



**TURUN
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TAXPAYERS' FUNDAMENTAL RIGHTS POST ATAD AND BEPS

Reijo Salo



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The originality of this publication has been checked in accordance with the University of Turku quality assurance system using the Turnitin OriginalityCheck service.

ISBN 978-952-02-0154-8 (PRINT)
ISBN 978-952-02-0155-5 (PDF)
ISSN 0082-6987 (Print)
ISSN 2343-3191 (Online)
Painosalama, Turku, Finland 2025

UNIVERSITY OF TURKU

Faculty of Law

REIJO SALO: Taxpayers' Fundamental Rights Post ATAD and BEPS

Doctoral Dissertation, 320 pp.

Doctoral Programme in Law (DPLAW)

June 2025

ABSTRACT

OECD's Base Erosion and Profit Shifting project (BEPS) originated in a few MNEs' tax behaviour. The project aimed to tackle this aggressive tax planning to ensure business equality. The EU effort resulted in the implementation of the BEPS findings through the anti-tax avoidance directive (ATAD).

Taxation is initially a complex consequence of financial activity. Therefore, taxation is dependent on economic freedoms. ATAD automatically impacts taxpayers' rights and obligations. Taxpayers' rights were not considered for economic freedom in the legislation process.

Based on the legality principle taxes are governed by law. Constitutions implement the legality principle setting limits for the legislator. This steering creates the first national protective level for taxpayers' fundamental rights. If the economic activity involves the EU's internal market, EU law sets another constitutional level protection for taxpayers.

Taxpayers' rights, and their protection, rely on fundamental rules and legal principles. Both the legislative process and tax assessments are directly or indirectly connected to constitutions and EU law. As these fundamental rules are not changed, BEPS and ATAD impacts should be measured against the fundamental rights to understand whether they restrict taxpayers' economic rights too extensively, i.e. are they proportional to their objective.

The EU has no legislative power linked to taxation. The question of proportionality is important to understand the legitimation of EU's tax directives. As the Member States are obligated to implement directives by tax laws, the legislative process is stressed. A directive doesn't eliminate national interests. A directive connects tax automatically to EU law and makes it an issue of EU law.

Tax is a national measure even on transactions within the EU internal market. This means that harmonised rules are used separately in each EU Member State. Harmonisation of tax rules does not therefore guarantee the functioning of the EU internal market. The question of taxpayers' rights and their protection is crucial.

KEYWORDS: Proportionality, impact assessment, rule of law, ability to pay, legality principle, internal market

TURUN YLIOPISTO

Oikeustieteellinen tiedekunta

REIJO SALO: Taxpayers' Fundamental Rights Post ATAD and BEPS

Väitöskirja, 320 s.

Oikeustieteen tohtoriohjelma, (DPLAW)

Kesäkuu 2025

TIIVISTELMÄ

OECD:n Base Erosion and Profit Shifting (BEPS) projektin heräte on muutaman kansainvälisen yhtiön tavassa hoitaa verojaan. Projektin tarkoituksena oli estää aggressiivinen verosuunnittelu ja näin varmistaa liiketoimintojen tasavertaisuus. EU toimi asiassa aloitteellisesti säätämällä BEPS projektin suositusten mukaisesti veronkiertodirektiivin (ATAD).

Verot ovat taloudellisen aktiviteetin monimutkainen seuraus. Verojen ja taloudellisten vapausoikeuksien välillä onkin suora yhteys. Veronkiertodirektiivi vaikuttaa puolestaan näihin verovelvollisten oikeuksiin ja velvollisuuksiin. Taloudellisia vapausoikeuksia ei huomioitu direktiivin säätämisprosessissa.

Perustuslakiin sisältyvän legaliteettiperiaatteen mukaisesti veroista määrätään lailla. Perustuslait asettavatkin rajoja normaalin lainsäädännön säätäjälle. Tämä ohjaava vaikutus muodostaa ensimmäisen verovelvollisen oikeussuojan tason. Jos taloudellinen toiminta liittyy EU:n sisämarkkinoihin muodostaa myös EU lainsäädäntö perustuslailliseen suojaan verrattavan suojan verovelvolliselle.

Verovelvollisen oikeudet ja niiden suoja perustuu perustuslaillisiin sääntöihin ja oikeusperiaatteisiin. Tämä sitoo niin lainsäädäntöprosessin kuin myös verotuksen toimittamisen joko välittömästi tai välillisesti vakaisiin ja periaatteellisiin säännöksiin, siis perustuslakiin ja EU oikeuteen. BEPS:n ja ATADin vaikutuksia tulisikin mitata näitä sääntöjä vasten, jotta ymmärtäisimme rajaavatko kyseiset säännökset liiaksi verovelvollisen talousoikeuksia. Toisin sanoen ovatko ne oikeassa suhteessa näiden sääntöjen tarkoitukseen.

EU:lla ei ole verotusvaltaa ja tästä syystä sääntöjen oikeasuhteisuus on tärkeä pohdittaessa EU:n verodirektiivien oikeutusta. Jäsenvaltioiden on implementoitava tämä direktiivi kansallisella verolainsäädännöllä lainvalmisteluprosessin ollessa varsin ohjattu. Direktiivi ei kuitenkaan poista kansallisia intressejä, mutta yhdistää verot välittömästi EU lakiin ja sen suojaan.

Verotus on kansallista myös EU:n sisämarkkinoilla tapahtuvien liiketoimien kohdalla. Harmonisoituja säännöksiä sovelletaan erikseen kansallisella tasolla jokaisessa EU jäsenmaassa. Näin ollen harmonisointi ei takaa sisämarkkinoiden toimivuutta. Tähän liittyvä verovelvollisen oikeudellisen suojan kysymys onkin tärkeä.

ASIASANAT: Suhteellisuus periaate, vaikutusarvio, oikeusvaltio, maksukykyisyys, legaliteetti periaate, sisämarkkinat

Acknowledgements

I was raised up to respect honesty and trust that honesty will always pay off. This has been a guiding principle for me. During my career I've learned that honesty is a key value, which is worth respecting, but it requires a lot of effort to get justice. Trust in honesty and justice was the true inspiration for this study; a by-product of a tax audit in Sweden, Belgium and Finland. These audits made me wonder what are the legal and moral basis for a tax authority's approach and will honesty really finally pay off.

I want to truly thank professor Jaakko Ossa for agitating me to start working on this study. It has been a pleasure, not only because of learning new issues, approaches and levels of consideration, but also an opportunity to learn to write whole sentences instead of writing only bullet points to power point presentations. Jaakko's endless positive support as an instructor has been extremely valuable during the dark moments during my study. I want to thank also professor Janne Salminen for giving really concrete and valuable discussions and comments to my work.

Starting the study after years of practical work in business and learning to focus on key issues I want to give credit to professor Asko Lehtonen, who gave me valuable hints on my doctoral thesis. This help was important and encouraging. I had another turning point in my study; professor Frans Vanistendael recommended to me to do the study in English to get wider audience and offered his support through interesting and valuable views. Unfortunately I can thank him only post mortem. The writing process has been a long and truly interesting process. For years I participated in a writing group where we shared our experiences, difficulties and celebrations. Especially I want to thank my writing group for taking the time and effort to discuss with me writing challenges for years.

The process was not only about the writing process, it was also a question about substance knowledge and understanding the different levels. I've had the pleasure to discuss with professor Sjoerd Douma and M Phil, attorney Paul Farmer, professional aspects in questions related to my study. Anders Köhlmark, retired partner at KPMG Sweden, has read through an early version of my study and offered comments to me based on a respectful and long career. PhD Matti Urpilainen has been a true friend

to me during the process by reading my text multiple times and asked valuable questions of my study and the topics I've raised.

Finally, professor Juha Lindgren and emeritus professor Raimo Immonen offered me an outside perspective in comments to get my study finalized. Outside perspective should never be underestimated. I'm grateful that Juha also was willing to oppose my study. I believe that he has the correct experience and approach to challenge my conclusions.

The process has been long, sometimes also heavy. Finally, I want to thank my family for tolerating me while I focused on my study for such a long time, equally for IT-technical help, which I truly have needed, and for reading my study with a critical eye.

I've received financial support from Säästöpankin Tutkimussäätiö and Maaliskuun 25. päivän säätiö, which has offered me an opportunity to do research even abroad. This has been valuable.

2nd May 2025

Reijo Salo

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1 Introduction to the research

1.1 Starting point

Fundamentals of today's taxation and rule of law were created long back in 1215 in the Magna Carta which stated that taxes should always be governed by law. This fundamental principle is still valid and is implemented in most of modern constitutions. Even though the legal fundamentals of taxation were established more than 800 years ago, tax law is the most or at least one of the most dynamic areas of law. This is due to the changing needs of government funding, rapid change of industrial operations, increased mobility of people and operations, and political pressures especially in the latest years.

Financial politics are reflected in tax laws. This relation creates a reflection of applicable political powers: governments political interests are reflected in issuing tax laws¹. This means that even though the neutrality of the tax system is seen as a key qualification of a good tax system, political interests in the area of industrial politics, environmental politics and economic cycles, to mention a few, steer financial politics as well as tax laws².

The legality principle has a very strong position in tax jurisprudence³. Being a fundamental principle, it does not define yet a good tax system as such, the legality

¹ See for example Wikström, Ossa & Urpilainen, pp. 25–29.

² The neutrality of the tax system is not necessarily self-evident. If official tax governance is weak creating opportunities for fraud and corruption, the tax system cannot reach neutrality. A good tax system is crucial for a well-functioning society as it is crucial also for taxpayer to be able to rely on the rules and authorities. Tax morale, even being a value of aspiration, is important for a good tax system, see OECD's program "Boosting tax morale – so people and businesses pay tax" at www.oecd.org/tax/tax-global/boosting-tax-morale-so-people-and-businesses-pay-tax.htm. As Fuller considers, reciprocity unites men because of their differences, p. 23. I see this crucial as both taxpayers and tax authorities should have a commitment to tax morale even though their approaches are different.

³ The impacts and scope of the legality principle have been analysed by several academics. See for example Vanistendael 2013, pp. 30–31, Ryyänen, p. 20. Äimä refers to 81 § of the Finnish Constitution, p. 20 and Tikka 1972, pp. 135–145. Haapaniemi considers retroactive implementation of new law to create challenges, p. 79.

principle states only that taxes have to be based on law⁴. This is crucial as any other level of morality would be challenging to comply with due to a clear and mutual understanding of what is meant by different moral values⁵.

Adam Smith, the father of economic liberalism, has defined qualifications for a good tax system. A good tax system includes, according to Smith, basically four components; equality, certainty, convenience of payment and economy of collection. Independently how for example equality is understood⁶, three of these classes include components that are strongly related to taxpayers' legal protection. Equality, certainty and convenience of payment include components protecting the taxpayer from governments or tax collectors' arbitrariness⁷. Fuller described in the 1960s qualifications for good legislation, a component in taxpayers' legal protection.

Tax is a consequence of business, i.e. business is the underlying source of taxation⁸. When assessing taxation, business transactions are considered based on tax law or laws⁹. The transactions, however, are based on civil law terms and conditions. The financial impacts are defined based on civil law definitions and

⁴ As Tikka analyses, for example the analogical interpretation is often left on an abstract level and for example in Finland accepted, though with quite strict limitations.

⁵ Fuller considers that "the morality of duty finds its closest cousin in the law while the morality of aspiration stands in intimate kinship with aesthetics", p. 15. Basically, this means that the legality principle relies on rules that represent more morality of duties than perhaps morality of aspiration. When discussing paying taxes, it is often referred to moral questions. This type of moral may be impossible to comply with as there is no clear and mutual understanding of what kind of rules the morale means.

⁶ For example, equality could be understood from an interest or ability to pay point of view. For instance, Knuutinen (2009, pp. 33–34) seems to agree with Gunnarsson, that Smith represents merely an interest approach rather than ability-to-pay-approach. Equality should then be understood in a horizontal view.

⁷ The EU considers in its 2019 study that "Achieving a level playing field for all companies. Despite major efforts to combat tax avoidance, effective tax rates still vary according to company size, location, level of internationalisation and sector of operation. Introducing a common, minimum corporate tax rate and a common corporate tax base could level the playing field considerably." This illustrates well the challenges within taxation: the presentation of a global minimum tax based on the effective tax rate is not actually a measure that would refer to nominal a tax rate. This may create expectations that are not met and lead to controversial taxes. EU Tax Observatory considers "The European Commission in fact highlights the beneficial effects of (non-harmful) tax competition: «In this context it is important to recognize that, while harmful tax competition must be addressed both at EU level and at the broader international level, notably within the OECD, and the State aid provisions of the Treaty must be respected, some degree of tax competition within the EU may be inevitable and may contribute to lower tax pressure. » (European Commission, 2001)", EU Tax Observatory 2021

⁸ Law again defines the level of taxation.

⁹ In case business is international tax laws in multiple countries need to be complied.

accounting rules. Accounting rules are the underlying framework for determining taxable income. This illustrates that there is a strong connection between tax, civil and accounting regulations. This connection sets limits not only to how tax laws can be legislated, but also to assessing taxes.

1.2 What is this research about

1.2.1 Public discussion as catalytic

Currently, there is an ongoing active public discussion on especially taxing multinational entities; fairness, ethics, transparency, and aggressive tax planning have been raised in the discussion¹⁰. Ongoing discussions illustrate that not all components of the good tax system are currently in place¹¹. On the other hand, the discussion has been concentrating almost solely on multinational entities and their taxation, perhaps even partly on a few companies' taxation only¹². As such this is neither a sufficient nor reliable basis for concluding how well the four components of a good tax system are in place. For that purpose, discussions and views are too narrow and high level¹³.

¹⁰ The EU study (2019) still states that (p. 12) “all the needs and problems originally addressed by the EU rules under assessment are still relevant. For instance, transfer pricing is still one of the main channels used by multinational companies to shift profits; aggressive tax planning via interest payments is still a salient issue”. It seems to be that the same topic stays on the agenda independently of the actions taken. I assume that the debate will not end soon as the discussion is about high-level topics that are hard to define in concrete, agreeable form. I would add on the list greenwashing and “taxwashing” that will be added to the discussion when taxpayers are trying to respond to the set topics, but where the impact is not what it was expected to be, see for example ESG and Sustainability in taxation, Amsterdam 2023.

¹¹ The discussion illustrates at least that there are multiple views existing that are not reflected in the tax laws and that global businesses are changing the scene for international tax as well as the allocation of fiscal revenues between countries.

¹² Discussion has concentrated on so-called GAFA (Google, Amazon, Facebook, and Apple) companies. The reason for that may be, at least partly, that these companies are not only large but also that they operate in a new digital industry. These companies are US companies with a US tax “infrastructure”, that is, worldwide income is taxed in the US, but first when it is imported to the US. First in 2018 with new GUILTY, rules US companies were not penalized for keeping their income outside of the US. The non-US income has often been subject to far-reaching tax planning.

¹³ This discussion often reflects morality of aspiration or morality of duty, but only in a limited area. The discussion raises expectations of the outcome, often by purpose. Unless the discussion is systematic and organised, the risk is that discussion is ongoing of a certain issue with the same terms and even alike-looking conclusions, but due to

Public discussion¹⁴ is not creating any tax laws until it results in democratic decisions. I would regard it rather to illustrate changes in the operational environment or moral aspects. The public debate raises views that are deviant from old views or illustrates the need to develop rules due to changes in the operational environment or new values, such as climate change. When the political pressure grows enough, public discussion may result in new tax laws and regulations. Before that process should satisfy requirements set for legislative work¹⁵.

Another angle of the reasons for public discussion could be mistrust towards tax authorities¹⁶, i.e. there would not be public trust in tax authorities' capabilities, resources, or possibilities of tackling aggressive tax planning¹⁷. It could be seen even

opposite targets not resulting in the outcome that was expected. As an example, I would mention transfer pricing; it seems to be a mutual understanding that taxes should be paid where the value is generated. Each country just has an entirely different understanding of where the profit actually is generated. Equally Pillar 2 may be an outcome of failed BEPS 1 actions.

¹⁴ The quality of public discussion can never be fact-based, but concerning aggressive tax planning, EU studies make far-reaching conclusions. For example, the 2019 study states based on a 2010 study that "Indeed, these bilateral tax treaties were in the past mainly concluded to avoid **double taxation** rather than double non-taxation. Overall, multinationals in high-tax jurisdictions are estimated to pay 30% less tax than similar domestic companies", p. 19. Further EU study (2016) concludes concerning shifting income through debt financing that "When comparing the consolidated ETRs of MNEs to similar domestic corporations, the use of ATP structures should be reflected in a significantly lower tax burden. As an empirical approach to compare MNEs and domestic companies, we can follow the logic of Egger et al. (2010) and match on observable characteristics. However, there are several other reasons a for lower effective tax burden, so the reverse conclusion that a lower effective tax burden is always due to ATP is not generally possible". Indeed, the effective tax rate is impacted by more financial factors than aggressive tax planning topics. The effective tax rate however creates an assumption for public discussion purposes without actual understanding.

¹⁵ As legislative work converts the morality of aspiration into the morality of law, it needs to ensure that behavioural rules can be complied with (compare with Fuller's list of consequences of failure, pp. 38–39). Legislator faces the challenges of good tax legislation. This task is not easy. In spite of ongoing public discussions, the rule of law governs ongoing tax assessments limiting the powers of tax authorities to adapt principles from public discussion.

¹⁶ See for example transparency discussion in the EATLP 2018 Zurich congress. Taxpayers seem to be the focus of NGOs, but when reading through carefully the comments and their targets, NGO's comments are addressed to tax authorities' actions. The demand for public country-by-country reporting can be seen as a request to understand how taxpayers plan their taxes and how tax authorities approve these approaches. Public country-by-country reporting is believed to bring an opportunity to control the behaviour of these two parties.

¹⁷ In this respect tax authorities face the same challenge as taxpayers: lack of trust. The challenge is that public discussion reflects assumptions without understanding all the

as a mistrust towards the existing tax assessment system¹⁸. The debate illustrates a certain expectation of how, in this case, multinational entities should be taxed. The expectation¹⁹ seems to be that every country will be a winner. The debate seems to agree that tax authorities do not have enough powers to manage the topics in line with expectations.

The views presented illustrate the moral aspects of some stakeholders²⁰. The focus is often on a few taxpayers and their behaviour. Discussion is coloured by simplifications, far-reaching conclusions, and a strong political agenda. This well-driven agenda puts pressure on political decision-makers resulting often in frequent new policies.

The current public discussion and following political pressure have changed the tax environment²¹. Even though tax jurisprudence can be considered dynamic, the changes and proposals to regulation²² have been remarkable even from the

content and impact of actual laws and rules. Where taxpayers are seen behaving aggressively, tax authorities are seen not being on top of their tasks. The reality, may often be that the public and political discussion is done without a proper understanding of the rules and circumstances.

¹⁸ The civil society comments reflect this aspect. The tax assessments or the rules resulting in a certain tax assessment in a stand-alone case are labelled not to be fair from a civil society point of view. In reality, the conclusion is not that simple or straightforward at all as the unknown factors are not considered, opinions differ so much, or indicators for the conclusion are not proper.

¹⁹ My conclusion is that some countries see that the BEPS action plan failed in its targets as it did not bring the expected increase in tax revenue for them. It was rather shifting the operations to new locations. This aspect was brought into the discussion for example by Krister Andersson from BIAC, see also Tax Seminar Turku 2016. BEPS 2, especially Pillar 2 in 2020 was drafted to eliminate this failure. The OECD states that “Pillar Two addresses remaining BEPS challenges and is designed to ensure that large internationally operating businesses pay a minimum level of tax regardless of where they are headquartered or the jurisdictions they operate in”, OECD Pillar 2 report, p. 14.

²⁰ Fuller has explained the morality behind the law, the morality of duty. This is the lowest level of morality. Higher levels of morality are more aspirational, that is dependent on personal views, and not easy to agree on, Fuller, pp. 15–16. The moral aspects represented by different stakeholders are more aspirational.

²¹ Transparency seems to be the answer to many topics raised. Further transparency is not only about transparency towards tax authorities but also public transparency. Instead of one set of communication being the solution to all challenges transparency may create new turbulence in the form of discussion of greenwashing or “tax washing” as the transparency requirements somehow ignore the differing needs and objectives of the discussion. See for example Ehrke-Rabel.

²² Examples of changes or new regulations are the OECD’s proposals in the BEPS project resulting in c-b-c-r, new transfer pricing rules, new tax treaty provisions through a multilateral instrument, EU’s ATAD, and revised DAC 6. The OECD’s BEPS 2 is

perspective of tax jurisprudence. Common for the changes is that they seem to have high political pressure and expectations²³ and that they have been executed in a short time²⁴. These changes put a challenge to taxpayers' rights on multiple levels in multiple countries. It appears that taxpayers' rights are not considered properly.

In conclusion, I would state that public debate has been quite an efficient catalyst for the initiation of new taxing rules, but a poor catalyst for developing taxpayers' rights in the area of these new rules. This may result finally in unexpected impacts²⁵

1.2.2 How to define low taxation?

States have sovereignty over taxes. Therefore, the tax burden is essentially based on tax laws in each country steered in cross-border cases by bilateral and multilateral tax treaties. The nominal tax burden is defined separately country by country²⁶. Effective tax rates differ from national nominal tax rates as the definitions of income and tax are not the same in tax laws and accounting standards²⁷.

under preparation in 2021 and most likely will be followed by the EU's actions in the area of digital tax.

²³ For example, the OECD BEPS project was urgent, especially for political reasons, see BEPS project.

²⁴ For example, the time used for Pillar 2 preparations, public hearings, and impact assessment was extremely short when compared with the size and magnitude of the reform. This results often in a situation where no or only poor guidance on how to comply with the rules is drafted.

²⁵ Part of taxpayer's protection is founded in fundamental rules and principles ensuring a balance between taxing rights and different rights. These rights will be applicable even for the new rules. If the impacts are not analysed before, the outcome may be unexpected.

