Chapter 1

Concepts and Basic Principles of EU Tax Law

1.1. Concepts

*European Union*

The European Union (EU) is the consequence of the European integration development that started in the 1950s after the Second World War.¹ The European Union in its present form was created by the Treaty on European Union (TEU), i.e. the Treaty of Maastricht, signed in 1992 and entered into force in 1993.²

The European Union originally consisted of three pillars or sectors of cooperation. These were (1) the European Communities, (2) common foreign and security policy, and, (3) police cooperation and judicial cooperation in criminal matters.

The most relevant cooperation from the perspective of tax law has been the cooperation based on the European Communities. The European Communities were formed by the European Coal and Steel Community (ECSC), established by the Treaty of Paris signed in 1951, the European (Economic) Community (EEC), and the European Atomic Energy Community (Euratom) established by the Treaty of Rome signed in 1957. By the Lisbon Treaty, which entered into force on 1 December 2009, the European Communities were replaced and succeeded by the European Union.³

*TFEU*

The Treaty on the Functioning of the European Union (TFEU; originally the EC Treaty) has the most relevance with respect to taxation. The TFEU is based on the Treaty establishing the European Economic Community signed in 1957 in Rome, as replaced by the Treaty of Maastricht signed in

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¹ See e.g. Craig and de Búrca 2011 pp. 1-30.
² The Treaty on European Union has been amended by the Treaty of Amsterdam, signed in 1997 and entered into force in 1999, the Treaty of Nice, signed in 2001 and entered into force in 2003 and the Treaty of Lisbon, signed on 13 December 2007 and entered into force on 1 December 2009. The abbreviation “TEU” is used in this book to refer to the Treaty on European Union in the form as amended by the Treaty of Lisbon.
³ See Art. 1(3) TEU.

**EU tax law**

EU law consists of the founding treaties (the TEU and the TFEU) and the legal provisions based on the legislative powers delegated to the European Union by the founding treaties. The part of the EU law provisions that may have an effect on taxes is referred to as EU tax law. After the entry into force of the Lisbon Treaty, the European Convention on Human Rights also became a part of EU law.4

**Territorial scope**

EU tax law provisions limit the sovereign taxing rights of the EU Member States in the area of direct taxation chiefly in situations in which the tax object or the tax subject has a connection to two or more Member States. However, for example, the free movement of capital principle of Art. 63 of the TFEU is relevant also in situations in which the other state is a non-Member State.

Besides certain exceptions, EU law provisions are relevant in relation to the whole territory of the European Union.5 The territorial scope of application of the EU law provisions in relation to each Member State depends on each state’s own accession agreement. Art. 355 defines how the founding treaties apply to certain associated and dependent territories of the EU Member States.6

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5. See Art. 52 TEU and Arts. 349 and 355 TFEU.

6. About the EU law provisions that apply to different territories, see also e.g. Pancham, Fibbe and Ruiter 2007 pp. 164-175 and Smit 2011 pp. 40-61 and about the territorial scope of EU law, see Kavelaars 2007 pp. 268-273.
Literature

There is substantial literature on EU tax law published in different languages of the Member States. The most important comprehensive work in English is Terra and Wattel’s *European Tax Law* (2012). Also worthy of mentioning are Easson’s *Taxation in the European Community* (1993) and Gormley’s *EU Taxation Law* (2005).

Certain international tax periodicals, such as *EC Tax Review* published by Kluwer, *European Taxation* published by the IBFD and *EC Tax Journal* published by Key Haven Publications, specialize in issues concerning EU tax law.

1.2. Relation to other legislation

1.2.1. Sovereignty and subsidiarity

Sovereignty

Despite the European Union and the Commission (the executive branch of the European Union), the Member States have broad sovereignty in the area of direct taxation. The organs of the European Union do not have their own taxing powers with regard to direct taxes; however, both the European Union and the Member States can make decisions concerning tax legislation.

Each Member State executes its own taxing powers by domestic tax laws. Each Member State decides which are the criteria that determine the scope of direct taxation in the state concerned. The Member States may, for example, choose to apply the territoriality principle for the purposes of income taxation and to tax non-residents only on the income from sources in the country concerned. The Member States, however, must exercise their taxing powers consistently with their obligations under the founding treaties and the legislative provisions given on the basis of such treaties.

