwels, *Art. 6 EVRM helaas nog steeds niet van toepassing op belastingheffing* [*Art. 6 ECHR unfortunately still not applicable to taxation*], Weekblad Fiscaal Recht 879, sec. 2 (2008).

the ECHR), which protects the right to property. The ECtHR states in this case that taxation is, in principle, an interference with the right guaranteed by the first paragraph of article P1-1 of the ECHR, since it deprives the person concerned of a possession, namely the amount of money that must be paid. Kruijer argues that this consideration can lead to the conclusion that the government depriving citizens of their right to property guaranteed by article P1-1 of the ECHR should be qualified as the determination of civil rights and obligations within the meaning of article 6 of the ECHR, considering the “civil” aspect of possessions, so that article 6 of the ECHR does apply in such a tax dispute. However, Pauwels observes that the ECtHR in no manner states that it reconsiders its judgment in *Ferrazzini*, and further points to the ECtHR’s judgments in which it again, after *Ferrazzini*, formulates that tax matters fall outside the scope of article 6 of the ECHR. Currently, it is still the ECtHR’s settled case law that “pure” tax matters fall outside the scope of article 6 of the ECHR.⁶⁴

The discussion between Pauwel and Kruijer is still relevant to this day, since it touches upon the issue of granting taxpayers the guarantee of article 6 of the ECHR’s right to a fair trial by deploying the other provisions of the Convention in order to invoke article 6 of the ECHR. Continuing in this line of thinking, a point of interest is further how certain Convention rights, such as the right to property, as the right to defence, relate to article 6 of the ECHR and how article 6 of the ECHR supports these other rights by ensuring fair trial rights and procedural fairness. Wattel reasons that a consequence of the enactment of the EU Charter is that, via its article 47, the fair trial requirements enshrined in article 6 of the ECHR now also apply to all national litigation in which EU rights and freedoms are at issue. According to Wattel this implies, inter alia, that the absolute exclusion of “pure” tax disputes from the scope of article 6 of the ECHR by the ECtHR in *Ferrazzini* has been nullified within the European Union for all tax disputes entering the scope of EU law, namely in all tax cases in which EU law is in some way (co-)decisive for the outcome of the case.⁶⁵ This argument is valid. Article 47 of the EU Charter is indeed of service to such tax disputes, though this does not remedy the situation in which a tax matter is neither within the scope of EU law or within the scope of article 6 of the ECHR. In that sense, those “lost” tax cases are suitable for applying these articles’ right to a fair trial provisions. For this reason, it is of importance to consider

64. HU: ECtHR, 25 Nov. 2014, Application no. 51269/07, *Pákozdi v. Hungary*, para. 17; and LT: ECtHR, 16 Apr. 2019, Application no. 55092/16, *Baltic Master Ltd. v. Lithuania*, para. 29.

65. P.J. Wattel, *General EU Law Concepts and Tax Law*, in *European Tax Law* sec. 3.1.4. (P.J. Wattel, O. Marres & H. Vermeulen eds., Wolters Kluwer 2018).



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