²⁶ The rule of law is necessary as the taxpayer has to be able to comply with the set expectations. These expectations need to be stated in the law in an understandable manner. If rules are not concrete enough or clear enough, but more on the level of aspiration, predictability is reduced creating risk for discrimination and arbitrary impacts. The law may fail as King Rex failed in Fuller's example. The EU's role as a tax legislator is complex as each Member State has tax sovereignty and the EU's taxing power requires unanimous decision. In practical terms, the EU has referred to the functioning of the internal market, but his argument should be subject to proportionality. In neither case, the EU is not a performing legislative process in line with the rule of law consideration.

²⁷ For example, IFRS takes a future view. Taxes should be booked based on what is likely to be realised in the future. Taxable income takes into account past events. This means that for example loss carry forwards impact ETR based on how losses are treated for future purposes. If it is more likely than not that losses cannot be utilised,

Business decisions are based on multiple factors, tax is only one factor among many factors. The effective tax rate is not a driving force for business decisions unless an option would create an extremely negative tax impact. Business decisions impact effective tax rates, but effective tax rate impacts businesses only randomly.

As tax is a consequence of business, EU-based tax regulation is a challenge; how would the EU regulate a national tax without interfering with tax sovereignty. The functioning of the internal market is a business environment issue targeting to eliminate obstacles. National taxes, harmonised or not, do not impact the internal market unless taxes are treating taxpayers differently based on nationality. Both tax-related subsidies and limitations make tax treatment sensitive to discrimination.

Tax impacts are measured in multiple ways illustrating the purpose of measures. Where tax authorities' statistics are based on taxes paid for a fiscal year in a country, multinational companies measure their consolidated tax burden through effective tax rates based on different rules, such as IFRS or US GAAP principles²⁸. Different measures are often based on varying methods and standards to recognise profits.

they need to be booked as tax cost in IFRS meanwhile for taxable income purposes they still exist.

²⁸ Accounting standards, such as IFRS, take a view on future impacts on profit and balance sheet of the reported period meanwhile taxable income based on tax laws are normally defines the profit based on issues that have realised in the past. This difference in view is fundamental, sometimes even confusing unless the difference is not understood properly. It looks like that for example the OECD is not in reality on top of the differences when they propose in BEPS 2. Pillar 2 proposal of combining tax law approach defining income tax and for example, IFRS approach when defining income for effective tax rate calculation. Mixing two standards results in an outcome that is based on no standard.

That's why there are various ways of calculating tax burden²⁹. There seems to be no one-size-fits-all standard³⁰ approach to measure tax burden³¹.

One of the key topics raised in the discussion has been low or no tax payments on income. This has been claimed to be an issue concerning especially taxpayers having multinational operations. Typical for the discussion has been simplified conclusions and mixed use of terms and indicators. Different measures confuse a complex issue prohibiting constructive discussion³². Further, this may be confusing when comparing consolidated³³ ETR with the local tax burden.

²⁹ Knuutinen 2009 has analysed well different methods and standards of how to identify income and costs. Some standards seem to identify income based on real values; fluctuation of value would be recognised as income independently whether it has been realised or not. Another approach is the question of time perspective as described above. Also, the treatment of losses on disposals may be recognised differently, to mention a few as examples. See Knuutinen, 2009 p. 77–98.

³⁰ Country-by-country-reporting initiatives have faced this challenge. Different actors, such as CSR Europe, have attempted to create a standard for what data should be published so that a taxpayer could illustrate that he/she has been doing “the right thing”. GRI published its standard 207 in 2019, which includes a selection of mandatory and voluntary data to be published in line with sustainability measures, see GRI Standards. GRI 207 represents more of a standard for what data should be published but does not illustrate sufficient measures to illustrate how different factors impact different businesses leaving a conclusion on a complex matter to the reader. My conclusion is that where GRI creates a standard for what to publish, it fails to help taxpayers to communicate material topics for a specific operation and it does not translate data into reliable information for different stakeholders. This illustrates quite well the challenges there are to describe tax burden.

³¹ Different measures are used to illustrate tax burden, such as ETR (effective tax rate) IFRS (taxes paid + deferred tax booked / profit), CTR (cash tax rate) IFRS (taxes paid for accounting period / profit), CTR-based on tax law (Taxes paid for tax year / profit), CTR on taxable income (taxable income / taxable profit) and nominal tax rate; tax on taxable income to name few.

³² A good example of this is to assess the tax burden after a large investment. After a large investment taxpayer makes depreciation of the assets. Depreciations create normally an incentive from a tax point of view for investments by allowing the taxpayer to depreciate asset value at the beginning of the asset's lifetime, say in seven years. This may result in a very low taxable income meanwhile IFRS identifies different kinds of depreciation over the whole lifetime of the asset. If the IFRS result is compared with taxes paid based on tax law effective taxation looks very low at the beginning of the lifetime and very high at the end of the lifetime of the assets.

³³ Consolidated financial information is based on group-level information where all internal transactions are eliminated. Consolidated financial accounts are often based on IFRS or US GAAP. They eliminate group internal transactions and their impacts; they recognise income and costs at different times compared with local taxable income. Financial instruments used in financing for example for hedging purposes create a lot of timing differences between the different standards as well as depreciations are often

Lack of comparability on the one hand and complexity of different standards, on the other hand, has been one of the reasons for far-reaching conclusions on taxes paid and sometimes single-minded discussions³⁴. Neither tax authorities seem to understand these different metrics though they are used in the discussions³⁵. Constructive discussion would require careful and understandable use of indicators as well as a better understanding of factors impacting tax based on existing law and its purpose to avoid confusing conclusions³⁶. High-level public discussion is not capable of taking into account technical indicators resulting finally in conflicting views between countries, taxpayers, and authorities³⁷.

When the debate focuses on the aspiration of whether a fair share of taxes has been paid, it fails often to illustrate who actually would have the right to tax and who

different. This is why taxes are booked differently in consolidated accounts and local accounts. Local accounts do not simply create consolidated profit by summing up, but through eliminations and complying with different definitions for the same topics.

³⁴ Discussion of MNEs' tax contribution started in early 2010. Still in 2020's after BEPS 1 and ATAD basic assumption of MNE tax contribution is unchanged even though MNE ETRs seem to be higher than SME ETRs. Focus has been, and still is, in mechanisms tackling issues as earlier. At the same time, OECD has initiated discussion of taxpayers' willingness to comply with tax rules and paying tax. OECD's target is to identify how economic behaviour could be changed or managed to be more tax-friendly, OECD 2019 Tax Morale. This study represents a different kind of discussion capable of catching more than purely high-level assumptions.

³⁵ Low effective tax rate may be used as an illustration of aggressive tax planning meanwhile for taxpayers it may only illustrate a timing effect; tax will be paid, but only later. My personal experience is that tax authorities measure effective tax rates by comparing taxes paid with taxable income excluding tax-exempt income and either including some specific income items or adding them to income basis. The outcome has been in these cases unpredictable.

³⁶ EU research states still in 2023 defines aggressive tax planning as referring "to the practice of exploiting loopholes in tax laws – that is, abiding by the letter of the law but violating its spirit – to minimise or avoid tax liability. It typically involves using complex tax structures that take advantage of differences in tax laws between countries to reduce taxable income artificially". Meanwhile, artificiality is surely part of aggressive tax planning, loopholes are more complex to define and understand; the intention or the spirit of the law is often complex and not visible. This view challenges the rule of law.

³⁷ It appears that most of the participants of the discussion have same the target, namely to increase the income tax contribution of MNEs, the conflicts arise when the discussion starts to touch more concrete issues. Concrete measures illustrate who are the winners and who are the losers bringing a feeling of whether tax contribution is low or not and where the tax could be paid. See for example OECD's proposal of BEPS 2 concerning digital service tax (so-called Pillar 1) and minimum tax (Pillar 2) which seem to be created to fill the gap created in BEPS 1 compared with the expectations.

has lost tax revenue³⁸. The challenge of high-level discussion is that it reflects so many conflicting views without any clear conclusion or guidance³⁹. An example of this is a study that the European Commission has done. This research concluded that multinationals have higher tax rates than national companies⁴⁰. Hiding income was offered as an explanation. Another factor that was mentioned was multinationals reporting more losses than local companies. The report failed to explain what are the building blocks of income tax contribution⁴¹. Understanding comparability of different indicators, their relation to profitability, income tax logic as well as how and why tax revenue, defined based on national tax laws and rules, as well as, ETR, defined by international accounting standards, behave in different ways, would be important to understand tax contribution.

The narrow focus on tax-related discussion becomes obvious when looking at points on what taxes mean for the free movement of capital and freedom of establishment. These freedoms are directly business-related and the indirect impact that taxes may have not been analysed. Taxes are for some reason disconnected from their origin, i.e. business.

1.3 Territoriality creates tension

The debate has its initial starting point in arguments whether MNEs utilise mismatches between tax regulations to avoid taxes, i.e. they do not pay their fair share of taxes anywhere or in a certain country⁴². This point is valid and a good

³⁸ It seems that a few US companies are in the focus without considering if the taxes should have been paid in the USA or outside the USA. Multiple countries may be of the view that they have too low tax revenue from these US companies.

³⁹ Fuller raised the same aspect in his studies about the Morality of Law. This fundamental setup has not been changed throughout the years.

⁴⁰ See also Aggressive tax planning indicators, 2017 pp. 78–80. This conclusion is somewhat contradictory to the statement that multinationals are doing aggressive tax planning. This factor was explained in the report by stating that multinationals report lower profits. I consider this to be an odd argument.

⁴¹ Even multinational companies have a target to create profit. As the European Commission was looking for indicators considering aggressive tax planning, losses seem to be a far-reaching indicator. Typical tax planning would look for low taxation, not for loss generation.

⁴² It is important to note that there are two, perhaps even contradictory views within the same message. Meanwhile, many civil societies argue that MNEs are not paying their fair share of taxes in developing countries, other civil societies argue that MNEs are shifting income from high-tax jurisdictions to low-tax jurisdictions, with a main focus on not paying their fair share in the headquarters country. As an example, Christian Aid is fighting against global poverty meanwhile Finnwatch is more focused on whether income is shifted from Finland to tax havens, which Finnwatch defines more

starting point for the debate, at least as one of the angles. From a taxpayers' rights point of view, it is important to understand also why there are differences in tax contributions and what would be in that case taxpayers' misbehaviour. Not having this angle in the discussion creates expectations that may not be met. As tax is a result of financial activity (taxes borne and collected) and profitability (income taxes) in a country, local political objectives create a challenge for taxpayers' rights in a global economy⁴³.

Countries are different due to geography, history, natural resources, legal systems, economic structure, and also tax system to name a few. Countries are adopting their regulative systems often to support their business environment and to create a good platform for financial activities, especially in their own area of strength⁴⁴. By attracting businesses countries attract tax basis. Countries drafting tax legislation to support their main industries is called tax competition. Tax competition is one part of competition between states⁴⁵.

Fiscal policy may be used as a competition tool to support the national needs. Tax competition or at least a certain specific type of tax competition is said to be harmful and even against the internal market in EU⁴⁶. EU's target is to create a well working internal market, i.e. to eliminate all the restrictions in EU internal markets.

aggressively than for example EU or OECD, see for example Finnwatch 7/2017. Political discussion is on a general level more focused on a domestic approach.

⁴³ Tax is a national measure and therefore there may be naturally a tension, even a mismatch, in cross border transactions. Countries involved in the transactions have a national interest, which may result in a double or a non-taxation situation.

⁴⁴ For example, Finland has been strong in investment products and forest industry meanwhile some other countries are strong in for example food industry. States usually adapt their legislation to support areas where they have strong industries. This may include also tax legislation. As an example, I would raise the Dutch tax treaty and investment protection treaty network supporting equity investment actors, Ireland's low corporate income tax rate attracting employment opportunities in some industrial sectors, and Finland's highly-educated workforce.

⁴⁵ All competition is not fair. Especially in the area of tax competition, it may lead to strange outcomes. This is why the tax competition has to be fair, based on rules and principles creating a plain playing field just like commercial competition or state aid.

⁴⁶ EU has defined harmful tax competition on EU's internet pages as a) an effective level of taxation which is significantly lower than the general level of taxation in the country concerned, b) tax benefits reserved for non-residents, c) tax incentives for activities which are isolated from the domestic economy and therefore have no impact on the national tax base, d) granting of tax advantages even in the absence of any real economic activity, e) the basis of profit determination for companies in a multinational group departs from internationally accepted rules, in particular those approved by the OECD or f) lack of transparency, European Commission, Harmful Tax Competition. Just a low tax rate or a beneficial tax rule does not create in itself automatically harmful tax competition.

It is difficult to see how healthy⁴⁷ tax competition as such limits the well working internal market as long as taxpayers are treated equally⁴⁸.

Even the internal market includes Member States that are different from each other. Well-working internal market does not require equal minimum tax rules in countries, more that domestic rules are not creating a benefit for national taxpayers⁴⁹. Tax competition creates a need for reforms to maintain the competitiveness of each EU Member State and the EU against other countries.

EU has promoted new tax rules such as the global minimum tax or BEFIT⁵⁰. EU has no legislative power within the area of income taxation. Therefore, to justify its new approach to income taxation, the EU is arguing that tax rules should be developed by the EU to ensure a well-functioning internal market. As taxes are a consequence of business activities, taxation in itself will not self-evidently improve the functioning of the internal market unless considered in relation to business and the market as a whole. A conclusion, that rules such as global minimum tax, do not improve the functioning of the internal market, but rather create limitations to freedom of establishment and movement of capital⁵¹ is possible.

⁴⁷ Healthy tax competition includes certain behavioural rules for governments, tax authorities, and taxpayers. I would state that the most important behavioural rule is transparency and predictability of tax rules. This means that tax authorities and taxpayers do not conduct so-called sweetheart deals, i.e. make agreements on tax treatment, that would not be based on published law and not available for every taxpayer in equal position. See for example B Team tax principles.

⁴⁸ Equal treatment should eliminate the main part of harmful tax competition as defined by EU itself, *ibid.* Misuse of different freedom rights or EU rights is not part of tax competition and should not confuse the discussion in this respect. Fighting against misuse of rights, or avoiding legitimate liabilities should always be prohibited, see for example Leenarts & Guttierres-Fons, p. 1638.

⁴⁹ Discrimination is identified in both horizontal and vertical dimensions. In both cases, the comparison is done for cross-border treatment, not national treatment. See Urpilainen 2012, pp. 77–78. This is a consequence of sovereignty of Member States concerning taxes, the EU has no power to dictate national tax rules.

⁵⁰ BEFIT is a European Commission proposal on Business in Europe: Framework for Income Taxation defining basis for some fundamentals of common tax base and transfer pricing applicable for MNEs published in September 2023.

⁵¹ I will illustrate this with an example. Multiple countries are competing for green transition investments and supporting material state subsidies to attract investments. To be efficient the tax incentives offered can work only if efficient taxation in line with P 2 rules exceeds 15%. This means that taxpayers having already operations in a country may benefit from investment incentives such as accelerated depreciation or investment credits as they can reach the minimum 15% effective tax as consolidated in the country where investment is done. A taxpayer making the first investment to the country will instead be subject to top-up tax in the country of operation, in case of local top-up tax, or in the headquarters country. This means that a cross-border investment is less

EU has moved partly from so-called negative harmonisation towards positive harmonisation, at least to a certain extent⁵². As taxation still remains within the Member State sovereignty, objectives for harmonisation should be considered; harmonising tax regulation in itself in this framework will not necessarily improve the functioning of the internal market⁵³ as tax is only the impact of business, not the only business driver. An aspect of national tax impacting international business should be considered.

As long as positive harmonisation is limited to defining only minimum rules, no real harmonisation is taking place⁵⁴. In case we agree that positive tax harmonisation is the solution for a better-functioning internal market, minimum rules do not result in harmonised rules in each Member State⁵⁵. As national interests vary, tax rules finally differ from each other as in the case of negative harmonisation and tax may create a challenge for the internal market.

attractive than domestic investment due to a strong national connection to taxation and the fact that tax is a consequence of business. See for example the ECJ C-484/19 Lexel paragraph 46: “It is settled case-law that a restriction on the freedom of establishment is permissible only if it is justified by overriding reasons in the public interest. It is further necessary, in such a case, that its application be appropriate to ensuring the attainment of the objectives in question and not go beyond what is necessary to attain those objectives (see, inter alia, ECJ judgments, C-446/03 Marks & Spencer, par 35; C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas*, par 47; and C-524/04 *Test Claimants in the Thin Cap Group Litigation*, par 64).“

⁵² Negative harmonisation means harmonisation through denial of discrimination, that is stating what restrictions are not allowed. Positive harmonisation in turn expresses how rules should look like, in other words setting the same rules for all Member States. ATAD (the Anti-Tax Avoidance Directive) is one of the first attempts in the field of taxation. This is challenging from a legal point of view as the EU has no actual taxing power and secondly using the functioning of the internal market as a mandate creates a need to ensure proportionality in the functioning of the internal market, which is not a tax metric in itself at all, but a wider topic.

⁵³ It seems that tax harmonisation is not complete unless taxing powers are moved from the Member States to the EU. In any other case, Member States have always the possibility to make national rules. On the other hand, creating rules for MNEs that have net sales higher than € 750 million, creates a border that creates unequal taxation. I wonder, as Vanistendael based on a discussion, whether harmonisation and a well-functioning internal market can be reached by steering the impact of business, ie. tax.

⁵⁴ Positive harmonisation is a challenge as taxing rights belong to Member States, not the EU’s mandate.

⁵⁵ Member States may apply absolute minimum requirements for operations that have national interest and more strict rules in other areas.

1.3.1 BEPS and territorial tension

Both the OECD's BEPS project (focusing on base erosion of tax base and profit shifting between countries) as well as the EU's ATAD⁵⁶ (focusing equally on base erosion and profit shifting through legal regulation⁵⁷) are targeting to eliminate harmful tax competition and tax avoidance⁵⁸. Harmful tax competition⁵⁹ is indeed not benefitting the internal market as it includes actions that are typically based on non-transparent agreements including unique tax treatment for certain taxpayers with artificial solutions only. Benefits are granted based on requests and agreements, which are not available for all taxpayers.

Tax is a consequence of business⁶⁰. Tax consequences are not different only due to their location, i.e. differences between countries. Business entities are different by nature and they are treated differently. Where small and medium sized enterprises are agile, multinational entities are inflexible. Where small and medium-sized entities are offered different kinds of tax and compliance reliefs on a local level, multinational entities may benefit from differences in tax systems in different countries but are liable for increased compliance⁶¹. Tax incentives, such as patent

⁵⁶ OECD started actions against base erosion and profit shifting to eliminate harmful tax competition and tax avoidance, see <https://www.oecd.org/tax/beps/beps-actions/>. EU has implemented a number of BEPS action plans. Anti-tax Avoidance Directive is part of the antitax avoidance package.

⁵⁷ ATAD creates regulative rules for BEPS actions meanwhile OECD's BEPS-project could make only recommendations.

⁵⁸ Harmful tax competition and tax avoidance are partly the same topic. MNEs are said to misuse mismatches in tax legislation and tax practices between countries receiving tax benefits in the form of double non-taxation. Tax practices often consist of some kind of private rulings and sweetheart deals.

⁵⁹ To make a difference between legitimate tax competition and harmful tax competition I define harmful tax competition to be specific tax treatment privately agreed between tax authorities and taxpayers that is not available transparently to all taxpayers in equal position or that could be considered as forbidden state aid. Legitimate tax competition is respectively a competitive tax burden that is based on rules that are common, transparent, and equal to all. Transparency means in these two angles. First, the rule and its interpretation are known and available to all in equal positions, and second, tax authorities respect the exchange of information.

⁶⁰ There is no tax on passive existence, tax is assessed on activity, such as acquisition of something, production, sales, and so on. Tax is also assessed based on business activity; for example, what is the profit of a business and what is real estate tax based on ownership of real estate. In this respect, I do not refer to passive operations, such as holding operations as even this kind of passive operations are activities.

⁶¹ See for example Urpilainen, 2012, p. 68.

box⁶², can be used by some companies, but not all companies. This tax competition is transparent and based on equal treatment⁶³.

Tax burden varies depending on the location of the operation, the nature of business, size of the business, business strategies, financial cycles, etc.⁶⁴. Even tax planning may impact tax burden though most tax planning only changes the timing⁶⁵ of paying tax⁶⁶. Based on this the discussion of aggressive tax planning seems to make the role of tax planning more dramatic than it actually is. It raises the question of whether the BEPS and ATAD measures taken are inflated and disturb the balance between fiscal and financial interests.

For some reason, BEPS and ATAD proposals and regulations are considered merely from a tax point of view only, i.e. consequence of business. The origin of taxes, i.e. business impacts, are not assessed at all. It is the business that is utilising well-functioning EU internal market, not a tax. Instead, tax may create indirectly an obstacle to the functioning of the internal market, which is allowed based on the ECJ's view only "in the overriding reason of public interest", and in that case, the obstacle should be proportional.

As an example, ATAD-based limitation on the deductibility of interest is impacting the tax base, but only secondarily. Primarily it impacts the financing of investments. The OECD's model rule makes a difference whether the investment is domestic or cross border, equity investment or fixed asset investment⁶⁷.

⁶² For example, the UK and the Netherlands have rules on beneficial tax treatment of research and development activities.

⁶³ Different taxpayers are not equal because their business operations are not equal. Taxpayers in equal positions have the same possibility to utilise the law-based incentive.

⁶⁴ Ireland has reviewed its tax revenue from 2013 to 2018. The conclusion was that the number of loss-making entities has decreased and profits have increased. This has resulted in increased tax revenue see for example (An Roin Airgeadais Department of Finance). This analysis concluded that profit relates directly to tax revenue.

⁶⁵ Timing of a tax payment may not be interesting for taxpayer as tax will be paid anyway and even timing differences are identified based on IFRS rules. Timing difference is interesting though in case the time gap is long.