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7. See Arts. 3-6 TFEU and Art. 5 TEU for the competence of the EU. See also e.g. Bizioli 2008 pp. 133-140 and Isenbaert 2009 pp. 264-278.
8. See e.g. C-279/93 Schumacker, C-311/97 Royal Bank of Scotland, C-250/95 Futura and C-446/03 Marks & Spencer, Para. 39.
Subsidiarity

EU tax law provisions direct the domestic tax laws of the Member States only to the extent that it is necessary for the realization and the functioning of the internal market. The purpose of the founding treaties is not to totally harmonize the tax laws of the Member States. In accordance with the subsidiarity principle, the Union shall take action with regard to direct taxation only if and in so far as the objectives of the action cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Union.

1.2.2. Separateness and interaction

Legal systems of tax law

Each EU Member State has its own national tax system. EU tax law, the tax treaties concluded by each Member State and the national tax laws of each Member State are parts of the national tax laws of the Member States. In accordance with the principle of autonomy, EU tax law, tax treaties and national tax law of each Member State are separate legal systems belonging to the national legal system of the Member State concerned. These different parts of tax law, however, are in a strong interaction with each other. For example, EU law has a substantial impact on the national tax laws of the Member States.

No EU tax

At present, the EU does not use direct taxes for its own recourse collecting purposes. There is no general EU-level income tax and the income taxes...
levied in the Member States are based on the national tax provisions of each Member State’s own domestic legislation. The tax revenue from the income taxes levied by the Member States goes directly to the Member State concerned or to a local authority thereof. The European Union does not benefit directly from the tax revenue.\textsuperscript{13}

\textit{Conflicts}

EU tax law, the national tax laws of the Member States and the tax treaties concluded by the Member States each has a language, concepts and provisions of its own. The provisions of EU tax law, the national tax laws and the tax treaties may therefore conflict with each other. The relationship and the primacy order among the different segments of tax law must be determined in order to determine the tax consequences in a cross-border situation.

1.2.3. The primacy of EU law

\textit{Founding treaties}

Unlike indirect taxes, the TEU and TFEU (the founding treaties) do not mention direct taxes. The only express reference to direct taxes was included in Art. 293 of the EC Treaty concerning the right of the Member States to conclude tax treaties in order to avoid double taxation. Such an express reference is no longer included in the TEU or the TFEU in the form as amended by the Lisbon Treaty. Both the TEU and the TFEU, however, apply to direct taxes despite the lack of an express reference.\textsuperscript{14}

\textit{Case law}

No express provision exists concerning the interrelationship between EU law and the national laws of the Member States. Based on the judgments given by the Court of the European Union (the EU Court),\textsuperscript{15} however, it is clear that EU law takes precedence over national laws. The primacy of EU law applies both in relation to the founding treaties and the EU directives.

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\textsuperscript{13} About the need and the possibilities for an EU tax, see e.g. Plasschaert 2004 pp. 470-479.
\textsuperscript{14} See also Kemmeren 2008b pp. 156-158.
\textsuperscript{15} E.g. C-314/08 Filipiak, Paras. 81-85, 106/77 Simmenthal and 6/64 Costa v. ENEL.
Even though direct taxation falls under the purview of the Member States, the states must follow the EU law rules and principles when exercising this power.\textsuperscript{16}

EU law norms override national law provisions that are in conflict with EU law, regardless of the status or the age of the national law provision. EU law norms take precedence also in the case of a conflict between an EU law provision and a national constitutional provision.\textsuperscript{17} Because of the primacy of EU law, the Member States must not enact legislation or conclude tax treaties, nor apply existing legislation or tax treaties in conflict with EU law. Domestic laws and tax treaties of the Member States must be applied and interpreted in accordance with EU law.

\textit{Conflict must be abolished}

The domestic laws and tax treaties of the Member States may include provisions that are in conflict with EU law. Once the conflict has been discovered, these provisions must be amended or abolished in order to comply with EU law. For reasons of legal certainty, the conflicting provisions must be amended or abolished even though the tax authorities of the state concerned would not apply them in practice.\textsuperscript{18}

1.2.4. The principle of the most lenient provision

\textit{Principal rule}

The main purpose of the EU tax law norms is to abolish tax obstacles within the internal market. Therefore, in relation to direct taxes, the precedence of

EU law usually means that EU law takes precedence over the domestic law or tax treaty provisions when EU law leads to more lenient tax consequences for the taxpayer.

The domestic law or tax treaty norms on direct taxation that mean more lenient tax consequences to the taxpayer than EU law requires are seldom in conflict with EU law. EU tax law, for example, does not require a minimum corporate tax, i.e. that national corporate taxes exceed a certain level. Except for certain exceptions, the Member States have the right to choose not to levy certain direct taxes, provided that the tax treatment does not amount to state aid forbidden by the TFEU.\(^{19}\) Unlike in the case of direct taxes, the principle of the most lenient provision cannot be followed in the case of indirect taxes.

**Exception**

The transitional rules of the Savings Directive\(^{20}\) applying to Austria, Belgium and Luxembourg provide for an example of a situation in which the principle of the most lenient provision does not apply in the case of direct taxes. Because EU law takes precedence over conflicting tax treaties, the minimum source state withholding tax based on the transitional rules of the Savings Directive must be levied during the transitional period, even though there would be a tax treaty that does not allow any source state withholding tax to be levied.

For example, the tax treaties of Finland with Austria and Luxembourg do not give any source-state taxing rights to Austria or Luxembourg in regard to interest payments from these countries to Finnish resident individuals. For the first years of the transitional period, Austria and Luxembourg, however, must levy a 15% withholding tax on the interest payments that come under the scope of the Savings Directive. In the same way, according to the tax treaty concluded between Finland and Belgium, the source state interest withholding tax that may be levied is only 10%, but for the first years of the transitional period Belgium must levy a 15% withholding tax on the interest payments that come under the scope of the Savings Directive. The rate is

\(^{19}\) About state aid, see 1.6.2. and about the limits for non-taxation, see e.g. Sullivan 2009 pp. 189-198.

35% from 1 July 2011. It is, however, likely that in the near future the countries under the withholding tax system will follow the other countries and will start exchanging information and stop levying the withholding tax.\textsuperscript{21}

1.2.5. Direct effect and application

\textit{Relevance}

EU law has direct effect and forms a part of the legal systems of the Member States without special national transformation acts. EU law creates directly rights and obligations to the organs of the Communities, to the Member States and to the citizens of the Member States. The EU tax law provisions that are sufficiently precise, clear and unconditional are directly applicable.\textsuperscript{22}

Both legal persons and individuals with the nationality of an EU Member State can rely on the directly applicable TEU and TFEU provisions and the directly applicable EU directive provisions before the tax authorities and the tax courts of the Member States, even if the provisions would have been implemented into domestic laws incorrectly or insufficiently.\textsuperscript{23} The tax authorities and the tax courts of the Member States must take the EU law provisions into account ex officio in the limits possible under the national procedural rules.\textsuperscript{24}

\textit{Taxation}

The EU law provisions that are directly applicable and that are relevant in relation to direct taxes include, for example, the TFEU general non-discrimination rule (Art. 18), the TFEU articles on the basic freedoms (Arts. 21, 45, 49, 56 and 63) and the sufficiently precise provisions of the Parent-Subsidiary Directive, the Interest-Royalty Directive and the Merger Directive.

\textsuperscript{21} See 6.3.4.1.
\textsuperscript{22} 26/62 \textit{Van Gend & Loos}. See also e.g. Weber 2009 pp. 45-53 about direct effect and direct applicability of EU law.
\textsuperscript{23} See e.g. 41/74 \textit{Van Duyn} and 8/81 \textit{Becker}, Para. 25.
\textsuperscript{24} See C-222/05 \textit{Van der Weerd}, Para. 41 on how the principle of effectiveness does not require the national courts to examine of its own motion a plea based on EU law if the parties are given a genuine opportunity to raise a plea based on EU law before the national court. See 7.1. about procedural autonomy.
Wherever the provisions of a directive are unconditional and sufficiently precise, those provisions may, in the absence of proper implementing measures adopted within the prescribed period, be relied upon.\textsuperscript{25}

\emph{Vertical and horizontal direct effect}

Unlike horizontal direct effect, vertical direct effect is particularly relevant in relation to direct taxes. Vertical direct effect enables EU citizens to rely on the direct effect of the founding treaties and the EU directives in actions against the state. In relation to the founding treaties, however, horizontal direct effect, i.e. an individual’s right to rely on such treaties in actions against another individual, is also possible.\textsuperscript{26}

In the case of directives, only vertical direct effect is possible. Horizontal direct effect is not possible because directives create obligations and are only enforceable against the state.\textsuperscript{27} Before a directive has been implemented into domestic law, the directive does not create obligations but only rights to individuals.\textsuperscript{28}

\section*{1.3. Primary law}

\subsection*{1.3.1. The founding treaties and the accession treaties}

\textit{History}

The founding treaties of the European Communities, i.e. the European Coal and Steel Community (ECSC), the European (Economic) Community (EEC, later EC), and the European Atomic Energy Community (Euratom), form the basis of EU law. These treaties are in force in the form as amended by the Treaty on European Union – i.e. the Treaty of Maastricht (signed in 1992; entered into force in 1993), the Treaty of Amsterdam (signed in 1997; entered into force in 1999), the Treaty of Nice (signed in 2001; entered into