⁶⁶ For example, US companies' tax planning has been based on having income out of the USA, preferably in lowly taxed, as income will be taxed in the US when it is finally imported to the USA. Finally, it is a question of timing only. In the case of US companies, this strategy was changed by US legislation creating a minimum tax level in the USA (GILTI).

⁶⁷ Taxable EBITDA is different in each of these cases.

1.3.2 Constitutional rules and political interests

All taxpayers, including even multinational companies, are enjoying fundamental freedoms and protection defined in different constitutions⁶⁸. These freedom rights, including the EU internal market, ensure economic freedom to use any legally justified model that the business owner or entrepreneur finds beneficial⁶⁹. Therefore, taxpayers can choose operative and legal form or location that fits best to taxpayers' targets and objectives⁷⁰. Taxation should not prohibit this right.

Circumstances defining the needs are separately based on several different factors created by the nature, risk profile, and strategy of the business always in question⁷¹. Taxes (borne and collected) are one of these factors to be considered⁷². Especially the role of taxes as a motivation is interesting in the existing tax debate, even tax authority

⁶⁸ Listed companies or business entities may not enjoy all fundamental rights based on national constitutions, such as Finnish, but they enjoy economic rights crucial for this study, such as the right to run a business. In the case of legal entities, fundamental rights could also be seen reflected in the right of stand-alone shareholders applying look through method. On the other hand, in EU law even listed companies and legal entities enjoy the basic freedoms.

⁶⁹ This principle is confirmed by long-standing court praxis. As an example I would mention Supreme Administrative Court (Finland) decisions 2017:145 in which the court confirmed that taxpayers had the freedom to choose group internal cost allocation as long as it was equal to what third parties would agree in equal case, Supreme Administrative Court (Finland) 2017:78 in which the court confirmed that restructuring of operations is an acceptable business motivation for transactions and results in outcome that has been the purpose of the legislation and Supreme Administrative Court (Finland) 2017:5 in which court confirmed that interest cannot be reclassified to dividend due to different tax treatment as shareholder has the right to choose whether to take dividends or not. Also, ATAD identifies this principle when regulating general anti-avoidance, Council Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, para. 11.

⁷⁰ Urpilainen considers that basic economic freedoms are ranked beyond dispute at the top of the legal hierarchy. Urpilainen 2012, p. 43. See also Karhu, pp. 789–807.

⁷¹ My view is that it is essential to recognise the differences between businesses. This seems to be crucial when considering whether a planning strategy or a transaction is aggressive or not, in other words, was the outcome in line with the purpose of legislation or not. What is typical and important for one business, may be almost unknown for another business.

⁷² The nature of different taxes results in different risks for the business. Where taxes on property and production taxes create an operative cost (included in operatively measured profit) and profitability, income taxes impact directly the return offered to shareholders. Increased property or production tax will reduce profitability and also income tax as a consequence of reduced profitability. Where property and production taxes create an immediate impact on profitability and investment opportunities or willingness, income tax affects to capability to invest through increased financing cost (of debt or equity). Taxes collected create again a compliance risk for operations resulting in tax costs.

argumentation; freedom of establishment may be stamped as tax avoidance⁷³. Tax authorities may, based on tax rules, "guide" businesses on what sort of business decisions should be made⁷⁴. The question is whether tax authorities have the mandate, or competence, to assess the quality of business decisions and reasons⁷⁵.

Use of these freedom rights is not unlimited nor are they existing for free. Limitations should though be justified and proportional. Limitations, that fiscal interests, i.e. taxation, create, are justified, at least to a certain extent⁷⁶. To ensure this, taxes have to be defined by law so that tax consequences can be concluded and the amount of tax be estimated⁷⁷. Constitutions protect taxpayers from arbitrary taxation independently whether taxes are collected by a king or democratic government⁷⁸. Values like balance between fiscal and business interests, predictability, equality, and clarity are therefore crucial for protecting taxpayers' rights on legislative, tax assessment, and court levels.

Taxes are crucial to finance states' activities in maintaining legal order and infrastructure for society. Each member of society is responsible to contribute to financing these activities. Meanwhile, there is a clear understanding of this

⁷³ This is argued as income is not taxable in the headquarters country. By this is understood that income is shifted to another country independently if the arm's length principle is followed and normal taxes are paid. Tax authorities may use this approach to protect national tax bases meanwhile other stakeholders may have other motives based on the same argument. A crucial factor in the discussion seems to be rather where the business is located than what is the behaviour of the taxpayer. Public country-by-country reporting offers formal KPI's to assess whether often assumption based aggressive tax planning is utilized independently of the factual substance. Aggressivity is measured by relevant or irrelevant KPI's, which does not fulfil legality requirements. As Dourado (2014) p. 210 states exiting a Member State even for tax reasons is acceptable as long as it is not artificial.

⁷⁴ This guidance is tax-motivated equally with tax avoidance.

⁷⁵ See Raitasuo, 2018. This can result in a consideration that lost revenue is based on decisions that do not maximise tax if tax maximisation is the driver of business legislation. i.e. tax revenue could be higher if businesses or advisers would not be oriented to tax minimisation. In this respect it is good to note that advisers normally make a disclaimer to avoid damages as advisers don't take risk on the business decisions

⁷⁶ The limitations are often rather soft, at least when considered from a Finnish constitutional point of view, though not without limits. The limitations are merely steering taxing rights. On the EU law level, the limitations are stricter.

⁷⁷ This conclusion is done in multiple constitutions, such as 81 § of the Finnish Constitution.

⁷⁸ Constitutional protection for taxpayers may not seem to be a standard approach. I see this to be due to two-fold reasoning. First of all, the legislative process should take into account constitutional aspects. As this target is most of the time reached, the need for post control is not always visible independently whether it is important. Secondly getting protection based on constitutional rules is often complex as constitutional rules represent high-level values, not concrete rules.

obligation, requirement of fair tax is more complex⁷⁹. Where current NGO-initiated discussion refers more to taxpayers not paying the minimum tax, or at all, less interest is raised to the equally important topic of taxing more than would be fair⁸⁰. Constitutional aspects and the traditional shareholder value have been missing from the discussion.

If tax rules are drafted purely based on fiscal interests, the tax burden may become exceptionally high for some taxpayers, but not for all⁸¹. Also, the wide use of anti-avoidance rules may create both national and international situations higher tax burden than was intended⁸². Both ends, low and high, involve fair tax as a definition. Fair taxation is therefore connected to taxpayers' rights and protection.

Taxes are an interesting topic from a political point of view. Political promises are based on slogans that sound fair and ethical with no further analysis on the real

⁷⁹ Joachim Englisch concludes that the ability to pay is not creating a fair share definition where the tax amount would be without limits. There should be a residual amount that will be taxed and a base amount that ensures the basic standard of living, Englisch 2014, pp. 444–446. On the other hand, Hemels remarks that so-called free riders are creating a cost for other taxpayers meaning that there is a basic obligation to pay tax, Hemels 2014, pp. 420–421. Joachim Englisch 2011 to a German constitutional court decision of 7 November 2006, case 1 BvL 10/02, BVerfGE 117, p. 1, in the context that a tax law was not reflecting fairly the ability to pay principle, p. 289.

⁸⁰ Public discussion of what is fair and what is not fair is a discussion of moral rules and is on the level of aspiration. This discussion in itself does not create any clarity as to what would be a fair or unfair amount or level of taxation. The subject is not only complex, but it is highly subjective. This is obvious if we consider how different objectives there are within one stakeholder group. Many civil societies are raising the importance of equal allocation of taxes between developing countries and developed countries. Other civil societies are more worried about taxes being avoided by the use of tax havens. Often civil societies focusing on national taxpayers are mostly raising the topic of taxes being shifted from that country to somewhere else. Investors are interested more in the engagement of the management to taxes. Objectives of different stakeholders are individual and subjective. Taxpayers can hardly comply with all angles raised up in the discussion.

⁸¹ The more objectives are aimed at a certain phenomenon, the more random tax burden and tax consequences become. This is evident as financial factors have different weights in different businesses.

⁸² Wide use of anti-avoidance rules means that tax authorities are reviewing business from a tax point of view and judging business decisions more from a tax consequence point of view ignoring or not understanding the business needs and circumstances. Even the political approach of tax authorities or a judge may impact the interpretation of the law; some judges may use anti-avoidance rules more based on political views (see Raitasuo, 2018), although interpretation should be freed from political influence as far as possible, at least in civil law countries. Political decisions are made through a democratic process. This is something that the Finnish SAC most likely is respecting by using the right to assess tax laws against the Finnish constitution. ECJ has not approved abuse of rights, see for example Vanistendael (2019) and Deak & others (2021).

impacts. This may result and has resulted in legislation⁸³ that is either targeted to some taxpayers or prevents certain kinds of behaviour⁸⁴. Politically this may be acceptable. Before any of these political statements are converted into legislation number of constitutional aspects, such as equal treatment⁸⁵, clarity, and predictability⁸⁶ have to be considered. If limitations set by the constitution are not taken into account⁸⁷ by political decision-makers, taxpayers' rights will be infringed and financial activities will be disturbed.

1.3.3 Legal view on tax planning – An academic approach

Already for decades, there has been academic discussion about whether tax planning is acceptable and what is the border between tax evasion and tax planning. Academic discussion covers both fundamental levels as well as more technical discussion of some individual cases. It is well established that taxpayers have the right to choose how to organise their business⁸⁸.

Academic discussion, which by no means is promoting tax evasion, in its diversity, illustrates well complexity between fiscal and business interests. It reacts faster to trends than legislation, but also respects the stability of fundamental principles. It illustrates equally that these freedom rights may not be abused. This

⁸³ EU's ATAD's final wording impact assessment looks poor and ignores several normal business factors. Proposal concerning taxation of digital business is targeted at few taxpayers only impacting actually a wider range of operations. Equal national taxes can be found for example in France where the tax measures have been drafted in a manner exempting French products and taxing foreign products. See also the Finnish Windfall tax HE 320/22.

⁸⁴ Hans Pilj in his article "Beyond legal bindingness" considers that when developing tax treaties governments make different levels of commitments. Some of them are meant to be only political statements illustrating political commitment, but no legally binding statement. Some statements are meant to represent a political view on a matter meanwhile some statements are meant to lead to legally binding rules.

⁸⁵ The law impacts all and can hardly not be targeted to a few taxpayers or one group of taxpayers only.

⁸⁶ Use of unclear terms impacts both clarity and predictability. See Hultqvist 2015, pp. 15–21.

⁸⁷ For example, Lehtonen has considered that tax laws end up randomly in parliamentary constitutional review. Constitutional aspects are not necessarily considered. Further Bentley stated that urgency in legislative work affects the quality of law.

⁸⁸ See for example Urpilainen 2012, p. 147, Äimä 2011, pp. 213–217 considers that there is a threshold for applying general anti-avoidance rules. The ECJ considered in C-6/16 Egiom in point 53 that "since the second sentence of the first paragraph of Article 49 TFEU expressly leaves economic operators free to choose the appropriate legal form in which to pursue their activities in another Member State, that freedom of choice must not be limited by discriminatory tax provisions".

becomes clear from the ECJ praxis as wholly artificial arrangements are not seen as acceptable use of EU freedom rights. This principle was clearly stated in the ECJ case Cadbury Schweppes⁸⁹. As late as 2021 the ECJ still confirmed the same principle to apply in case Lexel⁹⁰, which was decided after the so-called Danish cases⁹¹.

The current discussion involves aggressive tax planning, which often is seen as legal, but not moral or ethical. What is considered aggressive tax planning varies based on who is assessing planning. Conclusions are often made based on how things look from one angle, but not from a totality point of view. The complexity of tax avoidance indicators is not known properly⁹². Conclusions reflect most likely ideological background of how far can government's arms reach⁹³. Academic

⁸⁹ The ECJ explained C 196/04 Cadbury Schweppes plc in para. 37 that establishment in another Member State for benefitting from more favourable legislation does not in itself constitute abuse of freedom of establishment. The ECJ referred to cases C-212/97 Centros and C-167/01 Kamer van Koophandel en Fabrieken voor Amsterdam and Inspire Art Ltd. This freedom right may be restricted only by “overriding reasons of public interest” para. 47, which lower taxation in another Member State as such does not create and cannot be offset by less favourable tax treatment in the head quarter country (para. 49). To respect the objective of Community law, the freedom of establishment “involves the actual pursuit of an economic activity through a fixed place of establishment”, para. 54. Therefore, the restrictions on freedom of establishment are justified on the grounds of preventing abusive practices. Wholly artificial arrangements that do not reflect economic reality with a target to escape taxes normally due are not acceptable and are seen as an abuse of Community law (para. 55). These cases are analysed by academics like Vanistehdael and DeBroe.

⁹⁰ ECJ C-484-19 Lexel. This judgment is primarily based on the long-established principles set out in C-524/04 Thin Cap and C-196/04 Cadbury Schweppes paragraphs 46-52.

⁹¹ Case C-115/16, which equally confirmed the principles settled in Cadbury Schweppes, but created a stricter consideration for operators entering the EU with merely arrangements being artificial or close to artificial. These cases were about EU law in relation to third countries and therefore were not changing well-established practices from Cadbury Schweppes. See also Deak & others (2021).

⁹² It seems to be that both the number of identical-looking indicators obscure the discussion, but also what the indicators actually measure, is not commonly known. Effective tax rate and different forms of it is a good example. Another indicator that is often used is revenue by employee. In reality this KPI measures reliably only few business operations.

⁹³ Raitasuo considers that legal views on tax avoidance and the use of GAAR are based on ideological background meaning that left-wing governments tend to favor anti-avoidance rules. This means that left-wing governments do not differ that much from past kings and respect less basic rights. The challenge in tax avoidance rules is predictability and often the lack of recognising economic freedoms, which Raitasuo perhaps refers to as right-wing aspects.

research touches on this aspect from multiple angles, often on a broader scale than the public discussion.

The Danish cases have raised academic discussion about whether the ECJ has stated some new principles overruling old legal fundamental jurisprudence⁹⁴. The academic discussion illustrates that the latest ECJ decisions and EU-level legislation are not meant to eliminate freedom rights, perhaps merely sharpening definitions and clarifying definitions in the best case. It also illustrates how important it would be to analyse the purpose and importance of fundamental rights regarding taxing powers from the taxpayers' point of view. Let me illustrate academic analysis with an example.

As considered earlier tax planning as such is legitimate and acceptable⁹⁵. But what would be regarded as tax planning? Knuutinen defines tax planning as the consideration of tax issues as one component among other components or minimising taxes. Further Knuutinen considers that tax planning is typically based on tensions between choices made when drafting the law⁹⁶ and the purpose or spirit of the law⁹⁷. Tax planning would, based on this understanding, use the language or grammatical weaknesses in the law to its benefit⁹⁸.

My view is that the definition, which is based on a grammatical approach or even on a strict company law approach is somewhat limited and is not capturing the core of tax planning. I would argue that this definition is narrow, not capturing the whole

⁹⁴ For example, Ottosen and Vanistendael analysed Danish case impacts and tax avoidance principles in relation to the ECJ's latest decision in IFA Nordic seminar in 2019. For example, Howard, Baerentzen, Gommers and many more have written analyses of the Danish cases.

⁹⁵ In the public discussion tax planning has been stamped to be something extraordinary such as search for loopholes or utilising mismatches in regulations between countries. This may of course be also the case, but tax planning is after all a necessity that is a must for a successful business in order to know what to do, how to do and what would be the tax consequence.

⁹⁶ For me Knuutinen is looking at tax planning in a narrow sense. If the purpose of tax planning is seen purely to reduce the tax burden, this could be right. My experience is that if tax planning were so narrow, businesses would be in trouble as the business objectives would not be considered properly.

⁹⁷ Anders Hultqvist (2018) questioned the spirit of the law by asking who defines the spirit. Different members of parliament participating in the legislative work may have different views of the spirit of the law. This could mean that it is difficult to reflect the far-reaching spirit of the law reflecting very detailed interpretation in detailed cases. On the other hand, for example in the Dutch praxis guidance is sought from the parliamentary discussions. In Sweden guidance has been sought from the preparatory works of the law, though not systematically.

⁹⁸ Knuutinen 2012, pp. 4–5.

purpose of tax planning: to be part of business planning⁹⁹. I would at this stage conclude that tax planning as a natural consequence of business transactions should be seen as the execution of business strategy respecting existing and foreseen tax regulation, considering different options within the decided corporate risk appetite resulting in a targeted tax cost¹⁰⁰.

Academics often confirm that tax planning is acceptable, However, it appears that academic research sometimes defines tax planning in a narrow meaning differing from responsible tax management principles. This illustrates not only the complexity of tax management and planning but also the importance of taxpayers' legal protection. Measures taken to prevent tax avoidance, in other words, limiting taxpayers' freedom to choose between different arrangements, should be proportional to the set target, and the motives should be measured¹⁰¹. This measurement exists and has even a name, rule of reasons as created by the ECJ.

1.4 Sustainability empowering taxpayers' rights

In the early 20th century companies had social responsibilities in the societies where they were operating¹⁰². Over the years these responsibilities have been shifted over to governments meaning that business operations are concentrating on business and governments on the infrastructure. States ensure their citizens certain social rights.

⁹⁹ Based on my empirical experience I would define tax planning as a tax-oriented review and analysis of business plans to illustrate different tax consequences and risks related to them. Depending on the risk profile taxpayers may reach out for solutions that are more predictable even with higher tax costs or take more risk in relation to business plans and also tax by reaching out for solutions with lower tax costs. In other words, tax planning means more understanding of the business objectives, consideration of tax-related risks and consequences, and then guiding business in choosing the best possible solution. With business I mean concrete operative business cases as well as more strategic business, such as risk and profit planning for the entire group.

¹⁰⁰ See also Elgood, Fulton, Schutzman, pp. 13–3. Using grammatical weaknesses in the legislation for tax planning purposes would mean a high-risk appetite as tax planning trusts on a quite narrow interpretation of the law and favourable court praxis. This approach ignores quite far need to avoid surprises and the need for predictability (see Deloitte research).

¹⁰¹ See for example De Broe, 2007 pp. 755–765 and the case law analysed. See also ECJ C-6/16 Egiom, para. 57. Urpilainen 2012, pp. 80–81.

¹⁰² Companies were arranging daycare, schools, housing for employees, and so on, see Knuutinen 2014, p. 34–45.

The cost of these rights, that have to be financed, are different obligations such as taxes¹⁰³.

Taxes are a crucial part of financing government spending. The obligation to pay taxes belongs to all who enjoy legitimate and subjective rights. Fairness in this sense means that everyone should pay a share of the government budget¹⁰⁴. This sort of horizontal equity as the standard of fairness is complex as taxpayers and markets are very different¹⁰⁵. Taxpayers' legal rights¹⁰⁶, are not contradictory to the obligation of paying a fair share of taxes. They are not the same measure as seen in the public discussion¹⁰⁷.

Equality in the meaning of social justice and economic policy may be difficult to reach. For legal purposes, the equality principle can nevertheless be reached¹⁰⁸. Equality, one form of legal protection¹⁰⁹, has to be taken into account in the legislative work¹¹⁰. The legal aspects and especially taxpayers' legal protection should be therefore always considered. Taxpayers' rights require protection at the

¹⁰³ See for example Deak, 2009, p. 46. Development in social responsibility has been fast. If we consider that big, though locally managed companies arranged part of the social activities currently arranged by governments to in the current situation where companies are global, decisions are done centrally instead of in local decision making, the difference is material. It may look like MNEs social responsibility would have diminished. Partly this may be true, but on the other hand, it may also be an illusion. Paying tax is an indirect and non-transparent method of social contribution. Other than income taxes are hidden in income statements and not visible to society. In this sense transparency of total tax contribution, as promoted by EBTF (see EBTF.com) illustrates the importance of transparency measures that taxpayers could take; and illustrates how they respond to their social responsibilities.

¹⁰⁴ Hemels, pp. 420–422. Quite often this moral value is reflected only in CIT. If fairness is a complex topic due to its aspiration, considering fairness only through CIT will be even more challenging. Fairness is difficult to conclude just from the amount of taxes paid as there may be multiple factors impacting it. Some conclusions may be made by assessing how responsible is tax management in an MNE. For example, B Team principles offer a good benchmark for this assessment, see B Team.org.

¹⁰⁵ Deak 2009 considers horizontal equity to be merely a fictitious standard. This is illustrated for example by the fact that taxpayers are dependent on investors, who refer to market and regulative initiatives depending on investor objectives.

¹⁰⁶ Such as economic freedom rights or requirement of predictability and clarity stated in constitutions.

¹⁰⁷ Taxpayers' rights are more than one method to ensure that tax impact is fair and proportional to the view defined by the legal framework.

¹⁰⁸ See Deak 2009, pp. 45–47.

¹⁰⁹ Equal treatment of all taxpayers in the same position protects taxpayers as they should be treated as a group, not as individual taxpayers in legislation.

¹¹⁰ For example the Finnish Parliament Constitutional Law Committee confirmed (PeVL 9/2023) that the equality principle is valid for taxation. See also PeVL 97/2022 paragraphs 21 and 22. Meanwhile, the equality principle is applied in a restrictive manner to businesses in the Finnish constitutional system, EU law has a broader view on this principle in relation to businesses.

same time when tax laws should be developed to protect the tax base in different countries. These issues are at the heart of this study.

As said, constitutional freedoms are not available for free. Meanwhile, businesses have the freedom even to minimise their taxes, relying on these rights, they create an obligation to participate in financing this infrastructure. Responsible tax management is becoming more important illustrating not only that businesses are willing to fund their share of the legal infrastructure, but also that they are not misusing these freedom rights. I will come back on this later.

Tax policies should be sustainable¹¹¹ and responsible¹¹². Currently, tax authorities sometimes reflect tax avoidance in their praxis going so far that only a few business models will ensure tax benefits in line with the purpose of legislation, such as in the light of withholding tax or tax deductions¹¹³. Tax aspects seem to override an individual taxpayer's business needs when tax authorities take a position on how business should be organised. It illustrates how far the application of rules may go; genuine business needs are overrun by the aim to collect more taxes violating fundamental rights. It illustrates also weaknesses in tax authorities' governance model¹¹⁴.