\textsuperscript{25} 8/81 Becker. See also C-6/90 Francovich, Para. 11, C-62/00 Marks & Spencer, Para. 25 and C-138/07 Cobelfret, Para. 58.
\textsuperscript{27} 152/84 Marshall, C-91/92 Faccini Dori, Para. 24 and C-201/02 Wells, Para. 54.
\textsuperscript{28} 80/86 Kolpinghuis, C-106/89 Marleasing and C-91/92 Faccini Dori. See also Weber 2009 pp. 52-53 about inverse direct effect.
force in 2003) and the Treaty of Lisbon (signed in 2007; entered into force in 2009). These treaties (i.e. the TEU and the TFEU) and the accession treaties of the new Member States are primary EU law.

The internal market

The Treaty on the Functioning of the European Union (TFEU; originally the treaty establishing the European Community, i.e. the EC Treaty) has the most relevance as regards direct taxes. The TFEU is based on the founding treaty of the European Economic Community (signed in 1957 in Rome), which has been replaced by the Treaty of Maastricht and amended by the Treaties of Amsterdam, Nice and Lisbon.

Economic integration of the Member States and the creation of an internal market are the most important objectives of the founding treaties. These objectives are achieved by establishing an internal market and an economic and monetary union. Obstacles, including the tax obstacles, to the free movement of goods, persons, services and capital must be abolished.

Abolition of tax obstacles

Taxes must not prevent or restrict the free movement of goods, persons, services and capital between the EU Member States. The domestic laws of the Member States must be approximated to the extent required for the functioning of the internal market. The scope of the necessary actions is a political decision.

Negative and positive integration

The necessary approximation of the tax laws of the EU Member States supposes both negative and positive integration measures, i.e. both judicial and legislative integration. Negative integration is primarily a result of the judgments of the EU Court. Negative integration includes the abolition of the domestic law tax provisions and practices that constitute discrimination or a restriction in conflict with the TFEU or which otherwise, on the basis of the EU Court judgments, conflict with EU law.

29. See also Craig and de Búrca 2011 pp.1-30 about the founding treaties.
30. Art. 3 TEU.
31. Arts. 18, 21, 45, 49, 56 and 63 TFEU.
32. Art. 5 TEU.
Positive integration, on the other hand, implies express measures of the EU organs with the purpose of the approximation of the domestic tax laws of the Member States. Also, tax competition among the Member States has resulted in a certain level of integration.

**Coordination**

Until now, the harmonization of the domestic laws of the Member States in the field of direct taxation has been rather limited. Primarily, the integration of the tax laws of the Member States is based on the EU Court’s interpretation of the founding treaties. However, the direct tax systems of the EU Member States constantly harmonize and, as a consequence, are being harmonized. The tax laws of the Member States are coordinated to function together better, in accordance with the provisions and objectives of the founding treaties, with the result that the tax obstacles on cross-border activities are being abolished.

**Relevant articles of the founding treaties**

The founding treaties include certain express provisions on taxes, some provisions that apply indirectly to taxes and provisions on the decision-making procedures related to tax matters. The founding treaties, however, do not include any express provisions on direct taxes. The provisions of the founding treaties which are relevant from the perspective of direct taxes are the general provisions that are relevant with regard to any field of law. These provisions include:

- Art. 4 of the TEU on Union loyalty;
- Art. 18 of the TFEU prohibiting discrimination based on nationality;
- Art. 21 of the TFEU on the right of EU citizens to freely move and reside in the European Union;
- Art. 45 of the TFEU on the free movement of workers;
- Art. 49 of the TFEU on the right of establishment;
- Art. 56 of the TFEU on the freedom to provide services;
- Art. 63 of the TFEU on the free movement of capital and payments;
- Art. 107 of the TFEU prohibiting state aid; and
- Art. 115 of the TFEU on the authorization to issue directives.

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34. Art. 293 of the EC Treaty included an express reference to income tax treaty negotiations, but the provision was no longer included in the TEU or the TFEU after the amendments based on the Lisbon Treaty. See also Kemmeren 2008b pp. 156-158.
**Implied powers**

In addition to the above-mentioned articles of the founding treaties, Art. 352 of the TFEU may also be relevant in connection with direct taxes. Art. 352 authorizes the Council to take any appropriate measures, if action by the Union should prove necessary, to attain one of the objectives of the European Union and the founding treaties have not provided the necessary powers. In such a situation, the Council may (acting unanimously) take the appropriate measure on a proposal from the Commission and after obtaining the consent of the European Parliament. For example, the Council Regulation on the European Economic Interest Grouping,\(^{35}\) which also includes provisions on direct taxes, is based on Art. 352.

**Fundamental rights**

On 29 October 2004, the EU Member States signed a Treaty establishing a Constitution for Europe.\(^{36}\) The Constitution never entered into force, however. A new document on the fundamental rights was signed on 12 December 2007. This EU Charter of Fundamental Rights entered into force after the Treaty of Lisbon entered into force on 1 December 2009.\(^ {37}\) The Union shall also accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).\(^ {38}\) The Charter of Fundamental Rights of the European Union, is part of the EU primary law\(^ {39}\) and the fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, constitute general principles of EU law.\(^ {40}\)

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36. About the treaty on the European constitution, see e.g. Ojanen 2010 pp. 23-28 and Raitio 2006 pp. 194-330.
38. See Art. 6 TEU and the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950. See also Protocol 8 to the Treaty of Lisbon on Art. 6(2) of the Treaty on the European Union on the accession to the European Convention on Human Rights and basic freedoms.
39. TEU Art. 6(1).
40. TEU Art. 6(3).
1.3.2. Legal principles of EU law

Relevance

Certain legal principles based on the founding treaties, on the common legal principles recognized by the national legal systems of the EU Member States and on the decisions of the EU Court have an effect on EU tax law. These legal principles are considered to form a part of the primary EU law and they play an important role in the development, application and interpretation of EU tax law.\(^41\) The legal effect of the principles may differ based on the source and nature of the principle.

Principle of conferral

In accordance with Arts. 4 and 5 of the TEU, the European Union shall act only within the limits of the competences conferred upon it by the Member States in the founding treaties to attain the objectives set out therein. All other competence belongs to the Member States. This scope of competence is in accordance with the legality principle and the principle of legal certainty.

The competence of the European Union based on the founding treaties, however, is broad. In accordance with Art. 352 of the TFEU, the Council can take any action that is necessary for the attainment of the Union objectives in the functioning of the common market.

Direct taxation falls under the scope of divided competence.\(^42\) Both the Union and the Member States have competence. Positive harmonization of the direct taxation in the Member States is possible, provided that it affects the realization of the internal market, that the harmonization actions are made unanimously and that the subsidiarity principle is followed.\(^43\)

Subsidiarity

In accordance with the subsidiarity principle stipulated in Art. 5 of the TEU, in areas which do not fall within its exclusive competence, the Union shall

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\(^42\) See also Art. 2(2) of the TFEU and the Protocol of the Treaty of Lisbon on the exercise of shared competence.

\(^43\) See also Pistone 2002 p. 68.
act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.\footnote{44}{The institutions of the Union apply the principle of subsidiarity as laid down in the Protocol of the Lisbon Treaty on the application of the principles of subsidiarity and proportionality. National parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.}

**Proportionality**

In accordance with the proportionality principle stipulated in Art. 5 of the TEU, the actions of the Union must not go beyond what is necessary for the attainment of the objectives of the founding treaties. The measures used and the objectives pursued must be in the right proportion to each other.\footnote{45}{See e.g. 66/82 Fromançais and 8/55 Fédéchar.}

The measures taken must be appropriate for the attainment of the objective, they must be necessary because a less restrictive measure is not available and they must be sufficient for the attainment of the objective.\footnote{46}{The institutions of the Union must apply the principle of proportionality as laid down in the Protocol to the Lisbon Treaty on the application of the principles of subsidiarity and proportionality.}

**Flexibility**

Even though EU-wide harmonization of direct taxes requires unanimous decision-making of the Member States, certain Member States may enter into tighter cooperation in accordance with the flexibility principle. This alternative includes differentiated or flexible integration; for example, by means of bilateral tax treaties that are in accordance with EU law.

**Loyalty**

In accordance with the loyalty principle stipulated in Art. 4 of the TEU, the Member States must take all necessary measures in order to comply with their EU law obligations (positive Union loyalty). The Member States must also refrain from any measures that endanger the realization of the objectives of the Union (negative Union loyalty).\footnote{47}{See e.g. 106/77 Simmenthal, Paras. 16 and 21 and C-213/89 Factorame, Para. 19.} The loyalty obligation also binds, in addition to the legislator, the tax authorities and the courts of the Member States.\footnote{48}{See also e.g. van Thiel (2009) pp. 292-299 about the loyalty principle.}
**Effectiveness**

Effectiveness or the effect utile principle has a close connection to the loyalty principle. The Member States must provide for the effective realization of EU law in their legislation, administration and jurisdiction. The Member States must provide for effective legal remedies for the purposes of the realization of the rights based on EU law before the tax authorities and the courts. They must give full force and effect to EU law as interpreted in the decisions of the EU Court. 49

**Primacy and direct effect**

The primacy and direct application of the EU law provisions by the domestic authorities and courts have a close connection to the efficiency and the loyalty principles. 50 The EU law provisions and principles must be applied ex officio, even if the taxpayer would not appeal especially to them. 51

**Assimilation or equivalence**

The assimilation, or equivalence, principle obliges the Member States to use as efficient measures for the execution of their EU law obligations as they do for the execution of national provisions. 52 It must not be more complicated to appeal to EU law than it is to appeal to national laws.