¹¹¹ Sustainability includes in my view two aspects. Policies should be stable taking always into account the fundamental principles and values. Secondly, policies should be changed only based on proper impact assessments. Tax legislation should then respect the policies. As Bentley considers the purpose of policies is to set rules for actors such as tax authorities. As well there are rules for legislators when drafting new rules even if they are finally decided by the government by a simple majority.

¹¹² Public discussion is bringing sustainability high in ranking also for tax and tax policies. Sustainability should not be ignored as it brings long-term balance to tax matters. However, my view is that sustainability is not such a specific requirement for tax purposes. Taxpayers' tax management and government tax policies should be as part of sustainability also responsible. Being responsible in this context means taking into account the so-called big picture, tax as part of that, and respecting of the fundamental principles of the legal framework in all aspects. For tax policies, it means considering freedom rights, legal protection, and the right to protection through efficient legal processes important for the legal system in the whole ecosystem taking into consideration all policies, not only the efficiency of tax collection.

¹¹³ For example, Russian tax authorities set far-reaching requirements (prior Ukrainian war) protecting purely Russian interests on when a receiver of a dividend can be seen as a beneficial owner of the dividend. These requirements go beyond the purpose of tax avoidance. This view means that a normal holding company cannot be seen as a beneficial owner only in rare cases.

¹¹⁴ This kind of far-reaching arguments are hardly visible in governments' or tax authorities' policy statements. Nevertheless, individual tax authorities surprisingly often refer to tax avoidance as they have another view of what actually is needed for business, in other words, what would be an acceptable business reasons in their view. One explanation for this could be the weak governance model where individual tax

1.4.1 Elimination of tax avoidance challenges legal rights – An example

It's worthwhile to illustrate how tax policies have been impacted during the last few years by presenting an example. This example will illustrate why taxpayers' legal protection is an issue and how a balanced legislative process is a key interest in this respect. Taxpayers' legal protection is more than just a formality.

In light of Swedish interest deduction rules, Swedish tax authorities assessed in 2005 a few cases concerning group internal share acquisitions as tax avoidance. The executed transaction increased the basis for interest deduction meanwhile the capital gains were exempt and the interest income was not taxed at all or very thinly. The Swedish Supreme Administrative Court considered finally in 2007 that tax avoidance rules were not applicable¹¹⁵.

After this SAC decision, Swedish tax authorities started preparations for renewed limitations on interest deductions¹¹⁶. After a very speedy legislative process, new interest deduction rules were set in force from 2009 onwards. In the legislative process, planned rules were criticised for being unclear and for going beyond the target set for the law¹¹⁷. Later interpretation of the 2009 rules went even beyond the wording of the rules¹¹⁸. The law and its interpretation have created numerous legal processes and it is widely claimed to be poor¹¹⁹.

authorities have no obligation to follow tax authorities' own policies. It may also illustrate weak internal control within tax authorities with respect to following defined authority policies. See for example Australian tax authorities' governance.

¹¹⁵ RÅ 2007 ref. 84–85. This decision may be a reflection of an antiavoidance rule where the threshold for applying the rule was set high and tax authorities failed to present arguments that would have been applicable for their purposes.

¹¹⁶ Tax authority's memorandum 21 November 2007 "räntesnurror", Skatteverket 23.6.2008. Förslag om begränsningar i avdragsrätten för ränta mm. på vissa skulder and later 22.8.2012 Delrapport, skatteplaneringen med ränteavdrag

¹¹⁷ See Hultqvist 2014 and Hultqvist 2015. Hultqvist has analysed the legislative process around interest deduction rules and considered that quality of the process was poor as valid comments were merely ignored.

¹¹⁸ See for example Andersson & Carneborn 2012. It is crucial to notice that the Swedish SAC never asked for a ruling from the ECJ for applicability with EU law in connection to the so-called 2011 guiding decisions (see later). The need for this has been obvious and discussed lively in Sweden.

¹¹⁹ See Hultqvist 2014 and 2015. My view is that the history of these rules illustrates quite well why urgency in legislative work is "poison" for legal certainty and especially for fundamental principles. Mattias Dahlberg (professor of financial law), Richard Hellenius (senior adviser corporate tax policy at Swedish industry association Svenskt Näringsliv), and Robert Pålsson (professor in financial law) expressed their views already in 2009 during a ruling process (SRN dnr. 13-09/D). Equally Ulla Werkell (tax lawyer at Swedish real estate owners Fastighetsägarna) has criticised the legislation in

The 2009 Swedish interest deduction rules were renewed in 2012. Even the new rules were criticised from the beginning. The European Commission has claimed that the rules violate EU law¹²⁰. In these circumstances, taxpayer's legal protection is weak and depends purely on post-tax assessment legal processes¹²¹. The Swedish Supreme Administrative Court is not raising any ruling requests to the ECJ concerning the old 2009 rules but makes independent decisions on these questions. The Swedish SAC was following the same policy in consideration of new 2012 rules until 2018¹²². Lower courts deny the application of EU law purely by referring to these SAC decisions¹²³ and consider irrespectively of European Commission formal notice or later ECJ decisions Swedish rules to be in line with EU rules without any reference to the ECJ required¹²⁴. The legislative process as well as the court praxis illustrate the importance of taxpayers' legal protection and enforcement of it.

1.5 Focus and approach of this study

Both BEPS and ATAD have changed the taxation of MNEs. Although both projects identify taxpayers' right to organise business optimally, i.e. economic freedoms, the proposals and rules touch closely on taxpayers' rights and obligations. At the same time these new rules create a deviation between SMEs and MNEs tax treatment-an angle of equal treatment.

This study analyses the mandate that the OECD, the EU and Member States actually have when regulating national taxes. The nature of the rules that the OECD and the EU have created, is legally different. The OECD is not drafting rules for the EU's internal market, while the EU seems to implement them directly to improve the functioning of the internal market. EU directives bind Member States, but not

a ruling process SRN dnr. 96-09/D. Professor Mattias Dahlberg has repeated his criticism in a new ruling process SRN dnr 82-13/D, especially concerning EU law. Jesper Johansson was critical concerning the EU aspects of the new law in his article "Ränteavdragsbegränsningar – med anledning av att kapital är fungibelt", See Skattenytt 2011, p. 604. Finally, also Roger Persson Österman, 2009 has criticised the rules from the EU law point of view in his report.

¹²⁰ On 26 November 2014 the European Commission submitted a formal notice C(2014) 8699 to the Swedish Government considering the Swedish interest deduction rules. The criticism is actually referring to aspects that were not changed from the 2009 rules.

¹²¹ Appeal processes are not within the scope of this study as it would be worthwhile a study of its own.

¹²² Supreme Administrative Court referred finally a ruling request to the ECJ in relation to 2012 rules in 2018 in the case Lexel. The ECJ made its decision in 2021 C-484/19 – Lexel. The ECJ overruled the SAC's earlier position.

¹²³ SAC 2011 ref. 90.

¹²⁴ See for example Administrative Court of Appeal in Stockholm cases 30 June 2017.

taxpayers. This regulative complexity seems to impact taxpayers' economic freedoms.

It is important to consider what kind of mandate the OECD and the EU have on taxing profits and whether the impacts on the functioning of the EU's internal market truly are considered. As taxes are a national measure, the mandate raises an important question of how strong the enforcement of taxpayers' economic freedom rights is in the legal framework. On top of freedom rights, especially proportionality and legality principles are at the heart of this study on protecting taxpayers.

When approaching mandate, regulative hierarchy, taxpayer's economic freedom, different levels of taxpayers' rights and proportionality I'm utilising a few key sources and authors. They are firstly Fuller's approach to good legislation, secondly Knuutinen's considerations on substance and form, thirdly Bentley's analysis of different levels of taxpayers' rights and finally Vanistendael's approach to legal principles and EU law.

My conclusions are questioning whether the new rules as now executed fulfil the criteria of good legislation and that BEPS followed by ATAD are not necessarily within the EU's regulative mandate¹²⁵. This challenges constitutional, EU law economic freedoms as well as legal principles and measures the strength of the freedoms. This strength is not measured yet although there are all grounds for that. This should be of interest when considering the limits for applying anti-avoidance rules, the relation between civil law, constitution and tax, how to draft laws and regulation and the importance of a well-functioning dispute resolution mechanism. An interesting question for tax law practitioners.

¹²⁵ Meanwhile the executed new rules may be in conflict with the EU Treaty to some extent, but it doesn't mean that the objective of the new rules would not be good, especially when there are signs of strong national interests. The European Commission should consider how to improve the functioning of the internal market, but to be proportional.

2 EU & OECD actions – Internal market or interest in focus?

The European Commission launched on 28 January 2016 an anti-tax avoidance package¹²⁶. The purpose of this initial directive is to prohibit practices that are regarded to be harmful to the functioning of the internal market¹²⁷, such as tax avoidance practices¹²⁸. This directive includes multiple regulations to meet the objectives followed later with new proposals on BEPS 2.

¹²⁶ Council Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market. The directive set frameworks in multiple areas, that the EU considers to be harmful tax practice. This framework includes a minimum frame for national general anti-avoidance rules, special anti-avoidance rules, such as rules on CFC or hybrid situations, and interest deductions.

¹²⁷ EU refers already at an early phase to the functioning of the internal market concerning taxes. Taxation, however, is not within the competence of the EU, if we exclude VAT. EU Member States have tax sovereignty. For example, Prchal, p 5, considers that there is a rich case law for example on direct taxation on competence creep. Tax cases cannot be automatically referred to the ECJ unless there is a clear connection to EU law. This connection can be direct or more indirect through general principles of EU law, Lennaerts and Gutierrez-Fons, p. 1632, and Prechal, p. 8. National taxation in itself does not self-evidently impact the internal market, but it may indirectly impact the functioning of the internal market in the case of the nature of business that is taxed. This means that the functioning of the internal market may involve taxation or not. A general statement on taxation impacting the functioning of the internal market illustrates that taxation has not been considered in the big picture. For example, the alignment of tax rates in itself does not promote the functioning of the internal market, it may eliminate partly the willingness to move business activities for tax reasons within the EU. This in itself is not an issue of the internal market, perhaps more a moral aspect.

¹²⁸ One of the interesting aspects is a limitation on interest deductions applicable for both external and internal financing costs based on taxable profitability. The directive sets as a target to prohibit global tax planning “through excessive interest payments” (Council Directive (EU) 2016/1164, recital 6) even though the measurement for excessive interest payment is made to taxable profitability of a taxpayer. Taxable profitability depends on multiple other factors than whether debt funding (high debt, minimum equity) or interests (high interest compared with arm’s length level) is excessive

The matter of especially financing is delicate and complex. Meanwhile, it may be, that some taxpayers make extensive planning on external and internal funding, financing is on the other hand crucial business prerequisite and creates risk for some businesses. Loan funding is normally needed for business operations and investments. This is more crucial for capital-intensive businesses than for service-oriented operations.

Even arranging group internal financing is something else than tax planning; a MNE needs to consider whether it is beneficial for it to have external financing in subsidiaries and be hit by structural subordination¹²⁹. This consideration is, key when deciding how to organise financing. It belongs to taxpayers' economic freedoms.

Each selection a taxpayer makes leads to different tax impacts regardless of its origin. Attacking aggressive tax planning may result in a negative impact on normal business¹³⁰. From the taxpayers' legal protection point of view, it is a question of whether proportionality of the rules actually has been considered in the legislative process to eliminate the extensive complexity of normal business¹³¹ and whether taxpayers can effectively question the new rules in relation to fundamental economic rights.

When considering ATAD and later EU initiatives on a high level and from the taxpayers' legal protection, the question of whether EU actions improve the functioning of the internal market. The functioning of the internal market is crucial for the EU and equally important for the businesses operating within the internal market. Any barriers or non-justified limitations affect businesses and will weaken the EU's internal market. The proposals create new borders by different tax treatment

¹²⁹ Structural subordination is created when subsidiaries are funded independently by external funding. Each lender has different precedence to securities. Normally the parent company lenders have the weakest priority and will get repayment of their receivables after all other debtors, though before the shareholders. This normally creates a weaker creditability of the parent company and at least some of the subsidiaries. By arranging all funding centrally by the parent company or a finance entity having no other operations, all risk is central and all lenders will have equal rights to securities due to full transparency. This improves the group's consolidated creditworthiness and lowers the cost of funding. Therefore, decision to have central financing is outmost business driven.

¹³⁰ Question could be whether it has any impact on the aggressive tax planning at all. This would though require an economical study, which is not in the scope of this study. It however illustrates the danger of high-level simplified conclusions if the totality is not considered.

¹³¹ If the interest deduction limitations, as an example, are based on an assumption that financing is automatically creating erosion of the tax base, it ignores differences between operations, assumes financing to be profit dependent ignoring simple transfer pricing standards, and creates an extra cost even for those who have not considered taxation at all when funding the operations, see Knuutinen 2012.

not only based on nationality but also size and ownership setup resulting in different tax burdens between comparable businesses¹³².

ATAD states: “Within the Union, GAARs should be applied to arrangements that are not genuine; otherwise, the taxpayer should have the right to choose the most tax efficient structure for its commercial affairs.”¹³³ This statement is worthwhile analysing further from taxpayers’ legal protection point of view as it creates national minimum measures.

The OECD launched a project against base erosion and profit shifting (BEPS) in 2013. This project was initiated by G-20 countries and the EU. Non-taxation was the objective and was reached through aggressive use of mismatches in regulation between countries. The opposite problem of multiple taxation however is not on the agenda¹³⁴. Tax planning has opened many ways for multinational entities to minimise their tax burden¹³⁵: “no or low taxation is not per se a cause of concern, but it becomes so when it is associated with practices that artificially segregate taxable income from the activities that generate it”¹³⁶.

The OECD aims to eliminate or at least limit harmful tax planning and has published a number of action plans to create tools with coherence, substance, and

¹³² As an example, the Council Directive on Business in Europe: Framework for Income Taxation (BEFIT) creates not only different limitations but a totally different tax base for MNEs having more than € 750 million turnover and owning more than 75% of the investment. This means that different, even large investors are treated differently with some taxpayers having materially higher tax costs over a long period of time.

¹³³ Council Directive (EU) 2016/1164, recital 11.

¹³⁴ EU Commission released their tax policy (Press release 22 June 2015 - Commissions action plan on fair and more effective corporate income taxation in EU). EU Commission states that the driving force for the policy statement is that some companies (remark by author) are not paying tax at all in the EU for their operations and this leads to heavier taxes for individuals. The European Commission does not consider the challenge of same the income becoming taxed multiple times in the EU even though this could be a serious EU intra-market obstacle. Meanwhile, the EU Commission’s statement on its focus on **some** companies’ tax contributions illustrates well how the EU Commission reacted under political pressure. The focus is on the consequence, i.e. on tax, not the business and the functioning of the EU internal market as such. This focus creates a risk of more detailed regulation and even more far-reaching activities to avoid extra tax burden unless there is a proper focus on responsible tax management and sustainable tax contribution.

¹³⁵ See BEPS work, Action Plan on Base Erosion and Profit Shifting, OECD, 2013.

¹³⁶ OECD 2013 10 statement is based on assumptions of mismatches and artificiality being equal measures. The fact that mismatches are caused by different legislations in different countries as long as tax systems and legislation are not the same in all countries was not considered properly. Creating new detailed regulations will create new differences between countries and especially between businesses giving an illusion of aggressive tax planning and further need for more regulation, see for example Pillar 1 and 2.

transparency to reach out for these objectives. Some of the action plans resulted in recommendations for local legislative work meanwhile others were new tax treaty provisions or interpretation of existing rules¹³⁷.

After an era of different countries working on these recommendations, the OECD continues its agenda on BEPS. The script of the OECD, and equally EU, seems to be in 2020s the same as in 2013, perhaps added with Covid-19 nuances¹³⁸. The OECD states for example in its Pillar Two proposal that it “addresses remaining BEPS challenges and is designed to ensure that large internationally operating businesses pay a minimum level of tax regardless of where they are headquartered or the jurisdictions they operate in”¹³⁹. It seems to be that the OECD and the EU are concluding that BEPS 1 has failed with its objectives and new complex regulation should be added on top of BEPS 1.

When considering the OECD’s BEPS project, the aim has been to tackle the unhealthy tax behaviour of taxpayers and countries¹⁴⁰. Unhealthy behaviour refers to aggressive tax planning, being strictly legal, but being artificial. By using proportional, unified or equally functioning fundamental tax rules, such as tax base, across EU would eliminate the incentive of building artificial setups resulting in unintended extraordinary tax benefits at the same time with tackling with BEPS objectives. The objective, however, was not to eliminate the competition between countries.

¹³⁷ De Ruiter, Helsinki and Turku University seminar 2017.

¹³⁸ BEPS project was initiated to prohibit base erosion and profit shifting, in other words, so-called aggressive tax planning. Now after the Covid-19 pandemic BEPS 2 project is argued with the needs of governmental funding: “However, the time will come when governments will need to focus on putting their finances back on a fair and sustainable footing” (OECD (2020)). It is obvious that governments need funding after the pandemic, but is this a base erosion and profit shifting?

¹³⁹ OECD (2020), para. 8 under section 1.1 (so called BEPS2). In one-on-one discussions with representatives of different MNEs I have sensed that they regard that the OECD BEPS project has failed to deliver the expected tax revenue. One of the reasons for this would be that instead of bringing income back to HQ countries, the substance has been moved to low-tax or low-cost jurisdictions. This point was taken up also by Krister Andersson 2016. Further, this new approach on “effective” minimum tax (note, effective tax rate is not equal to nominal tax rate) will not solve the objectives that multiple civil societies have raised; Pillar 2 is not ensuring that developing countries would get their share of taxes.

¹⁴⁰ For example, BEPS report says that “tax planning has opened many ways for multinational entities to minimize their tax burden” and this is harmful for governments, individual taxpayers, and businesses OECD 2013, p. 8. As part of this may be and surely is true, but the comparison between multinational entities and small and medium-sized entities cannot be based on pure possibilities that international operations offer without comparing other angles, such as liabilities and risks international operations create and tax planning as well as other opportunities offered to small and medium-sized businesses.

EU's core is a well-functioning internal market. Taxation in itself is not creating an internal market as tax is about consequences around business acting within the internal market¹⁴¹. The objective of BEPS projects was not to tackle the functioning of the internal market, but rather to eliminate extreme misuse of differences between tax systems. The aim was not to create the same rules for all countries. As such BEPS was not designed for the EU's internal market. This is a factor that we should bear in mind when analysing the EU's mandate to legislate around tax as well as how this impacts taxpayers' legal protection.

BEPS work was impacting some specific areas of business that were seen to be used aggressively. The fiscal fairness was to be tackled with BEPS and ATAD actions. As aggressive tax planning is often based on artificial features the legitimate and true solutions suffer due to strict regulations tackling the misuse of legitimate setups. This means that proportionality may not be well considered when new rules are built under political pressure approaching morality from purely tax and fiscal interest points of view¹⁴².

Taxpayers are building on responsible tax management which relies on not only the letter of tax law but also the purpose and spirit of the law. This means that tax avoidance nor aggressive tax planning is not on the agenda. For some reason it still looks like that the EU's policies are based on early 2010-based assumptions; how to tackle tax avoidance among MNEs¹⁴³. This kind of agenda does not promote

¹⁴¹ Businesses compete with each other, and so are countries competing for investments. Harmonisation of taxation may eliminate incentives to make tax-initiated solutions but does not eliminate the challenges that Member State's tax sovereignty has. Taxation may still create borders and obstacles for the free movement of business, people, and capital and freedom of establishment. To improve the functioning of the internal market the internal market should be the focus, not the consequence.

¹⁴² Finnish government published in 2024 a plan to consider how to tackle the challenges that ATAD-based interest deduction rules have created for capital-intensive green transition investments. The same kind of analysis was published in May 2024 also in Sweden. This illustrates that the OECD process has failed to take into account legitimate business needs in changing environment when tackling extreme misbehaviour.

¹⁴³ Benjamin Angel, Director at DG TAXUD gave a presentation in CSR Europe and Fair Tax Foundation Tax Responsibility and Transparency index launch on the importance of an index measuring responsible behaviour and especially transparency. He mentioned how the trend among MNEs has changed from reaching out of non-taxation or extremely low taxation to ensuring responsible tax behaviour. Despite that, he mentioned as a key topic for the European Commission the need to continue with tax avoidance topics. This means that European Commission would not respect legitimate economic freedoms and responsible behaviour, but rather focus on the misbehaviour creating obstacles for business. This illustrates well how strong the assumptions and mistrust are. In the same seminar, MEP Paul Tang reminded, that it's not only about transparency, but responsible behaviour is about commitment.

responsible tax behaviour, is based on old assumptions, and leads to lengthy controversial processes. It looks like that responsible approach to tax matters is often mixed with fairness considerations¹⁴⁴. Therefore, this study aims to analyse how the legal framework will protect taxpayers' legal rights.

2.1 Is interest deduction limitation impacting the functioning of the internal market?

Interest is a payment for financing, it is therefore a service fee for financial services. Taxing income and deduction of the cost is basically neutral, if we ignore differences between tax levels in different countries. Subsidizing financing creates an unbalance between different actors and could create a state aid issue not in line with the functioning of the internal market¹⁴⁵. This is due to the neutrality between taxation and deduction being disturbed.

The same impact exists when limiting interest deductibility, though the impact is the opposite; financing costs are increasing. For investors, non-deductibility means negative cash flow impact and deferred profit distributions¹⁴⁶. In practical terms, this means a lower capability to invest¹⁴⁷. Is the increased financing cost in the form of tax impacting the functioning of the internal market? We can consider that by comparing different investors.