**Procedural autonomy**

EU law includes a number of administrative and procedural principles, such as the principle of procedural autonomy. The procedural prerequisites for an appeal based on EU law are based on the domestic law procedural rules, unless an express EU law provision requires differently. The procedure, however, must follow the EU law principles.

**Administrative and procedural principles**

A number of administrative and procedural principles can be deduced from the decisions of the EU Court. These include for example:

49. 106/77 Simmenthal, 222/86 Heylens, C-97/91 Borelli, C-453/00 Kühne and Heitz, C-234/04 Kapferer and C-603/10 Pelati d.o.o., Paras. 23 and 24. See also e.g. van Thiel 2009 pp. 299-301 about the effectiveness principle.

50. 6/64 Costa v. ENEL and 26/62 Van Gend & Loos.

51. C-431/93 Van Schijndel.

52. See e.g. C-234/04 Kapferer, C-262/09 Meilicke and C-603/10 Pelati d.o.o., Para. 23. See also e.g. van Thiel 2009 pp. 301-305.
– détourment de pouvoir (prohibition of misuse of administrative authority);\(^{53}\)
– good governance;\(^{54}\)
– audi alteram partem, audiatur et altera (principle of hearings);\(^{55}\)
– protection of good faith;\(^{56}\)
– concealment right of an attorney;\(^{57}\)
– confidential treatment of information;\(^{58}\)
– the right of the interested party to obtain information on the documents of his/her own case;\(^{59}\)
– legal certainty;\(^{60}\)
– predictability;
– protection of trust;\(^{61}\)
– pacta sunt servanda (a contract binds);\(^{62}\)
– no retroactivity;\(^{63}\)
– administrative official’s obligation to give a statement of reason;
– nulla poena sine lege (no sentence without law);\(^{64}\)
– ne bis in idem (no two judgments on the same case);\(^{65}\) and
– access to justice (effective legal remedies).\(^{66}\)

Even though these principles are not based on the judgments of the European Court of Justice on direct taxes, they must also be followed to the relevant extent in relation to procedures concerning direct taxes.

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53. See e.g. 3/54 ASSIDER.
54. See e.g. 32/62 Alvis and Art. 41 of the Charter of the Fundamental Rights of the European Union.
55. Id.
56. See e.g. joined cases 4–13/59 Mannesmann.
57. See e.g. 155/79 AM and S.
58. See e.g. 264/82 Timex.
59. See e.g. joined cases 56/64 and 58/64 Consten and Grundig and Art. 42 of the Charter of the Fundamental Rights of the European Union.
60. See e.g. 13/61 Bosch and C-318/10 SIAT, Paras. 57 and 58.
61. See e.g. 112/77 Töpfer and 102/86 Mulder.
62. See e.g. C-162/96 Racke, Para. 49.
63. See e.g. 100/63 Kalsbeek and 98/78 Racke, Para. 15.
64. See e.g. 14/81 Alpha Steel.
65. See e.g. joined cases 18/65, 35/65 Gutmann, C-617/10 Åkeberg, judgment KKO: 2013:59 of the Supreme Court of Finland and Art. 50 of the Charter of the Fundamental Rights of the European Union.
66. See e.g. 222/84 Johnston and Art. 47 of the Charter of the Fundamental Rights of the European Union See also van Thiel 2009 pp. 299-300.
Fundamental principles

EU law includes a number of fundamental principles that are similar to the fundamental principles included in the constitutions of the Member States, in the EU Charter of Fundamental Rights or in the European Convention of Human Rights. The Charter of Fundamental Rights of the European Union (“the Charter”), is part of the EU primary law and the fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, constitute general principles of EU law. These fundamental principles include, for example, freedom, democracy, equality and the protection of fundamental and human rights. Other examples include, inter alia, the protection of property, the protection of privacy, non-discrimination and the legality principle. Also, the principle of a constitutionally governed state and a prohibition of unjust enrichment are recognized as EU law principles. The fundamental principles may be of relevance in relation to direct taxes – for example, in requiring that the tax treatment in the Member States not constitute discrimination based on nationality, gender, religion or ethnic origin.