It seems to be that it is most beneficial for non-EU investors to invest outside of the EU. The interest deductibility in the target is not dependent on taxable profit. The investor's capability of deducting interest is not dependent on taxable income either. Further, a non-EU investor has better capability to invest in the EU as the target can

¹⁴⁴ Many civil societies raised the question of fair tax contribution when discussing responsible tax behaviour (CSR Europe 2024). The question of fairness depends more on political views and opinions producing a new law, meanwhile, responsible tax behaviour is more ensuring that these laws are actually respected, transparency in the best case illustrates this.

¹⁴⁵ A company receiving government support may gain a distortive advantage over its competitors. Therefore, Article 107 TFEU generally prohibits State aid unless exceptionally justified (https://competition-policy.ec.europa.eu/state-aid/overview_en). State aid and limitation of tax deductibility have the same impact although they are opposite by nature.

¹⁴⁶ This impact is irrespective of whether the financing is external or internal. Cash flow is always impacted in comparison with the base case impacting investment indicators as investment will need more cash for financing the cost of non-deductibility. Equity investor's risks are increasing and dividend to investor is deferred as the investment target has lower profits.

¹⁴⁷ This may mean that there is actually an impact on the internal market, this impact is changing relation of businesses not only within a country but within the EU.

deduct interest cost based on its taxable profitability¹⁴⁸ meanwhile the equity investor is not limited by the taxable profit-dependent interest deductions¹⁴⁹.

Investments done within one country in the EU have a better tax treatment than an investment within the EU internal market but cross borders. This is because all the income is taxable within one country and creates a basis for interest deduction, especially if the investment is done within one fiscal unit¹⁵⁰. The least beneficial situation is that an EU-based taxpayer invests in another EU country. The target's capability to deduct depends again on the taxable profitability and market interest¹⁵¹. The investor's return is tax-exempt dividend not included in the basis of taxable EBITDA, i.e. not creating the basis for interest deduction.

As we can see, the taxpayer is treated differently depending on the nationality of the taxpayer and the taxpayer's position in a certain country. The different tax treatment is not eliminated by having the same rule in every EU country as taxable EBITDA and tax is a national measure even under ATAD. Therefore, it seems that there is an impact on the functioning of the internal market.

¹⁴⁸ Target's capability to deduct interest cost is dependent on the capital intensity, i.e. the volume of financing, and taxable profitability.

¹⁴⁹ Dividend income, at least within a group, is normally tax exempt income.

¹⁵⁰ Fiscal consolidation is crucial for the investment within one country to utilise the whole taxable basis in a country. In a contrary case, equity investors' capability is dependent on the tax treatment of dividend income; if the dividend is tax-exempt, the investor cannot deduct interest costs.

¹⁵¹ If the investor has other operations in the same country that is included in the same fiscal unit, the deductibility of interest costs is impacted, normally improved.

3 What is taxpayers' legal protection?

When talking about taxpayers' legal protection we can understand different things. Rights to be protected, rights to be utilised to challenge taxation, or clarity of obligations. Already here I see that rights and obligations go hand in hand. For the purposes of this study, it is important to understand a bit better what is actually taxpayers' legal protection.

3.1 What are the taxpayers' legal rights to be protected?

Protection needs an object, something to be protected. This takes the focus to who is a taxpayer and what are the taxpayers' rights to be protected¹⁵². Brezinski defines taxpayers' rights as the "legal situation of a person having the ability to demand to be treated in a manner which will improve –objectively or subjectively- his position in a society, economy or law"¹⁵³. This ability is available on legislative, legal, and administrative level¹⁵⁴. I therefore think that rights are based on commonly shared

¹⁵² The question of who is the taxpayer in the case of a company. It is relatively easy to define who the taxpayer is for taxes on salaries, but who actually is the taxpayer for taxes that businesses pay? There are views where companies are seen merely as a method to attract equity for business, in other words, a unit defined by law (so-called artificial entity) allowing several individuals to make a joint business by injecting equity. Companies may be seen as separate units from shareholders and governments or just a collection of individuals making business, see Knuutinen 2014, p. 63-64 and also Avi-Yonah. Independently of the definition, i.e. if it is an individual or the company, there is a taxpayer who is in actual terms paying the tax and this taxpayer has rights that should be protected.

¹⁵³ Brezinski, pp. 18–19. This definition illustrates well the balance between the obligation to participate in funding the society with society's limitation to interfere with taxpayer's private interests.

¹⁵⁴ Legislative level means constitutional requirements, legal meaning the rule of law in substance issues, and administrative approach rule of law in administrative topics.

values. These values represent different levels of morality¹⁵⁵, some being more permanent¹⁵⁶ and fundamental and some more detailed and concrete¹⁵⁷. Such values are based on different laws, regulations, and fundamental principles in a democratic country. This is important as historically the rule of law has been the foundation of a democratic society, including the tax system¹⁵⁸. Changing any of these values requires a proper democratic process to confirm the joint understanding of permanently changed social values¹⁵⁹.

Antoinette van Rijn defines a taxpayer's right to written or unwritten rules protecting the taxpayer against illegal tax assessments from the taxpayers' point of view¹⁶⁰. Van Rijn's definition includes also freedom rights. This definition seems to be somewhat narrow concentrating on purely substance topics. Brezinski proposes also that non-financial aspects should be included in the protection¹⁶¹. I follow more the lines defined by Brezinski, which is in line with my argument of tax being a consequence of business.

A taxpayer's business is based on transactions and solutions defined in civil law. These activities are then assessed based on tax regulation, but business is not based on tax law. Taxpayers' interests, i.e. rights, are wider than just the strict legality of a tax assessment or even purely tax treatment. These interests can also be interfered

¹⁵⁵ Morality can be identified on multiple levels. The more aspirations they have, the higher their values. Higher values and morals are personal meanwhile law has to be on a level that can be defined and agreed upon, that is on a lower level. Fuller identifies this to be morality of duty, the lowest level of morality that can be jointly defined, Fuller, p. 35.

¹⁵⁶ Constitutional rules are permanent, which is reflected already by the order that constitutions can be changed. Changing a constitution requires a large majority and needs to be confirmed twice, a second time after an election (as in Finland). Changing the constitution requires a permanent change of moral thinking, see for example Fuller. Constitutions may define the process or framework for freedom rights or principles for state legal procedures, in line with what Brezinski described.

¹⁵⁷ Meanwhile moral rules are often dependent on different, more personal views, legislation has to be something that is predictable and that taxpayers understand and can comply with. If tax law is something that taxpayers cannot comply with, but fails to do so almost automatically, legislation fails, see Fuller, p. 37.

¹⁵⁸ Bentley, p. 17.

¹⁵⁹ Joint understanding is defined by constitutional rules clarifying what kind of majority is required for approval in the parliament. This represents a more permanent moral thinking of the required majority. In 73 § of the Finnish Constitution it is described how changes in the constitution can be decided. To make changes urgently a 5/6 majority of the votes is required. Further in the 74 § control over constitutional aspects is defined to form a so-called pre-control.

¹⁶⁰ A. van Rijn, p. 45.

¹⁶¹ Brezinski, p 19, refers for example to non-financial rights in connection to authorities such as the right to get information from authorities to be able to make conclusions about his or her tax impacts.

with by tax legislation¹⁶². Taxpayers' rights in relation to society, economy, and law cover properly also fundamental right aspects from freedom to run a business to requirements of predictability in all of its forms.

The next step is to understand how these rights are protected. Taxpayer rights, such as the right to property¹⁶³, belong to the heart of a state, that justifies tax collection; tax collection maintains a framework of society funding the state resources to act¹⁶⁴. The taxpayers' obligation to pay taxes and fund society is fundamental as the taxpayers would not have rules to rely on without the state's resources. Equally important is that when the state goes too far collecting tax, the taxpayers are in the same position as no rules existing at all. Tax may create an obstacle or limitation to economic freedoms. My view is therefore that there has to be in balance with taxpayers' rights¹⁶⁵.

Levying taxes can be seen as a political issue. Political pressures impact the level of governmental spending that needs to be funded by taxes. Political weights change depending on how the majority succeeds in its task. If the financial burden from funding government spending becomes heavy, that may change political weights¹⁶⁶. As taxation will impact financial activities, there is therefore a balance between financial circumstances and political will. If taxation becomes unfairly high, tax revenue will be reduced as less financial activities and government spending is not financed¹⁶⁷.

¹⁶² Even though tax always interferes with a taxpayer's right to property, taxpayer's rights have to be respected already in the legislative process to ensure that the violation is proportional.

¹⁶³ Finnish Parliament Constitutional Committee considered whether constitutional rights should be considered when legislating on tax. The constitutional Law Committee came to the conclusion that on top of equality also the right to property should be considered. The committee concluded that the higher the tax is, the more crucial is the proportionality principle; tax should be considered against the objectives, Finnish Parliament Constitutional Law Committee 2023.

¹⁶⁴ This is the background Finnish Constitutional Committee referred to, in broad terms. The higher the tax burden becomes, the more crucial the topic to be funded must be. This illustrates quite well the balance between government funding and the obligation of paying tax.

¹⁶⁵ Bentley considers that a society that does not recognise individual property rights of any kind would find it difficult to levy taxes, Bentley, p. 12. I understand this so that if a society protects for example property rights or rights for business, members of the society, including businesses, need to cover the costs incurred because of this fundamental duty of society. See also Finnish Parliament Constitutional Law Committee 2023 points 2,3 and 5.

¹⁶⁶ This, I think, is the balancing power of democracy limiting extreme views to be implemented.

¹⁶⁷ This balance is often described as the dynamic impact of taxation. See for example comments raised to the proposal on windfall tax in Finland HE 320/2022.

I think that the taxpayers' civil rights have to be in balance with taxpayers' obligation towards the society¹⁶⁸. Therefore, my conclusion is that a constitutional review of each legislative action should be an act to protect both taxpayers' rights and values of the society. This allows taxpayers the ability to request their rights to be considered in the legislative process¹⁶⁹. Legal expectations, both at the legislative and interpretation level seem to be taxpayers' right in this respect¹⁷⁰.

3.2 Sources of taxpayers' rights

Taxpayers' rights are built in different parts of the legal systems. These rights have different content and power depending on their status or classification. Bentley classifies taxpayers' rights to be, first of all, enforceable taxpayers' rights. These rights include constitutional protection¹⁷¹, supranational protection, and legislative protection. On the second level, there are enforceable taxpayers' rights considering secondary legal rights followed by primary administrative rights. Fourth are principles of good practice including secondary administrative rights and finally administrative goals¹⁷². I would add legal principles to the first category¹⁷³. Legal principles guide hard law interpretations even though not offering primary outcomes.

National constitutions proclaim widely civil rights, including entrepreneurial right for doing business, like in 18 § of the Finnish Constitution. Instead of just ensuring this kind of basic freedom rights constitutions also protect these rights¹⁷⁴. Good examples of this are the protection of property (15 § of the Finnish constitution), the right to a fair trial (21 § of the Finnish constitution), and the

¹⁶⁸ See also Bentley, p. 16.

¹⁶⁹ This right is used on a personal level initially in elections. Another important method to ensure balanced considerations is to ensure that taxpayers or groups representing taxpayers can contribute to the legislative processes.

¹⁷⁰ This is why intermediate rules, or grandfathering rules, are often used to soften the impacts of new rules and consider legal expectations.

¹⁷¹ The Finnish constitution does not offer the same kind of enforceable protection as many other constitutions do as Finland does not have a constitutional court and further the constitutional protection for businesses is more indirect than for persons.

¹⁷² Bentley, pp. 293–297

¹⁷³ Legal principles have their origin in constitutions, see for example Vanistendael 2014. Constitutional rules are not directly enforceable, though giving strong guidance for other legislation and interpretation of law. Legal principles are therefore indirectly enforceable.

¹⁷⁴ See Brezinski, p. 45. Taxpayers have the right to use their economic freedom to choose how to establish their business, claim for rights, or be equally treated and rely on legal processes ensuring their rights. Meanwhile, the enforcement on a national level, at least in Finland, is weaker in the case of a legal person seeking protection, on the EU law level the enforcement is stronger.

authorities' obligation to ensure the execution of fundamental rights and human rights (22 § of the Finnish constitution)¹⁷⁵. Constitutions' purpose is to protect citizens, that is even taxpayers, from authorities' supremacy and political trends¹⁷⁶.

Constitutional rules set the more permanent framework for the normal legislation¹⁷⁷. The permanent nature of the constitution is the protecting source when considering taxpayers' rights. Equally, I see also the Treaty on the Functioning of the European Union as part of fundamental legislation creating a permanent framework as changing the agreement requires more than a simple majority and it includes the same sort of provisions as constitutions¹⁷⁸.

Legal order defines both administrative and substance rules for taxation; in other words, how transactions are taxed, how tax assessments are done, and how they can be challenged. Meanwhile, international laws, EU law, and constitutions create a framework for legal order, national tax laws define taxing rights in detail. The relation of the EU law framework is complex and fundamentally differs when

¹⁷⁵ These examples illustrate the fundamental nature and strong position that the constitution has. These rights are, as classified by Bentley, enforceable, which is built into the legal system with concrete regulation in line with the constitution.

¹⁷⁶ Deak, p 45, states that "levying taxes means at least two things: accepting an order of private property and voting for political democracy." This illustrates well how the powers are shifted. Legal order acts as a guarantee against government confiscatory interests.

¹⁷⁷ One could argue that the legislator is not bound by any rules as they may change the rules, as well as constitutional rules. The permanent nature is built in through majority requirements: constitutions require more than a simple majority to be changed, sometimes even multiple approvals in the parliament. Saying that nothing prohibits the legislator in this sense is a fact, but it ignores the stabilising factor of built-in complexity in the approval process.

¹⁷⁸ The EU treaty covers to a large extent the same rights as national constitutions. EU law principles, which the ECJ has confirmed in its case law, are based on principles, that are reflected in the main part of EU Member States' constitutions. As such the EU does not have legislative powers in itself, applying both substantive law of the Union and general principles may force national legislators to respect the EU's policy choices, see Lenaerts and Gutierrez-Fons, p. 1629. They consider further that the ECJ holds consistently that the EU is a distinct and autonomous legal order. This legal order could create a fragmentation between national and international law. This gap should be filled, according to Lenaerts and Gutierrez-Fons by the legal order itself. To accomplish filling the gap the ECJ had to create in line with the nature, objectives, and functioning of the Union new principles completing the legal order. These principles are aligned with basic constitutional levels common to Member states, Lenaerts – Gutierrez-Fons, p. 1632, see also ECJ C 26/62 van Gend & Loos par 3 and Vanistendael 2014 p. 35 represent the same view. I would state that EU law actually has a rather direct connection to the EU Member States' constitutions and tax laws as the common principles are taken into account in each Member State's legislation.

considering directives, EU regulation, and ECJ case law¹⁷⁹. Administrative rules define how the taxing powers can be used. Legal principles steer the application of these rules on all levels. This hierarchy¹⁸⁰ is a component in taxpayers' legal protection built into legal order.

The non-tax international treaties¹⁸¹ create an indirect source of taxpayers' rights. These treaties and regulations offer taxpayers tools to force tax authorities or governments to act in accordance with international laws, EU law, and rules governments have agreed to. Enforcement could happen for example in the form of the right to claim damages¹⁸².

Legal principles are based on constitutions though not always expressed in a written form. These constitutional principles are the basis for the tax law that stipulates the outcome of taxation¹⁸³. These constitutional legal principles are more permanent than laws and as said, they do not offer necessarily the solution to a specific question, but they give guidance on how to solve conflicting

¹⁷⁹ Legal framework is complex as the Member States have tax sovereignty, the EU is steering national taxation even by substantive rules through directives legitimated by the functioning of the internal market impacting Member State tax revenue, EU regulation being effective directly and ECJ case law that is a statement on the national legislation conflicting in certain aspect with EU law. Complexity especially with directives originates from drafting the rules: directives as not drafted as tax laws fulfilling national requirements on tax law as they are drafted to improve the functioning of the internal market, but they limit the national legislator's hands to draft the tax laws.

¹⁸⁰ Hierarchy of laws and principles targets in ensuring fulfilling the purpose of legal order and a specific law. See Vanistendael 2014, p. 46.

¹⁸¹ As said earlier, business is regulated by civil law regulation. Civil law creates a framework. The result or outcome of this framework will be assessed based on accounting rules and then tax laws and regulations. Tax burden may sometimes prohibit a business and become a limitation of utilising economic freedoms. The relation to civil law and non-tax treaties is therefore crucial.

¹⁸² Right to claim damages could be possible for example in case a country is not respecting EU rules or not respecting fair trial. Again, claiming for damages is not a daily issue, more a possibility in cases where taxpayer's rights have been materially violated. This means that the threshold is high, though reachable. In this respect, the ECJ has stated "In international law a State which incurs liability for breach of an international commitment is viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. That principle must apply a fortiori in the Community legal order since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law which directly govern the situation of individuals (Brasserie du Pêcheur and Factortame, cited above, paragraph 34)", ECJ, Case C-224/01 Köbler.

¹⁸³ See Vanistendael 2014 p. 30.

situations¹⁸⁴. Legal principles are a source for taxpayers' legal protection as they ensure predictability.

There are different kinds of legal principles with fundamentality on a number of levels. The constitutional legal principles are at the top of these principles. Second-level principles are applied on the level of statutory law and on the lowest level principles applied by authorities implementing or applying laws¹⁸⁵. As the principles are based on different levels of laws, the hierarchy is reflected by the fundamental rules also.

Administrative regulation offers protection to taxpayers as it sets ground rules for authorities. Administrative regulation may have different forms depending on the existing legal system. Common to them is that authorities are committed to following them¹⁸⁶. Unlike legal principles or constitutions, these rules are created through administrative regulation subject to changes¹⁸⁷. In Finland, government statutes and decisions would create this source of taxpayers' protection¹⁸⁸.

Authority decisions may also be a source for taxpayers' protection. Authorities announce guidance and principles for their operations. They can be regarded as secondary administrative rights¹⁸⁹. As a last point of source for taxpayers' rights could be mentioned administrative goals¹⁹⁰. Goals that the administration sets for itself indirectly create rights for taxpayers.

As we can see there are multiple levels of legal protection. The complexity of legal protection is increased as the OECD and the EU are regulating on tax or have

¹⁸⁴ Vanistendael 2014, p 24, states that "principles, including legal principles, are rather soft and flexible, not immediately dictating any specific answer to a legal question and certainly not pointing to the payment of a precise amount of cold cash". Further, I consider EU directives to be complex in this sense as directives are not assessed in line with requirements set for tax legislation in all EU countries, but they attempt to have the same impact as tax legislation.

¹⁸⁵ Vanistendael 2014, p. 46.

¹⁸⁶ As these rules create an obligation for tax authorities to respect them and act accordingly. It creates protection for taxpayers. Taxpayers should be able to rely on tax authorities to behave in accordance with administrative regulations. For example, Australia has set rather detailed governance rules not only for taxpayers but also for tax authorities.

¹⁸⁷ See Bentley 2007, p. 129. Bentley mentions that flexibility may be required as rights are granted but, if needed, also taken away. Changing these rules is, however, transparent and should respect terms defined by existing primary law.

¹⁸⁸ Authorities may state principles when applying these regulations, which creates then the lowest level of legal principles. Taxpayers may rely on these principles in actual cases against "hard law" interpretations as the principles are binding authorities

¹⁸⁹ See Bentley 2007, p. 131. The strength of these rules and enforcement is less efficient. Whether stand-alone civil servants obey these rules depends also on the governance system tax authorities have.

¹⁹⁰ See Bentley 2007, p. 133.

regulation that may impact taxation. From a legal protection point of view, I would question whether OECD regulation actually creates legal protection for taxpayers; it may be merely a source for interpreting the law. EU regulation instead clearly is a source for taxpayers' legal protection. Taxpayers can refer to EU law creating a right for taxpayers more than an obligation as taxpayer can make beneficial reference to EU law in relation to national law¹⁹¹.

EU law has enforcement that goes beyond national legislation if there is a connection between tax issues and EU law. The new EU tax-related directives create a direct link to EU law, though not a guarantee of alignment with EU law. EU-level regulation creates some sort of duplicative legal protection in addition to the national legal protection.

Considering the protection of taxpayers' rights, enforcement becomes crucial. If taxpayers have no method or tool to demand, i.e. enforce their rights to be respected, the rights are soft. They belong more to the soft law area than the hard law area¹⁹². Therefore, it is crucial to study especially enforcement of taxpayers' rights as enforcement creates taxpayers' legal protection¹⁹³.

3.3 Enforcement of taxpayers' rights creates legal protection

Taxpayers' rights have no purpose if the taxpayers have no method of enforcement to support rights. Taxpayers' enforcement methods are not as straightforward compared with tax authorities' enforcement methods¹⁹⁴. Taxpayers have positive

¹⁹¹ EU law is executed by Member States through implementing EU law to national law. Taxpayers can request Member States to treat taxes in line with EU law, but if EU law is not implemented, taxpayer has no obligation to follow tax related EU law until national implementation.

¹⁹² See also Brezinski. Being part of soft law does not mean, that the rule would not protect taxpayers, but more perhaps that the threshold is higher. The protection is different by nature, see for example Vanistendael 2014. For taxation in international relations enforcement of tax treaties, and also EU Treaties, is crucial, Vanistendael 2011 pp 185–186.

¹⁹³ Soft enforcement means that the threshold for legal protection is higher, not that it would not be in place.

¹⁹⁴ Tax authorities' enforcement methods are more concrete and absolute than taxpayers' enforcement is. For example, tax authorities have a primary right to make an assessment meanwhile taxpayers' primary right to receive information about a tax assessment process or underlying arguments does not necessarily exist. Taxpayers' fundamental rights to enforce tax authority in any respect are secondary and always subject finally to the tax authority's view in the first place. This is visible for example in OECD's BEPS project, as all tax authorities' enforcement methods were executed, but dispute resolution was not agreed upon.

rights supporting their position in society, economy, or law. On the other hand tax authorities have the power to make assessments, even overruling to a certain extent these positive rights¹⁹⁵.

Fundamental freedom rights are soft due to their nature¹⁹⁶ in case tax authorities consider the use of freedom rights abusive or not appropriate for tax purposes. Taxpayers may seek enforcement to get a judgment of legislation or tax authorities' view in relation to freedom. Courts act as a final, independent¹⁹⁷ body to make a judgement that taxpayers' rights have been considered duly. In case courts fail to be independent they may be reluctant to protect taxpayers from fiscal interests and powers¹⁹⁸. Fundamental freedom rights become meaningless¹⁹⁹.

Enforcement of taxpayers' rights is built into the legal system. Fundamental freedom rights as well as legality principles are stated in the national constitutions²⁰⁰ and therefore are hierarchically in the highest level of legislation. High legal status of the fundamental rights and obligations set for fiscal powers rule over normal law²⁰¹. Constitutional rules are important enforcement tools for taxpayers.

Efficient enforcement of taxpayers' rights is nevertheless dependent on the control; pre-legislative or also post-legislative. Constitutional courts represent typical post-legislative control being an enforcement method for taxpayers. Countries that have constitutional courts, such as Germany and Belgium, offer a stronger enforcement method for taxpayers.

Taxpayers' potential for enforcement of their rights is more complex, perhaps softer in countries where there is no constitutional court system, such as Finland and

¹⁹⁵ Bentley 2007, pp. 178–183.

¹⁹⁶ Fundamental freedom rights are concrete, but broad in their expression, see Fuller. As taxing rights and freedom rights are basically in conflict with each other, final enforcement is done on an aspiration level often based on measurement of proportionality. Procedural rules exist often to ensure that this measurement is done properly.

¹⁹⁷ Independence of courts from political decision-making and the execution of these political decisions is key in the enforcement of taxpayers' rights as a final tool.

¹⁹⁸ Good example of this is the Swedish SAC decision 5118-5121-17. The taxpayer presented reasons why the case should be taken up to the ECJ, but the SAC ignored the request by stating that the SAC had made a judgment on EU law in 2011 and any case law from the ECJ after that in the matter is irrelevant. The SAC created itself *acte clair* for the EU law interpretation even though it has no authority over that.

¹⁹⁹ Even time spent on enforcement will weaken taxpayer's capability to enforce. If the court process takes a long time or tax authorities are not willing to share their view and interpretations early on, enforcement is poor and taxpayers' rights are diluted. See for example Fortum Tax Footprint report 2024, p. 20, concerning a Belgium tax for 2008 case closed by the Supreme Court in 2024.

²⁰⁰ For example Finnish constitution 81§ defines legality principle for taxes to be assessed.

²⁰¹ Vanistendael 2014 p. 34, and Urpilainen 2012, p. 44.

Sweden. The threshold set for courts to test the law in relation to constitutions is set very high²⁰². Taxpayers' protection is relying in this case to process around legislative work. The challenge of pre-control is the difficulty in assessing even all likely, not to mention, probable impacts of a law in relation to constitutional aspects. The parliamentary Constitutional Law Committee is facing a complex challenge²⁰³. These challenges and gaps in the constitutional analysis create a mismatch²⁰⁴ representing a softer enforcement tool for taxpayers compared with a system with post-control²⁰⁵ as there is no direct enforcement method for taxpayers. A well-working public hearing can though be seen as one element of taxpayer enforcement.

Hierarchy in the legal system is also an enforcement method for taxpayers within the tax legal system. I would call it an interpretative tool of enforcement²⁰⁶. Taxpayers can, even with some success, base their arguments in the appeal process on hierarchical rules to protect their rights²⁰⁷.

²⁰² Äimä, p. 72, and Lehtonen 2012, pp. 32-34. The threshold to rule against statutes in relation to constitutions is lower than for law.

²⁰³ Lehtonen considers that the functioning of pre-control depends on how the Constitutional Law Committee's guidance is followed and respected. Lehtonen states that only a few tax laws or tax procedural laws are dealt with within the Constitutional Law Committee in the Finnish Parliament. He concludes that even in cases where the Committee gives comments and is not satisfied with the legislation, corrections done are rarely reviewed anymore by the Committee. See Lehtonen 2013. See also Myrsky 2012. A tax law should not be rejected in the Constitutional Law Committee unless the proposal is extreme, rather the Committee should give guidance on how to adjust law to be in line with the constitution and constitutional principles.

²⁰⁴ Bentley considers that the amount of legislative work and the required speed of legislative work prohibits sufficient review of taxpayers' rights in the legislative work. This may be one of the reasons, which creates a serious fundamental threat to taxpayer's rights.

²⁰⁵ Obviously even a constitutional court has a threshold for a case to be reviewed by the constitutional court. The threshold is never the less lower than a normal administrative court has, independently of lower administrative court of supreme administrative court assessing question of law being in line with constitution. This is due to the set task and authority of a constitutional court. On the other hand, proper pre-control is also important enforcement protecting taxpayers' rights in the legislative process.

²⁰⁶ Taxpayers can seek protection from the hierarchical system as laws with higher status should overrule laws with lower status. This is the case especially in countries with constitutional courts. In Finland the SAC rather applies constitutional interpretation that does not take a position on legislative process formalities.

²⁰⁷ Vanistendael, pp. 34–33, see even Äimä and Bentley. Political decision-makers have a wide range of freedom to regulate different issues through legislation if they have the required majority. If there is no required majority the legislator has to adapt its will to be in line with higher-level laws. If the legislative process fails in one or multiple aspects to consider higher-level rules, taxpayers can challenge this in court. The legal framework acts as an interpretative enforcement tool.

Right to appeal as an enforcement method has multiple angles: the taxpayer has the right to appeal tax assessment to courts and further to higher courts²⁰⁸. These courts will make an independent assessment of the cases in light of the law and its interpretation. In respect of hierarchy in the legal framework, the taxpayer may request national court refer the case to the ECJ to seek interpretation in EU law²⁰⁹. In this case, the taxpayer is utilising the enforcement that EU law has on national law.

Taxpayers may under some circumstances as a last effort appeal to the European Court of Human Rights or claim for damages in case the government has failed to fulfil its obligations²¹⁰. The efficiency of these enforcement methods may be somewhat questionable as they take time, they are somewhat narrow and are often expensive to use.

Administrative principles, that are close to human rights, offer also an enforcement method for taxpayers. Taxpayers have the right to get guidance from the authorities and reasoned decisions, to name a few. These enforcement methods are soft, i.e. creating a secondary protection to act in line with its obligations.

3.4 Why is taxpayers' legal protection a valid question now?

Meanwhile, tax rates have been decreasing over the last decade²¹¹ tax contribution has been increasing. Governmental expenditure has increased due to many reasons, more detailed regulation being one of them²¹². As the need for public funding is increasing and the number of payers is not growing, the search for those who are not carrying their share can start, such studies like "Getting to Good"²¹³. This has

²⁰⁸ The latest trend in tax authority praxis and also legislation seems to be a restrictive possibility for rulings, see for example the Finnish Pillar 2 legislation. The unclear legislation may have resulted in a situation where tax authorities are concerned about giving a ruling and rather collect different cases and wait for court praxis. This leaves taxpayers with the risk of later interpretation.

²⁰⁹ Taxpayers are dependent on the court's goodwill to fulfil its obligations, see the Swedish SAC decision 5118-5121-17, compared with Swedish SAC reference on to ECJ case Lexel C-484/19.

²¹⁰ This possibility is confirmed by the ECJ in the decision C-224/01 Kobler even though the threshold can be considered rather high.

²¹¹ EBTF total tax contribution report 2023.

²¹² More issues are solved by issuing new regulation and complying with this regulation increases not only private costs but also governmental spending. This may impact the efficiency of public funding meaning that the more there are details to be complied with, the more resources are used for bureaucracy and less for actual operation.

²¹³ Christian Aid, Oxfam, and Action Aid 2015 launched a study on defining what good looks like. This study is an important study initiating progress for good tax governance. At the same time, it is quite subjective to measure what good looks like.

resulted in a discussion about whether multinational companies are paying their fair share of especially income taxes²¹⁴.

The political pressure that was created out of the public debate on especially multinational entities avoiding taxes, corporate income taxes to be specific, and the amount of lost tax revenue started a process to tackle aggressive tax planning, non-taxation as a result of mismatches in the national legislations as well as practices and taxpayer bad behaviour. The objective was to bring back the lost tax revenue²¹⁵, an objective that was not based on any hard facts, merely on assumptions.

BEPS 1 and 2²¹⁶ as well as the EU's ATAD projects have resulted in several new recommendations and instructions by the OECD and directives by the EU²¹⁷. They again have created a number of national tax laws. The aim has been to change taxpayer behaviour by eliminating aggressive tax planning²¹⁸. The new rules create new limitations and obligations²¹⁹. The new rules increase the likelihood of failing

²¹⁴ Meanwhile financial crises, such as problems in the banking system or the Covid-19 pandemic, highlight the sustainability of governmental funding when tax revenues are shrinking and fundamental frameworks in society are at stake. Also, business development, such as new digital businesses, creates a challenge to national governments. What may have been less discussed is the question that who is not paying the fair share, that is the MNE or its owners as well as what is fair share. Another interesting angle is whether the discussion is about taxpayer behaviour, tax authority behaviour, or national behaviour in legislative processes.

²¹⁵ This objective was valid for developing and developed countries depending on who was participating in the public debate. For example, Christian Aid and Oxfam. As such these NGOs' message of developing countries having too small income tax revenue is correct as many developing countries' income tax revenue is lower. The reasons behind this are most likely many, not only in relation to MNEs. At the same time, an EU study stated that "The international corporate tax system aims to tax the profits of multinational enterprises (MNE) where they arise. However, MNEs have in some instances exploited mismatches and loopholes in the international tax framework to reduce their overall tax burden. This entails substantial problems, such as revenue losses, unfair competitive advantages or lower tax morale", European commission 2017, illustrating rather collecting more tax revenue in EU Member States than in developing countries.

²¹⁶ BEPS 1 refers to OECD's original base erosion and action plan program in 2014 and BEPS 2 refers more to OECD's initiative on Pillar 1 (allocation of income) and Pillar 2 (global minimum tax initiative)

²¹⁷ The OECD has actual terms acted like an outsourcing partner for the EU. The EU has implemented several recommendations from the OECD. The OECD is not an actual regulator even G20 appointed the OECD to study BEPS action plans.

²¹⁸ Taxpayer behaviour is considered to change when substance rules are changed. This may be efficient to a certain extent, but it ignores the fact that it impacts all taxpayers, some unproportionally in legitimate civil law arrangements within economic freedoms.

²¹⁹ Limitation on interest deductibility is a good example of this (OECD BEPS action plan 4) and Council Directive (EU) 2016/1164 Article 4. The rules do not measure whether financing is used for financing of investments or tax planning purposes, see Knuutinen 2020, p. 60.

in compliance, which is one of the hallmarks Fuller defined to illustrate the failure of legislation²²⁰. As taxation is a national measure, the new EU level rules create actually a new level of taxpayers' legal protection – the relation of EU-initiated national laws in light of the EU Treaty²²¹.

The complexity and different approach to legal rights and protections is highlighted by the legislative process. The legislative process of directives differs from actual legislative work. As EU law overrules national legislation²²², the possibility of a national legislative process taking into account all necessary aspects is limited. Questions on proportionality as well as legitimisation of EU directives, sustainability of EU regulative process, and alignment with national constitutions in the legislative process are not analysed properly²²³.

Public debate talks about tax morale. The European Commission raised tax morale in its study²²⁴. Considerations of the spirit of the law²²⁵, fair taxation, and even tax avoidance are relatively subjective terms²²⁶. Taxation is based on the rule of law for a good reason. Taxation, as an infringement of property and freedom rights, cannot be based on subjective valuations, but on actual law defining clearly when and to what extent to pay the tax²²⁷. The spirit of public debate is a challenge to taxpayers' legal protection.

²²⁰ The possibility of complying with rules is crucial for good legislation and allows taxpayers to be capable of complying with the rules. Fuller has already in 1964 described the ten criteria for a good (tax) law and the challenges with different levels of morality as regards a law failing in its purpose. The same challenges exist now when discussing and drafting rules for example to reach fair share of taxes.

²²¹ The new regulation that has been launched is at least to some parts fundamental, such as the global minimum tax. Some of the rules have been implemented through EU directives and require implementation on a national level. Legitimation of EU directives has based on the functioning of the internal market.

²²² See Knuutinen 2012, pp. 52–53.

²²³ These aspects are not new in the legal sense, but new for tax law as the Member States have tax sovereignty and the EU as such has no legislative power. In case of BEPS the EU has considered lightly the regulative fitness of the OECD proposal to the EU law.

²²⁴ European Commission 2017.

²²⁵ See Hultqvist 2018. Who actually can define the spirit of law? Spirit of the law is mentioned often in connection to tax morals. This term seems to be high on the scale of aspiration of morality. This is why I think that it is better to rather refer to the purpose of a law as that is most often defined in the preparatory works of the law.

²²⁶ Fuller considers that high-level moral rules, even though all agree on them, are difficult to comply with. This as there are many personal views on what these moral rules actually mean. Content is strongly reflecting personal values. This leads to a situation where taxpayers almost automatically are not compliant with the rule as it is understood in so many different ways. This is the reason why legislation has to be on the lower level of morality scale, that is on the level that the democratic majority has the same view.

²²⁷ Bentley 218. Bentley considers Winston's critics on Fuller's analysis and views on good tax law. Bentley considers that "rules may be necessary or at least beneficial for

Transparency is the new era in the fight against tax avoidance or aggressive tax planning. At the same time, when tax authorities are receiving a lot of new data, the assessment process, and use of received data are nevertheless not developed²²⁸. Taxpayers' legal position and protection are not considered to ensure a balanced outcome. This creates a question of how the existing legal principles, constitutions, EU law, and administrative rules impact the new tax authority processes.

The amount of new regulation is not the only aspect that creates a challenge²²⁹. The new rules have been created in urgency and in conflict with Fuller's principles. This naturally impacts the quality of the legislative process²³⁰. This is a challenge not only for the legislative work but legal certainty and taxpayers' legal protection.

As last view for why the questions for this study are relevant now is the urgency of legislative work. Can urgency replace certainty? This topic is typically a question for official processes such as the appeal process: is speed more important than certainty? The same question can be raised also for this study, and on multiple levels.

We can see that taxpayers' legal protection is challenged on multiple levels due to the new era of tax legislation, perhaps a new paradigm in taxation. Nevertheless, the fundamental, constitutional rules and legal principles haven't changed. There is currently tension between them, which legitimates a study over taxpayers' legal protection.

a legal system to succeed". With this caveat, he argues that Fuller's arguments on good law are acceptable and to be applied. See also Murphy.

²²⁸ Transparency is a dilemma as taxpayers will provide more data than before independently whether tax authorities need the data or not, sometimes even online to tax authorities. This highlights the importance of clear rules and tax authority commitment to respond in a short time. If rules are not clear and tax authorities are not acting in the same time frame as a taxpayer reports, the risk of non-compliance is pushed onto the taxpayer whether the taxpayer wants that or not. Transparency is then a one-sided obligation.

²²⁹ Marlies de Ruiters compared the changes in business environment and operations to changes in transportation in the last century. When current transfer pricing rules were discussed, fast transportation form was a car and, on rare occasions an airplane. Currently, trade is done over the Internet and no actual physical goods are traded. It is a fair question to ask how this sort of business could be taxed with the same rules as the traditional trade of goods. Further, it does not mean that there would be any aggressive planning or tax avoidance, merely that the rules are not suitable for current business operations. Ruiters, 2018, Helsinki. This illustrates well how complex topic taxation is. Even the new businesses impact tax revenue though not being any part of aggressive tax planning or tax avoidance.

²³⁰ For example, in the Pillar 2 proposal the EU did not have any impact assessment, and more relied on the OECD's analysis and impact assessments. It is however important to note that OECD did not reflect the rules against the functioning of the internal market.

4 Scope of the research & research method

4.1 View and purpose of this study

Based on what I have been describing earlier, it is fair to say that tax has been a centric discussion topic. The debate has resulted in political pressure to take action reaching out for fair tax contributions. The OECD, the EU, and different governments have presented some rules to eliminate aggressive tax planning, unfair tax competition, and finally, the allocation of tax revenue. No actual understanding of how taxes behave nor the actual tax contributions have been made.

The expectations of the new regulation have been high, but as there is a high level of aspiration by nature, several stakeholders may be disappointed in the results²³¹. It seems to me that the focus of the OECD and the EU have separated from each other. Where the OECD starts to talk about the need to review and eliminate overlapping regulation, the EU is heading for new regulations to satisfy its own political objectives. In this kind of business environment taxpayers' legal protection is worth analysing more closely.

²³¹ The challenge with “wishful” expectations that are not based on clear facts, perhaps more on general statistical assumptions will become difficult to reach. Expectations may be unrealistic and taxpayers react to uncertainty by changing their behaviour. The existing setups may be based on normal business considerations so that the new regulation is in reality not changing the tax treatment at all. The legislative process is slow even at its speediest and all the consequences of the changes are visible after a longer time. Meanwhile, political decision-makers do not tolerate this long waiting period. This may be one of the reasons for example OECD so called BEPS 2 Pillar 2, which is targeting to reach out for more taxes to headquarters countries. The complexity of the issue at hand can be seen when analysing different interests a bit more closely. Developed countries with multiple headquarters want to see increasing tax revenue to eliminate leakage of business activities to other countries. Other stakeholders expect BEPS 2 to ensure that developing countries have sufficient tax revenue to eliminate the negative impacts of aggressive tax planning. EU's BEFIT (2023) may illustrate more the EU's wish to establish tax revenue for the EU than the functioning of the internal market and the tax system.

4.1.1 Proactive business and reactive legislation – A challenge for freedom rights and taxation

The trend in business operations during the last decades has been globalisation. This started with strong global sales and markets and has developed later into global operations in production, research, and development. The trend has been to move production to low-cost countries or closer to actual markets. Also, the use of global supply chain consideration is more common²³².

The latest development is the digitalisation of trade and business. Trading and sales are not bound to a fixed place anymore. Especially services sold are not connected to one place²³³. The amount and use of customer data are changing value creation. Defining where the profit is generated at least in traditional meaning is becoming more challenging.

The nature of business is changing fast. Traditional businesses need to adapt new methods and tools to survive. New businesses are invented. Digitalisation is not the only change ongoing. Climate change has an impact on business as old polluting production or fuels need to be replaced. Some businesses are forced to be closed and at the same time, new opportunities will lead to new businesses. In financial terms large losses will be seen in traditional businesses and even in the new businesses meanwhile profits are generated elsewhere than where they have been generated traditionally. Freedom to change business models when needed is fundamentally important to business.

As tax is a consequence of business, it can never change with the same speed as business is developing²³⁴. Changing and updating the law is not an easy task. Legislative work of a consequence, i.e. tax, when the cause, i.e. business, is changing on a stand-alone basis may result in unexpected outcomes. From a taxpayers' legal protection point of view understanding business logic²³⁵ may be one of the key drivers for balanced tax legislation.

²³² Supply chain considerations mean that different roles and functions are shifted into different places. Meanwhile, R&D is located in the best possible location for that function manufacturing, assembling, storing, marketing, sales, and administration may be located in different places to utilise applicable local strengths for each function.

²³³ The sale of goods is commonly connected to the sale of services, or converted into the sale of services; instead of selling cars, it is about selling transportation services. Sourcing customer data and utilising this data when selling services is a typical phenomenon of businesses utilising digital solutions.

²³⁴ This is equally true for both tax legislation and tax administration as well as for the taxpayers' own tax function.

²³⁵ Business logic is not the only factor to be taken into account. Social and environmental factors among others are to be considered. Equally, business needs to take into account a wide range of factors, tax being one of them.

Two recent drivers changing the tax landscape, are the OECD's BEPS1 and 2 projects targeted to eliminate base erosion and tax avoidance as well EU's ATAD to eliminate tax avoidance. Both programs are reflecting on how to eliminate unwanted behaviour, but not considering how to promote responsible behaviour.

The OECD and the EU have proposed and are proposing a large volume of new tax regulation²³⁶. Unclear or extensive limitations may create heavy burdens or obstacles for business, in other words, restrict economic freedoms. It is important to know and understand the purpose of new legislation to be able to draft regulations to reach this objective and ensure proportionality of the rule²³⁷.

Changes in business, like globalisation and the digital economy will automatically impact the tax base in different countries as business operates differently. Restricting new trends will not create any financial activity, but most likely weaken business opportunities²³⁸. Changes in the tax base may therefore be a result of the conversion of businesses. Restrictive tax measures and rules may slow down the development of businesses and result in lost tax revenue. Respect of taxpayers' rights is crucial to ensure proportionality of taxation as well as creating certainty²³⁹.

Some taxpayers have used their economic freedoms by using operative setups, that are not common for the business, in other words artificially, purely for tax minimisation²⁴⁰, by stretching the rules using arm's length look-alike setups without

²³⁶ Good examples of new regulation are financing-related restrictions and taxes on the digital economy. Considerations on taxation of digital services do not seem to be BEPS-related at least directly. It would seem to be merely an attempt to create new rules to define how to tax income in an entirely new area of business. OECD states for example "A consensus-based solution comprised of two pillars (Pillar One focused on nexus and profit allocation whereas Pillar Two is focused on a global minimum tax intended to address remaining BEPS issues) can not only play an important role to ensure fairness and equity in our tax systems and fortify the international tax framework in the face of new and changing business models; it can also help put government finances back on a sustainable footing." (OECD (2020), p. 7. For some reason, BEPS is the framework and authority to build proposals on tax on digital services even though the argument could be more neutral and business-friendly: the need to create clarity and predictability for businesses and governments.

²³⁷ This means that taxpayers' legal protection should cover more than ensuring economic freedoms, as well as the proportional assessment of tax.