Human rights

The Charter of Fundamental Rights of the European Union entered into force after the Lisbon Treaty entered into force on 1 December 2009 and the Union shall acceded to the ECHR. Already before the accession, however, human rights have had a role in tax cases.

Even though tax obligations derive mainly from administrative and not from civil law and therefore often do not fall under Art. 6 of the ECHR concerning the right to a fair trial, for example different types of increases in taxes may be considered to be penalties for criminal offences and therefore come

67. Art. 6(1) TEU.
68. Art. 6(3) TEU.
69. See e.g. 29/69 Stauder, 11/70 Internationale Handelsgesellschaft, 4/73 Nold and 149/77 Defrenne.
70. E.g. Art. 345 TFEU. See also 44/79 Haurer, Para. 30 and C-44/89 von Deetzen, Para. 26.
71. E.g. joined cases 46/87 and 227/88 Hoechst, Paras. 17-19 and 85/87 Dow Benelux.
72. See infra 2. on non-discrimination.
73. See e.g. Arts. 5 and 19 TEU.
74. E.g. C-314/91 Weber.
75. E.g. joined cases 4–13/59 Mannesmann.
under the scope of Art. 6 of the ECHR.\textsuperscript{77} Further, Art. 47 of the Charter, concerning the right to an effective remedy and to a fair trial, does not limit its applicability to civil and criminal cases but also covers tax cases.\textsuperscript{78}

The application of Art. 6 of the ECHR (or Art. 47 of the Charter) for example includes the right to a fair and public hearing.\textsuperscript{79} The length of the proceedings must not be excessive\textsuperscript{80} and the equality of arms principle applies. The taxpayer, for example, has the right to see all the documents assembled by the tax authority.\textsuperscript{81} The taxpayer must be considered to be innocent until proven to be guilty of a tax crime, such as tax fraud, and the taxpayer does not need to help in finding him or her guilty to a crime (freedom against self-incrimination).\textsuperscript{82} The taxpayer has the right of silence in any tax investigation where there is a likelihood of a significant penalty and there is default on the taxpayer’s part.\textsuperscript{83} In such a situation the taxpayer does not need to answer the relevant questions (oral or written) and he does not have to hand over relevant documents.\textsuperscript{84} The taxpayer should not have to prove a hypothetical assumption.\textsuperscript{85} It is, however, in accordance with Art. 6 to require a taxpayer to report all his or her income and wealth as long as there are no pending criminal proceedings against him.\textsuperscript{86}

\textsuperscript{77} See e.g. case 284/94 Bandenoun v. France, case 13102/04 Impar Limited v. Lithuania and case 7359/06 Aquardino SRL v. Moldova for cases that fell under the scope of Art. 6 and case 44759/98 Ferrazzini v. Italy for a case based on which most tax cases do not fall under Art. 6. See also La Scala 2009 pp. 495-496.

\textsuperscript{78} The scope of the Charter, however, is limited to cases in which EU law is at issue. See Art. 51 of the Charter.

\textsuperscript{79} See e.g. 73053/01 Jussila v. Finland. See also La Scala 2009 pp. 500-501 about the case Jussila and Attard 2009 pp. 532-533 for other cases based on Art. 6.

\textsuperscript{80} See e.g. 974/07 Wienholz v. Germany in which the proceedings that lasted more than 17 years were considered to be excessive and in conflict with Art. 6 even though the suspension of the proceedings had been at the request of the taxpayer. See also Baker 2011 p. 254 about the case.

\textsuperscript{81} The only valid grounds for refusing to supply the documentation include the protection of vital national interests or the protection of fundamental rights of third parties. See e.g. case 11663/04 Chambaz v. Switzerland. See also Baker 2012 p. 585.

\textsuperscript{82} See 19187/91 Stauders v. United Kingdom, Para. 68 and 31827/96 J.B. v. Switzerland.

\textsuperscript{83} See e.g. case 12547/86 Bendenoun v. France, case 73053/01 Jussila v. Finland, case 10828/84 Funke v. France, case 31827/96 JB v. Switzerland and case 11663/04 Chambaz v. Switzerland. See also Baker 2012 p. 584.

\textsuperscript{84} See also Baker 2012 p. 584.

\textsuperscript{85} In the case 34976/05 Metalco Bv v. Hungary it was considered that the right to fair trial included that the taxpayer did not have to prove hypothetical facts.