²³⁸ Mark A. Weinberger in EY Tax Insight for business leaders 2018, pp. 10–11 considered free trade with low obstacles in world trade to be beneficial to all countries meanwhile uncertainty damages business. That includes also the uncertainty of tax rules and policies.

²³⁹ See EY Tax insight for business leaders 2018, pp. 14–15.

²⁴⁰ Although the way how business is organised is a well-known setup used in normal business cases, the same setup may not be suitable for other businesses at all. In that

an operative legitimisation. This kind of artificial setup is an abuse of the rules²⁴¹. These operations create a small, but intense branch called conduit and base companies²⁴². Pure conduit companies may have a strong taste for tax planning and may be seeking purely for tax benefits²⁴³, but it does not create an assumption that holding companies, or finance companies would automatically be conduit companies or base companies. Assumption-based conclusions are a threat to taxpayers' legal protection.

The OECD and the EU have considered in 2013 and onwards that MNEs are using globalisation as an opportunity to minimise their taxation. Having business operations in multiple countries means that profits are taxed in each country of operation. Tax rules differ from country to country as tax, other regulations, and legal culture are not harmonised. Cross-border business will have complex tax consequences. Equally, it creates also a risk of non-taxation or multiple taxations impacting taxpayers' ability to pay²⁴⁴.

case, the structure is artificial. For example, some industries are based on ongoing research and development resulting in patents, technical and marketing IP. These industries may centralise their R&D activities in one place and ownership of IP in another place. Manufacturing can be split into multiple countries using the IP. Finally, a central organisation is marketing and selling the product. This may be the core of a certain industry. Another industry, for example, utility is based on different business logic; development of a long lifetime production fleet, optimised maintenance, and efficient hedging and risk mitigation. If an utility would implement a typical supply chain setup, it would most likely be artificial as it would not fit as such to the business logic.

²⁴¹ The substance in these setups is often outsourced and the legal entities have no actual resources to manage the business.

²⁴² See for example De Broe 2007. Conduit company is a company that is incorporated outside shareholders domicile (A) in country B only for the benefit of a better tax treaty between country B and third country (C) than what the tax treaty between A and C would be. Base company in its turn means a company that is regarded to be a company for tax purposes and has been incorporated by related parties outside the domicile of the main owner to solely or as far as be regarded almost solely operate the main owner's business in this country on behalf of the main owner.

²⁴³ In some cases taxpayers were using also ruling systems in some countries to get an agreement on tax treatment for their setups. Ruling systems have been developing partly to prevent treaty shopping but also to prevent "inspector shopping". Romano, pp. 27–37.

²⁴⁴ See Knuutinen 2009, pp. 43–49, and Joachim Englisch, 2014. Meanwhile, non-taxation is often seen as aggressive tax planning the opposite position, multiple taxation, could be seen as aggressive tax collection. This would be a neutral scene for the discussion. In most cases, multiple taxation is a consequence of complex mismatches in tax legislation and is difficult to avoid.

4.1.2 Research question

This research is about taxpayers' legal protection and its enforcement. It aims to answer the question of how taxpayers' legal expectations are protected by the legal system as regards taxing powers. With enforcement, I mean the efficiency of protecting legal rights. These legal rights are not only tax law connected. Extensive tax regulation or interpretation may limit business opportunities in a way that conflicts with economic freedoms or the functioning of the EU internal market. The question of prohibiting aggressive tax planning creates tension between legitimate civil law arrangements and tax collection.

The changing tax environment, political discussion, and the tax authorities' actions create a good basis for this research, perhaps more than ever before. Both BEPS and ATAD are interesting from this research point of view. Understanding taxpayers' efforts to be compliant, the so-called compliance burden, and being capable of paying the right amount of taxes at the right time to the correct country is also a factor to be considered.

Taxpayers' commitment to responsible tax management can be seen as a legitimation for enjoying the economic freedoms and benefits of the EU internal market. The question of whether national taxing powers override these EU freedoms is surely a valid question. The purpose of good tax policy adds to the purpose of this research.

The current development has almost exclusively ignored taxpayers' interests. Tax collection and closing gaps have been the overriding focus of legislative work. The question of whether tax on legislative or interpretative level might prohibit use of the economic freedoms on national or EU level, not just eliminate abuse, has not been measured nor raised at all. Improving the EU internal market is presented as an argument, but only as an assumption. Tax authorities' powers have been increased, but taxpayers' legal rights have not been considered.

The new regulation often refers to existing dispute resolution rules or a need to consider them, not the relation to the EU or constitutional considerations²⁴⁵. Therefore this study should answer the question of whether taxpayers still can efficiently utilise their fundamental freedoms and how these freedoms and related protective regulations limit tax collection in reality post BEPS and ATAD. In other words this study tests ATAD rules in the existing constitutional and EU law frameworks from taxpayers' interest.

²⁴⁵ For example, in the OECD's BEPS project the need for dispute resolution was raised in BEPS action 14, but no real development has taken place in this area. The reason of this may be that governments or political decision making are more fiscally-oriented than respecting finally the constitutional principles.

4.2 Research method – What is the relation between property rights, economic freedom and the right to tax

4.2.1 Background

Taxing powers are based on moral or ethical obligations that every member of society has to finance the funding needs of a society. This could be expressed also a bit differently in the view of different approaches. As strange as it may sound, the right to tax lies in the individual property rights and the economic freedoms. If a society did not not recognise property rights or economic freedom it would not have the right to tax either²⁴⁶. These rights would be encompassed by the protection of individual liberties against other individuals²⁴⁷.

Protection of individual property rights and liberties, i.e. such as economic freedoms, creates a need for social order. The task of social order is to promote general welfare and social organisation. Social order stabilises society allowing individual liberties. This means that the existence of taxation is derivative of individual liberty and property rights²⁴⁸.

Bentley states that “taxation can be seen as a barometer of the developing balance between state and individual rights”²⁴⁹. Fuller has studied the morality of law by considering what would a good (tax) law look like. The basic conclusion Fuller makes is, that rules, in this case tax rules, should be formed in such a way that they can be complied with²⁵⁰. Bentley considers that prerequisites for taxation originate in the social order. But to succeed in its task to promote general welfare the right to tax is not unlimited²⁵¹. The limitations serve individual liberties and property rights. The balance between the right to tax and individual property rights or economic freedoms is therefore crucial. This study approaches property rights and freedoms

²⁴⁶ See for example Bentley 2007, pp. 12–13.

²⁴⁷ For example, N:E: Simmonds p. 25 reflects Locks &/ Gant representing deontological theory. Bentley considers that “even a Hegelian view, which accepts a broader concept of public interference, recognizes the importance of property rights to individual liberty”, Bentley 2007 p. 13.

²⁴⁸ Deontological theory does not consider taxation itself as a fundamental good, but it is a justified limitation as it is necessary for the maintenance of social order. Consequently, theory of taxation is part of the social order and the system of property rights maintaining the social order and promoting beneficial economic results, Bentley 2007, p. 13.

²⁴⁹ See Bentley 2007, p. 15.

²⁵⁰ According to Fuller, if rules fail, social order is not maintained. This would mean the promotion of general welfare and also property rights.

²⁵¹ Bentley 2007, p. 15. Bentley considers that even in Marxist theories there are limitations to the state’s powers. Marxist theories recognise as such very little individual property rights. This means that these limits actually define taxpayers’ legal protection.

from an individual point of view²⁵². The question is more about what limits the taxing powers.

Property rights are the one fundamental right that taxpayers' protection is based on. Even though taxing rights are essential for the existence of property rights, and is therefore limited, taxing powers must be in balance with property and freedom rights. Another angle that taxing powers have is the distribution of welfare within the society²⁵³. Even when discussing distribution of welfare taxing powers are limited to ensure that taxation can be regarded as fair²⁵⁴.

Fairness includes multiple angles. Murphy and Nagel consider that the question of how much taxes should be collected and what services and goods are delivered by the government are a result of democratically made decisions in one jurisdiction²⁵⁵. The current debate considers the question of fairness to be more linked to the basic idea of the obligation to pay tax in connection to presence in a country²⁵⁶. For this tax contribution, taxpayers can enjoy the "goods and services".

The question is how the free riders fit into the system of fairness. They are utilising the same protection without the "membership fee", putting taxpayers in an unequal position²⁵⁷. The flip side of the coin from the taxpayers' legal protection point of view is who and what kind of actions create free riders. This is essential to avoid taxpayers who have made an effort to behave responsibly becoming subject to the same taxable treatment as free riders²⁵⁸.

²⁵² The traditional approach would be rather to consider how far can taxing power reach out. An example of this is the question of what can be considered tax avoidance. In this study the question is the other way around: what cannot be seen as tax avoidance.

²⁵³ Distribution of welfare can be seen as a dimension, at least indirectly, for the protection of property rights.

²⁵⁴ Ibid. As Bentley states, even Marxism considers some limits to allow some individual property rights. This means that even Marxism is not supporting unlimited taxing rights.

²⁵⁵ Murphy & Nagel, p. 25. Democratic decision-making has a direct link with the legality principle, which is crucial to ensure that fairness is considered when executing taxing powers.

²⁵⁶ Discussions of fair tax relate surprisingly often to income tax on profit but fairness is seen in relation to where the sales revenue is generated, or other presence is visible independently to profitability of the business. Profitability is often seen as a basic assumption. Alternatively, the difference between revenue and profit is not understood.

²⁵⁷ Sigrid Hemels, p. 425, considers this angle presented by Harts and Rawls. Hemels considers democratically drafted tax laws always to be fair. This can be questioned based on the view Murphy and Nagel take. As Fuller states, it illustrates the lowest level of morality. Political pressure and urgency may sometimes challenge this thinking if political decision-makers do not respect the fundamental rules of legislating on tax.

²⁵⁸ This is the reason why the quality of tax law is essential; to allow taxpayers to know tax consequences, trust on tax treatment, and protect against far-reaching interpretation of tax avoidance rules.

The ability to pay tax can be considered fundamental for fairness²⁵⁹. The current discussion is concentrating quite heavily on -right or wrong- those who are not considered to pay enough tax. Free riders are somehow defined by different measures of taxation²⁶⁰ being problematic for taxpayers' legal protection. It is equally important to ensure that taxes are not unfairly high²⁶¹ and therefore fairness includes an important angle of taxpayers' legal protection. By any means the ability to pay should not be damaged. Equally, taxpayers need to make an effort to illustrate that they behave responsibly, i.e. they are not free riders.

I consider that the legal system builds up taxpayers' legal protection step by step. Constitutions are on the one hand ensuring the required balance between taxing powers and protection of fundamental rights from the government and taxing powers by limiting taxing powers and setting requirements for tax legislation. On the other hand constitutions create stable principles offering guidance/limits for authorities executing the legislation and courts judging the cases²⁶².

In the big picture, many angles boil down to trust. Bentley considers trust to be one of the key factors improving willingness to comply with laws²⁶³. Trust is built into the legal system in the form of two legal principles: certainty and legitimate expectations²⁶⁴. My view is that legitimate expectation is valid for both substance questions (how the law is interpreted) and also to tax authorities'

²⁵⁹ This would be the case at least in the approach Murphy & Nagel takes.

²⁶⁰ Conclusions just based on tax euros or dollars may be somewhat narrow and not take into account all factors. It may though present mistrust to taxpayer and tax authority behaviour. Conclusions are often done if not based on tax dollars or euros, but based on different KPIs, such as ETR (effective tax rate) which is often mixed with nominal tax rate, which does not correlate directly with each other.

²⁶¹ Other obligations, such as the obligation to create shareholder value may be covered by shareholders' rights, see for example Knuutinen 2014, p. 60.

²⁶² Legal framework uses limitations not only for taxpayers but also for legislators and public authorities (see Wattel, p. 183).

²⁶³ See for example Bentley 2007, p. 184. Tax authorities using their power in confrontation instead of negotiations, explanation and guidance will escalate the problem as the taxpayer is losing trust in the tax authority.

²⁶⁴ See Weber & Sirithapor, p. 247, and AG opinion in the ECJ case, C-63/93 Duff.

processes²⁶⁵. Tax authorities should always respect the rules set for them. This improves the trust²⁶⁶.

4.2.2 Method

I would challenge Hemel's consideration of democratically drafted tax laws always being fair²⁶⁷. Taxation may become high, even confiscatory, due to democratically made decisions to take new duties and tasks to the government, that are not necessarily government duties²⁶⁸ or failure of the legislative process. The outcome of these decisions may not reach the set objectives, i.e. tax is not proportional. This takes us to compare the justification of the taxation in comparison to taxpayers' fundamental rights²⁶⁹. Taxpayers may get protection even from the constitution as their obligation is unfairly high²⁷⁰. I see that the question of taxpayers' legal protection is finally a comparison between different obligations or between different obligations and rights²⁷¹. Comparison is a typical search for a balance.

²⁶⁵ Taxpayers have the right to expect that tax authorities follow the law and procedures. This could be the case when tax authorities are requesting information from another country in group internal transactions. Tax authorities have sometimes a tendency to request the information from the group company they are auditing based on "you have access to this information" and not through the official route. This approach ignores rules in the other country and does not improve trust in tax authorities' questions. Compare Spies, Schilcher, & Zirngast, pp. 288–289.

²⁶⁶ For example, ATAD and DAC have created a lot of new tools for tax authorities. Making shortcuts in procedures gives an illustration of low respect for the existing rules. On the other hand, taxpayers cannot be expected to have rights only. Taxpayers need to make a clear commitment to comply with the rules and behaviour that respects tax regulations.

²⁶⁷ See for example Constitutional Law Committee statement (Finland) PeVL 9/2023.

²⁶⁸ Knuutinen 2014, pp. 79–80, considers that society has been legalised society and rights that governments have created have created a legal network that may put the basic fundamental rights for good life at risk. For this research, this view gives an authority to challenge tax law from a constitutional point of view. Comparative law can offer some tools for this comparison.

²⁶⁹ Rights and obligations create a two way-path, as rights create an obligation to someone else and the other way round, see Knuutinen 2014, pp. 64–68. On the other hand, all obligations and rights are not directly linked.

²⁷⁰ Freedom rights are complex and sometimes extremely difficult to measure. Restrictions are possible, as long as they are proportional. Measuring proportionality is difficult. Despite the complexity, it should be clear that one freedom cannot create overly far-reaching restrictions to another freedom or someone else's freedom rights, such as property rights. As an example, government funding should not result in such high taxation that the taxpayer has to sell property to pay the tax on the same property or that the taxpayer's possibility to fund basic living is in danger.

²⁷¹ Comparison could be done between two obligations or by comparing for example property rights to the obligation to pay tax.

Likewise, there is another comparison, that needs to be done. Businesses rely on civil law-based setups, arrangements, and transactions, that are set into the constitutional framework. Taxation is creating funding for maintaining this framework, but when is it limiting the basis for tax revenue, i.e. the business itself? This comparison is crucial to conclude the proportionality of the rules.

Taxpayers' legal protection is not connected only to the confiscatory nature of tax. We have multiple fundamental legal principles that give guidance when interpreting laws to ensure proportionality. These principles have their origin in constitutions, or somewhere else in legislation²⁷². They are not directly applicable rules or guidance to stand-alone cases, but they state broadly long-term, stable principles that take extremes out of legislation and its application²⁷³. For example, the principle of legality restricts tax authorities' interpretation or right to assess. The principle of equality will protect taxpayers from being treated unequally from others²⁷⁴. Legal principles continue the protection created by constitutions creating a basis for comparison as the core research method.

Creating trust between taxpayers and tax authorities in one country is a complex topic. Taxpayers' legal protection should be always considered to create trust²⁷⁵. The matter of taxpayers' legal protection becomes even more complex in international operations. It is not only taxpayers and tax authorities that may have conflicting interests and views. Tax authorities in different countries have conflicting interests²⁷⁶.

²⁷² Vanistendael 2014 considers legal principles to be soft and flexible. This surely explains their stability. As Vanistendael puts it “oddly enough, this characteristic of “hard laws” rests on number of fundamental principles, which are to be found in different legal systems. The basic principle is the principle of legality...”, p. 30.

²⁷³ Vanistendael 2014 has listed different levels of legal principles from general principles to technical principles.

²⁷⁴ Pahlsson considers equality to be a prerequisite for the rule of law, p. 152. The equality principle includes a requirement of comparability of case meaning vertical comparability. As Papis states (pp. 374-375) “the principle of equal treatment, as an origin of the principle of neutrality, furnishes the latter with the broad content of a prohibition on treating comparable situations differently (*note; vertical comparability*) and different situation in the same way, unless it is objectively justified”. See also ECJ C-279/93 Schumacker para. 30: “It is also settled law that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations”. Finnish constitutional interpretation however is considering equality between taxpayers restrictively, at least compared to EU law.

²⁷⁵ With trust, I do not mean the so-called sweetheart deals that may have occurred in some countries where taxpayers have received beneficial, not-for-all tax treatment under an *inter partes* agreement. To my understanding, these kinds of deals are not common.

²⁷⁶ Each tax authority is collecting taxes for their home country. Allocation of income is more about how one income is split between countries than finding new income or some income not being taxed at all. A good example of this is the case “Orstedt” from

This all boils down to the fact that countries have sovereignty over their funding. Each country drafts its laws defining the level of taxation²⁷⁷. Even though there is a very strong national aspect in laws and especially in tax laws, there is currently a strong international framework setting minimum requirements and focusing on non-taxation²⁷⁸. On the other hand, EU Member States have committed to developing the EU internal market by joining a treaty defining the fundamentals of the EU.

A well-working internal market is the cornerstone of the European Union. The internal market does not eliminate competition between Member States, but targets to eliminate hindrances to the movement of capital, employees, and freedom of establishment²⁷⁹. In this respect, the EU treaties and regulation create at least within the EU a benchmark for taxpayers' legal protection. On one hand, taxpayers can rely on doing business freely within the EU internal market without national limitations. On the other hand, taxpayers can refer to the rights created by EU law even in case of tax, if tax is limiting business.

The new tax-related directives setting minimum rules for tackling tax avoidance create a new angle to the comparison of taxpayers' legal protection and the functioning of the internal market. This means that EU law and rules are actually setting borders for national tax legislators in the aspect of respecting a well-working internal market. The EU creates definitely one level for taxpayers' protection and another level for comparison between rights and obligations.

The traditional legal dogmatic method is not sufficient as only research method. When analysing taxpayers' legal protection, I face often the question of conflicting interests. Even though, as Murphy and Nagel's consideration of taxes funding public services, I see that there is a component of conflicting interests: what is proportional

Denmark. Danish tax authorities considered the cash flow that a project company is estimated to have from a wind park to belong to the developer. Any sale of SPV would in practical means mean the sale of future cash flow that would belong not to the SPV (project company) but to Danish headquarters. This view ignores entirely the SPV countries' interests as well as the original and new shareholders' interest in getting revenue from the business. I find the case to have an extremely opportunistic approach by the Danish tax authorities. It illustrates also the complexity of legal protection: even though tax authority in one country would comply with tax treaties or the EU law, tax authority in another country may have different view destroying the attempt to solve an issue.

²⁷⁷ In the EU national tax legislation needs to comply with EU rules, i.e. not creating obstacles for the functioning of the internal market.

²⁷⁸ The OECD's and the EU's focus is year after year unexpectedly strongly in non-taxation or too low taxation.

²⁷⁹ Taxpayers should have a low threshold to move within the EU, which promotes competition and competitiveness of the EU. The new era of tax regulation that the EU is executing creates a new level of consideration for taxpayers' legal protection.

and what is not²⁸⁰. This takes us more than often to measure different interests, their weight, and importantly also proportionality²⁸¹. This measurement in the form of comparison is becoming more crucial in a post-BEPS environment²⁸². This is why legal dogmatics need to be only a supporting research method for the comparative method.

The comparative method allows me to measure conflicting interests. The new rules are designed to eliminate certain behaviours. There is obviously a risk that even the legitimate operations or taxpayers not behaving in an unwanted manner are impacted by the new rules.

Comparison can be done in different ways²⁸³. To reflect taxpayers' legal protection the comparative angle in this research has to be connected to the comparison between fiscal interests and freedom rights and has to be reflected in different levels of legal protection²⁸⁴. Comparison is more fundamental in the legislative process and becomes more concrete when approaching tax authorities' right to assess business reasons²⁸⁵.

4.3 Scoping research by legal levels protecting taxpayers as a basis for comparison

Taxpayers' legal protection is based on the idea that there is a rule in the law, regulation²⁸⁶, or legal principle that is higher in the legal hierarchy ruling possibly

²⁸⁰ I think that the principle of ability to pay, or we could call it fairness, illustrates this aspect quite well. There is naturally a lower limit when considering the ability to pay, but also a higher end. The lower end, that is all should contribute, can be argued by the equal sacrifice. The higher end relates to the prohibition of confiscatory taxation. See Englisch 2014, pp. 441–446.

²⁸¹ Proportionality measure is embedded deep in the legal principles, ECJ case law, and also European constitutions. Proportionality is included in the rule of law test as one key component of measuring the legitimisation of regulative freedom (see for example Urpilainen 2011, p. 80, and Vainstenadael 2014, pp. 44–45.)

²⁸² Anti-avoidance rules create often an exception for the main rule to prohibit abuse. But the measurement of what truly is abuse is often blurry and needs to be seen in relation to freedom rights.

²⁸³ Vanistendael 2014 identifies multiple angles as a source of comparison (pp. 44–45), not just hierarchical, but also interest-based levels.

²⁸⁴ This includes the comparison of the civil law framework with the tax consequence framework

²⁸⁵ In concrete form how far can tax authorities' tax-based assessment go when considering abuse of law based on the business purpose test. When is tax authorities' analysis considered to have an overweight of tax motivation?

²⁸⁶ With regulation I refer to EU law and international treaty law. OECD recommendations give mostly only guidance for interpreting law. Therefore, they do not have

over the tax rule. This illustrates that the different values and issues are protected to a certain extent and ensured with enforcement. By comparing the rules and the different interests we may be able to conclude whether taxpayers' rights are stronger than fiscal interests, a reflection of proportionality²⁸⁷ and enforcement capacity. Equally, this allows us to consider how different principles and the legal framework steer decision-making in an unclear interpretation by comparing different aspects. This section presents the different levels of legal protection.