\textsuperscript{86} See Allen v. United Kingdom. See also Äimä 2010 pp. 1-3.
Also the *ne bis in idem* principle to the Seventh Protocol of the ECHR (no two judgments on the same case)\(^{87}\) and the right to property of Art. 1 of the First Protocol to the ECHR\(^{88}\) are relevant in tax cases. In order to be in accordance with Art. 1, taxes must be imposed according to law, tax laws must pursue a legitimate purpose, taxes must not be disproportionate\(^{89}\) to the ends involved, taxes must serve a valid purpose in the public or general interest and tax provisions must be reasonable and proportionate means to achieve the valid purposes.\(^{90}\) For example, taxation based on so unclear legislation that it lacks the quality of law breaches the right to enjoyment of property. The requirement of the rule of law is satisfied only if the law is accessible, precise and foreseeable in its application.\(^{91}\) Retrospective tax legislation on the other hand is not considered to be in conflict with Art. 1.\(^{92}\) However, retroactive tax legislation can never reverse the effect of a final, binding court judgment to the detriment of a taxpayer.\(^{93}\) There are even cases in which a tax system has claimed to be in conflict with Art. 9 of the ECHR on the freedom of religion.\(^{94}\) The ECHR also includes a non-discrimination principle.\(^{95}\)

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87. Art. 4(1) of Protocol No. 7 to the ECHR and Art. 50 of the Charter of Fundamental Rights of the European Union. See e.g. KKO:2013:59 14939/03 Zolotukhin v. Russia, 13079/03 Ruotsalainen v. Finland and C-617/10 Åkeberg. See e.g. Hellsten 2010 pp. 527-541 and Monsenego 2012 pp. 280-281 for more about the *ne bis in idem* principle.

88. Art. 17 of the Charter of Fundamental Rights of the European Union. See e.g. 30345/05 Joubert v. France. See also Monsenego 2012 pp. 276-280.

89. See case 32798/06 Monedero & others v. France for a case concerning disproportionality. See also Baker 2010 p. 260 about the Monedero case. See 66529/11 N.K.M. v. Hungary for confiscatory taxation in conflict with the right to property. See also Baker 2013 pp. 393-394 about the case.

90. See Attard 2009 pp. 350-351.

91. 23759/03 and 37943/06 Shchokin v. Ukraine. See also Baker 2010b pp. 568-569 about the case.

92. See 27793/95 MA v. Finland. In individual cases, retrospective legislation, however, may impose an excessive burden on an individual and therefore breach the individual’s rights. See 72638/01 Belmonte v. Italy and Baker 2010 p. 260. See also Ergec 2011 pp. 2-11 and Monsenego 2012 pp. 276-280 about the impact of ECHR Art. 1 of Protocol No. 1 on taxation.

93. See e.g. case 7359/06 Aquardino SRL v. Moldova.

94. See 40010/04 Tamara Skugar & others v. Russia, 8196/05 The Association of Jehovah’s Witnesses v. France and 12884/03 Wasmuth v. Germany. In the Wasmuth case, it was considered that it was not in conflict with the freedom of religion or the right to privacy of Articles 9 and 8 of the ECHR to indicate on a identity card issued for tax purposes that a person is not subject to church tax. See also Baker 2011 p. 253 about the Wasmuth case.

95. See also Art. 21 of the Charter of Fundamental Rights of the European Union. In case 11581/85 Darby v. Sweden the European Court of Human Rights considered that Art. 14 of the ECHR read together with Art. 1(2) of Protocol No. 1 prohibits discrimination in tax matters unless a different treatment can be justified by objective differences between the taxpayers. See also Attard 2009 pp. 535-536. For example, Arts. 4 and 8
Structural principles

EU law also recognizes a number of structural principles, which determine the relation of EU law to the domestic laws of the Member States. These principles include, for example, autonomy, direct effect and application, primacy and equality among institutions.\(^\text{96}\)

1.4. Secondary law

1.4.1. Concept

Directives

Secondary EU law includes the provisions given by the EU organs on the basis of the authorization of the founding treaties. With regard to direct taxation, these provisions include the directives on direct taxes issued in accordance with Art. 115 of the TFEU. Unlike in relation to direct taxes, with regard to indirect taxes regulations are also possible.\(^\text{97}\) The authorization to issue directives included in Art. 115 of the TFEU instead is the only express measure available for the positive harmonization of direct taxes.

1.4.2. Directives

1.4.2.1. Authorization to issue directives

Art. 115

In accordance with the authorization of Art. 115 of the TFEU, the Council – acting unanimously in accordance with a special legislative procedure

\(^{96}\) These principles are discussed at 1.2. infra.

\(^{97}\) Art. 113 TFEU. Only in a very exceptional situation, Art. 352 TFEU may allow provisions on direct taxes issued in the form of a regulation. See supra 1.3.1.