4.3.1 First level – Freedom rights

Constitutions are the basis of our legal system. The constitution reflects permanent values by protecting fundamental freedoms. The permanent nature is reflected by the procedural and majority requirements set for changing the constitution²⁸⁸. These fundamental freedoms are regarded to be crucial for a well-working legal state. They include rules that are crucial for a taxpayer to ensure the basic economic freedom rights²⁸⁹ where extensive taxation²⁹⁰ does not set limitations for utilising these freedoms. These freedom rights protect property and ensure freedom for business²⁹¹. Rights protecting property and business cover even companies, although to a limited extent²⁹². They are regarded as being intermediates for single persons organising their business²⁹³.

enforcement power, but rather a soft source interpretation with no OECD-level legal institution to appeal or refer the interpretation to.

²⁸⁷ See for example Zalasinski p. 307

²⁸⁸ For example, during the Covid pandemic all restrictions planned to manage the pandemic were benchmarked with the constitutional rights to ensure proportionality of the measures. Even though there may be different understandings or interpretations of how far-reaching restrictions can be, the measurement of proportionality is an important factor required by constitutions. Equally, constitutions are, or should be, measured when considering tax laws.

²⁸⁹ Economic freedoms ensure entrepreneurs' freedom to arrange business in a justified manner.

²⁹⁰ Tax is levied on the business and its profits based on justified choices the entrepreneur has made.

²⁹¹ For example, 15 § and 18 § of the Finnish Constitution. Economic freedoms represent freedom to choose the best possible setup or location for business (freedom of establishment and movement).

²⁹² Protection of businesses organised in company form is limited, see Constitutional Law Committee (Finland) statement PeVL 97/2022. According to EU law, the protection of companies is stronger.

²⁹³ Companies have equal residency or citizenship as natural persons even though they cannot enjoy at least directly all the rights, such as the right to education. On the other hand, companies can be seen as a "joint venture" of shareholders enterprise, a joint

Äimä considers that fiscal rights limit the protection of property²⁹⁴. The reason for this conclusion is that human rights agreements leave a wide range of powers for taxation²⁹⁵. The constitutions have had a purpose to limit fiscal powers to protect for example property rights, but not prohibiting taxation as a whole²⁹⁶.

Constitutions and human rights protect taxpayers from overly far-reaching taxation. A certain right has normally a countermeasure – obligation or liability. In other words, if taxpayers enjoy protective rights, they have an equal obligation to pay taxes. At the same time also government has rights and obligations, i.e. right to tax and obligation to respect taxpayers' property. The purpose of this study is to reflect on government obligations²⁹⁷.

Freedom rights may be restricted, i.e. freedom is limited, such as different permits may be required setting terms for business²⁹⁸. Freedom rights need to be regarded when these limitations are created²⁹⁹. This may be the case, even when considering tax laws and single taxation impacts may be extreme in some cases³⁰⁰.

effort where all shareholders have joined their efforts to do business. See for example Knuutinen 2014, pp. 66–68. On the other hand at least, multinational companies based on OECD's proposals Pillar 1 & 2 of 2020 seem to become resident in countries where they do not have any physical footprint or have an obligation to pay taxes in another country than where the operative footprint is.

²⁹⁴ Äimä, 2011, p.109.

²⁹⁵ European Convention on Human Rights (ECHR), Article 1 of the First Protocol, amended by Protocol no 11.

²⁹⁶ When Äimä is talking about constitutions protecting property and limit therefore fiscal rights, though not eliminating them, I find that Äimä is talking about the balance between taxing powers and property rights. Partly this boils down to a question of legitimation of taxation and funding need to arrange protection for property, *ibid.* See also Myrsky 2012.

²⁹⁷ This reflects quite well the challenges that unclear or poorly drafted antiavoidance when considering proportionality.

²⁹⁸ This means that business arrangements are not possible or are steered by applicable non-tax regulation. The proportionality of this limitation is measured by constitutions, but they are not reflected against tax rules. Tax rules should be reflected to economic freedoms, not only to eliminate the risk of arbitrary of tax.

²⁹⁹ Mäenpää, 2013. Freedom rights limit authorities' actions and authorities need to take them into account in all they do. This means that even though utilising freedom rights may be restricted, the limitations have limits. The Constitutional Law Committee (of the Finnish Parliament) considered that taxation may violate property rights and constitutional rules need to be considered when tax rules are drafted PeVL 9/2023 vp HE 34/2023 vp.

³⁰⁰ See also Bentley 2007, p. 156. Equally, see also PeVL 97/2022 vp HE 320/2022 vp illustrating the risks of interfering with complex topics (energy prices) by urgently drafted tax law. Limitations on tax is equally impacting economic freedom rights as any other limitation even though the impact may sometimes be indirect.

Constitutional rules protect taxpayers primarily by limiting and steering the legislative process of tax laws to prohibit confiscatory situations³⁰¹ or eliminate tax becoming a limitation³⁰². Constitutions give guidance to what can be legislated and how instead of stating exactly what the rules have to be³⁰³. This guidance and threshold defined in constitution are important to ensure consistency of taxation³⁰⁴ bringing in also the aspect of comparison between taxing powers and taxpayers' rights; the measure of proportionality is comparative.

Even though the threshold of the constitutional rules restricting and steering tax legislation may be high, it is and should be considered each time.³⁰⁵ That is why these rights create the fundament for taxpayers' legal protection, being its first level³⁰⁶.

Due to the nature of being the law behind the law's enforcement of fundamental rights in a concrete tax issue has a high threshold. A high threshold does not mean

³⁰¹ We could also talk about fairness, which could be measured by constitutional principles such as equal treatment or non-discrimination. As taxation is a justified restriction of freedom rights, the constitution, instead of bluntly denying tax, steers tax law to be proportional as regards constitutional rights.

³⁰² In the same manner as the ECJ considers if a tax case has an EU-law angle and whether the tax (i.e. tax consequence of a business) is prohibiting EU-law-based freedoms in a way that is not proportional.

³⁰³ Kimmo Sasi stated that nothing limits the powers of the Parliament as a legislator (Turku University, International tax seminar 2017). Politically, I consider this to be true. Political parties can draft whatever kind of tax policies, but if the policy is seen as overly far-reaching, a simple majority may not be enough. Majority requirement creates a threshold to ensure that the fundamental change has wide support and is not only a temporary "trend". Constitutions steer and adjust tax law in relation to constitutional fundamental rights and therefore protect taxpayers' rights.

³⁰⁴ This means on the other hand that constitutional protection in a court case in countries with no constitutional court, is indirect.

³⁰⁵ Constitution and constitutional principles have an impact on positive law and courts have the power to apply them, see Vanistendael 2014, p. 35. Meanwhile, the whole law may not be prohibited from being adopted, but the different angles should be taken into account to ensure that fiscal interests are proportional to their objectives and constitutional freedoms.

³⁰⁶ Bentley has studied taxpayers' rights and, in his classification, constitutions are regarded to have constitutional enforcement. Bentley approaches constitutional aspects more from a traditional point of view, as he is talking about a fair trial, the right to appeal, etc. I am approaching the issue more from the taxpayers' legal protection point of view, that is how are taxpayers protected from excessive taxation. Bentley's classification has nevertheless a function in this approach. Bentley talks about entrenchment (p. 144). Entrenchment deals with taxpayers' legal protection; i.e. how can the constitution protect taxpayers from parliamentary overriding. After all, "constitution is the law behind the law".

that courts would ignore fundamental rights³⁰⁷. At least the Finnish Supreme Administrative Court hesitates to step into the role of a legislator even lightly. Instead, it considers whether requirements are set in the law in the constitutional frame, i.e. approaching tax through constitutional interpretation. In this respect, the constitution has, as Bentley describes, an enforcement impact³⁰⁸.

4.3.1.1 EU freedoms on level one of protection

In some cases also EU law sets the limits (negative harmonisation) and steering (positive harmonisation) for national taxing powers³⁰⁹. It is important to note that these limitations are not restricted only to traditional discrimination. According to settled case law, all measures which prohibit, impede, or render less attractive the freedom of establishment must be regarded as obstacles³¹⁰. European Court of

³⁰⁷ See SAC (Finland).2016:180. the SAC stated that neither the Finnish Constitution 106 § nor the law on Supreme Administrative Court 2 § gives the Supreme Administrative Court a mandate to assess whether the legislative process of income act 124 § first and fourth moments has been in line with the legislation and that pre-emptive nature of constitution 106 § can be applied only in case the conflict cannot be eliminated based on constitutional interpretation. This means that the SAC is not willing to step into the role of legislator, but respects the constitution. This can be seen in for example the Finnish SAC decision 2017:78 where the Court considered that the taxpayer had presented financial purpose and the setup in question was not artificial. Therefore, it was not abuse of the fundamental freedoms. This is a good example of constitutional guidance and proportionality when interpreting tax laws. The Court reviews constitutional rules and rights and puts the case in this framework. See even SAC 2018:166 (terms for taxation need to be included in the law) and SAC 2022:149.

³⁰⁸ Taxpayers can request a ruling from the European Court of Justice in case the EU's internal market is somehow affected.

³⁰⁹ As the EU does not have any actual taxing powers, and therefore the EU's impact on national decision-making is merely indirect unless taxation interferes with competition and the functioning of the internal market, see Vanistendael 2014, p. 31. Based on this EU legal order the ECJ has stated whether tax laws are in line with EU law or not, i.e. creating so called negative harmonisation. As from the era of BEPS EU has moved towards positive harmonisation meaning stating actually how tax rules should be drafted.

³¹⁰ Case C-55/94 *Gebhard*, para. 37: "national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it" referring to Case C-19/92 *Kraus v Land Baden-Württemberg* paragraph 32 stating "...only if such a measure pursued a legitimate objective compatible with the Treaty and was justified by pressing reasons of public interest". See also Case C-442/02 *Caixabank France*, at para. 11 states that

Justice has repeatedly held for instance in the context of the freedom to provide services, that the latter requires

“not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State, but also the abolition of any restriction, ... which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State...”.³¹¹

I see that the same analysis applies in the context of the other TFEU provisions, including the freedom of establishment³¹².

EU law and the European Court of Justice have protected and continue to protect taxpayers through its case law and principles set in the functioning of the internal market³¹³. Even though EU law does not directly impact taxation nor taxpayers as such, the nature of taxes being a consequence of business links EU law to taxes through the functioning of the internal market³¹⁴ by setting obligations for Member

“Article 43 EC requires the elimination of restrictions on the freedom of establishment. All measures which prohibit, impede or render less attractive the exercise of that freedom must be regarded as such restrictions. “

³¹¹ Case C-350/07 *Kattner Stahlbau*, para. 78 “according to the case-law, the freedom to provide services requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services”.

³¹² See for instance Cases C-464/02 *Commission v. Denmark* and C-298/05 *Columbus Container Services*. It is important to note that less attractive in this context does not mean that states would not have the right to tax. It means that in some restricted cases aggressive national taxation may make the business less attractive for taxpayer from another Member State and therefore is an obstacle to freedom of establishment. An example of this could be interest deduction limitation, an investor from another Member State receiving a tax exempt dividend could be seen less attractive than a national investor investing in a subsidiary.

³¹³ Vanistendael 2014 considers that EU principles have a direct impact only when it is a question of competition and realisation of the internal market, p. 31. See also Prechal, pp. 6–7, and Lennarts & Guttierrez-Fons who consider that even in cases where the EU does not enjoy legislative rights, EU law may force national legislators to make choices based on EU law. See also Douma, pp. 226–228 about community law’s impacts on community law in light of Fuller’s principles.

³¹⁴ Ibid.

States³¹⁵. Freedom of establishment, free movement of capital, and non-discrimination are the cornerstones for the ECJ when approaching EU law and the functioning of the internal market. These aspects create an EU-level fundamental protection in addition to national constitutions³¹⁶.

The ECJ has the sole right³¹⁷ for the ultimate interpretation of EU law. National courts must send cases to the ECJ for precedent decision³¹⁸. Even though *acte clair* exists, this obligation is strong. As the ECJ considers whether a Member State has implemented rules that violate EU law, the ECJ can take the case up only if there is an EU law angle or involvement in the issue³¹⁹. Taxpayer challenges Member State legislation in a specific case in light of EU law, not national law. EU law has a fundamental route for enforcing some of the basic rights of taxpayers³²⁰.

EU law can be regarded to be equal to a constitution in the legal system due to the fundamental level of its rules binding Member States³²¹, it offers an enforcement

³¹⁵ We can see a trend where the ECJ makes a reference to the legal framework, i.e. are taxpayers' actions in line with the purpose of EU law, see for example joined cases C-116/6/16 and 117/16 Danish cases or C-585/22 X BV, para. 59.

³¹⁶ Equally, it creates an indirect control for some aspects of cases involving a constitutional approach. For example, businesses set up in a company form are not enjoying specifically strong protection by some aspects of the constitution, such as equal treatment. EU law, due to the setup of the EU, brings these aspects more directly into the focus of taxpayers' protection and supplements businesses' "constitutional" protection.

³¹⁷ Only in case the issue has been already solved by the ECJ, the national court may make the decision without reference to the ECJ. This *acte clair* is not a broad exception, but rather it creates specific requirements for not to refer the case, see Dourado & de Palma Borges 2007.

³¹⁸ This was confirmed again in case C 83/21 Airbnb Ireland UC, Airbnb Payments UK Ltd v Agenzia delle Entrate. The issue was about Airbnb's business model and withholding tax. The lower court in Italy considered based on ECJ case law that withholding tax is neutral and does not impact the functioning of the internal market whereas the higher court, based on ECJ case law, considered that there is no clear ECJ decision of whether the withholding tax might in any way impact the functioning of the internal market and referred the case to ECJ.

³¹⁹ EU law involvement will be analysed later.

³²⁰ Some EU countries have a high threshold to send cases to ECJ, such as Sweden. In Sweden the SAC seems to make final decisions concerning EU law aspects also without asking the ECJ for any precedent decision. Taxpayers' need in this case search for extraordinary methods to get fundamental rights to be considered in the legal process and to have enforcement for them, illustrates poor recognition of taxpayers' rights.

³²¹ The principles defined by EU law and ECJ case law are based on principles approved and used in the majority of EU Member States. Based on Vanistendael 2014, p. 33 for example, the principle of non-discrimination was adopted by the ECJ already in the early phase as the ECJ considered that if the internal market should have a meaning, principles should be regarded as hard law. On the other hand, Vanistendael has

method for taxpayers to get these fundamental rights to be considered³²² belonging to the first level of taxpayers' legal protection³²³.

4.3.2 Second level – Legislative process protecting taxpayers' interest

Fundamental constitutional freedom rights are violated by the state's right to collect taxes. As taxes create the basis for financing a state's operations, this infringement is justified³²⁴. This does not however eliminate the question concerning the level of taxation and the depth of the infringement. Throughout the times the balance between the collection of taxes and taxpayers' capability to comply and pay taxes has been a key issue³²⁵. Complex regulation brings the legislative process into the heart of taxpayers' legal protection.

The question around the level of taxation³²⁶ is not the only topic that has to be considered in the legislative process even though the level of taxation is an important factor from a taxpayers' legal protection point of view. Overall tax burden may be acceptable but in a way that still becomes confiscatory in some specific cases. The legislative process should ensure that this is not the case.

The constitution is actually setting, in addition to the tax burden, also another requirement that steers the legislative process and protects taxpayers' legal rights³²⁷. This requirement is clarity and predictability of law³²⁸. Law has to be drafted so that

considered that legal principles adopted by the ECJ are adopted by most EU Member States. Also, Hettne considers that the ECJ makes an effort to find support for its interpretation from pan-European principles and traditions, p. 16.

³²² See Dourado & Silvas.

³²³ Enforcement takes place through an appeal in a tax case that is referred to ECJ. Taxpayer challenges the Member State national legislation even in cases the law is in line with the national constitution.

³²⁴ See for example Bentley 2007, *ibid*, see also Dourado 2014, pp. 206–207.

³²⁵ Bentley, 2007 p. 24. See also Fuller in respect of what is required from a good tax law.
³²⁶ Level of taxation involves the principle of ability to pay or in other words what is fair. Fairness includes in this sense both minimum and maximum levels. Englisch (p. 443) considers that the principle of equality is fundamental for the ability to pay: taxpayers in equal positions should make equal sacrifices. The legislation defines the level of fairness (see Fuller) and therefore legislative process is important. One should not make too light conclusions because it is not easy to conclude which taxpayers are in an equal position.

³²⁷ See for example Myrsky.

³²⁸ Fuller has studied the morality of law and defined points for good legislation. Fuller identified eight ways to fail to make a law (p. 39). Douma considered that the ECJ is following Fuller's principles (p. 220).

taxpayers can conclude what the tax consequence is and how the law can be complied with. Or to ensure that taxpayers can actually comply with the tax law³²⁹.

Respect for constitutional rights and obligations in the legislative process requires good preparation, proper impact assessment concerning the operations to be taxed both on a pre- and post-tax basis, and well-organised discussion. It allows a balanced comparison of different interests and aspects. This is important not only to ensure a fair tax burden but also to respect the predictability of the law in different circumstances. As taxes are to be based on law, the law has to be drafted so that tax burden can be estimated and tax treatment known before any transaction³³⁰. Clarity and predictability have to be built into the law in the legislative process³³¹.

Impact assessment is a crucial component in the legislative process allowing comparison of different interests which ensures clarity and predictability. It should illustrate the impacts that taxation will create on operations³³². Additionally, it should, if done properly, also predict areas where more clarity is needed³³³. If impact assessment is limited only to the assessment of fiscal revenue, it does not respect requirements concerning proportionality, predictability and clarity³³⁴. The legislative process creates an angle where taxpayers' rights and should be respected in the spirit of the constitution and of EU law.

As the EU has become more active in the field of taxation³³⁵, also the quality and transparency of the EU's legislative process needs to be renewed. EU has

³²⁹ In this respect legislative process should consider even the traditional legal rules, such as how can the right to appeal be ensured, the taxpayer has a right to get confirmation of the tax treatment already prior to the transaction. Clarity and predictability are crucial for taxpayers' legal protection as in case of unclear tax law, also tax authorities have problems issuing trustful tax assessments.

³³⁰ Äimä, Tikka, Knuutinen are making the same definition.

³³¹ Legislator needs to have room to draft laws so that they are clear and predictable. In this sense the EU creates a challenge as the EU creates rules that bind the Member States meanwhile the EU is not having an actual legislative process, only a process to draft directives.

³³² These impacts can and should then be compared with the target of the tax and planned regulation.

³³³ In this sense the work of so-called lobbyists is important to a certain extent as they will illustrate the impacts from different angles. However, when lobbying interests move over to the target setting of a single group, the comments of lobbyists are not positive for legislative work. It is more a political discussion rather than legislative work.

³³⁴ Hultqvist 2014 considers that the poor quality of Swedish interest deduction rules was caused by urgency but also a strong fiscal interest only. The law was drafted and proposed by tax authorities. Even though the rule was defined by law, the law failed to be clear and predictable putting in danger the rule of law.

³³⁵ EU as such has no taxing powers based on the EU Treaty although the EU has illustrated a willingness to have them, see for example EU's plans to finance the Covid aid package in 2021. "Old" tax directives have been different.

traditionally not regulated directly how taxes should be assessed, but in the post-BEPS world, we can see direct tax-related regulation. This creates a challenge for the national legislator's process. Therefore, even the EU's capability to draft guiding rules for tax is critical for taxpayers' legal protection and has to be reviewed on this level as the EU rules bind the Member State.

4.3.3 Third level; – Rule of law and predictability, an early form of enforcement

Taxpayers' legal protection is founded on the rule of law and predictability. This means that tax has to be based on the law so that taxpayers can conclude the tax burden. This limits tax authorities' powers and mandate and is one of Fuller's³³⁶ terms for good legislation by ensuring the capability to comply. Tax authorities as well as courts need to judge the case based on the law³³⁷. As Fuller puts it, the law creates the lowest level of moral agreement of taxation, in other words, what is seen as the right level and form of taxation³³⁸, law needs to be predictable. Taxpayers have to have a possibility to understand consequences, trust on the rule and be able to comply³³⁹. This makes the rule of law a key factor for taxpayers' legal protection³⁴⁰.

³³⁶ See Fuller, p. 35.

³³⁷ This limits authorities' mandate as tax has to be based on law. Considerations of the spirit of the law illustrate more attempts to fill gaps that tax laws have. The spirit of the law needs to be applied with caution as the spirit is already more a matter of interpretation and personal views. The purpose of the law has the same qualifications but is often documented in the preparatory works. As a source, the purpose is stronger than the spirit of the law, but the rule of law is always the starting point.

³³⁸ Fuller considers that the morality of law describes the lowest level of moral rules. The more moral the aspect are, even though easy to agree on a high level, they are personal subject to subjective understanding of the facts, circumstances and framework. In other words, there are as many views and opinions as viewers.

³³⁹ In case taxpayers cannot comply with the rule with a fair amount of work, they are subject to real reputational and financial risks as the selected tax treatment can easily always be disagreed, in other words different stakeholders expect different kind of outcome. Therefore, predictability and clarity are the basic rights of taxpayers to be able to fulfil the obligation to pay tax.

³⁴⁰ Rule of law is crucial when considering national-level questions, even EU-level taxation. When considering international taxation rule of law is weaker in spite of tax treaties as two countries have a competing interest based on national law in the taxable transaction having impacts in two or more countries. As Vanistendael 2011 considers "because taxation is "par excellence" the action which the sovereign exercises his authority, more than wars, conflicts between tax systems in the international arena are inevitable, resulting in double or even multiple taxation". Vanistendael 2011, p. 185.

Rule of law is reflected in numerous constitution³⁴¹. The rule of law is based on requirements that are set for tax collection. The basic terms are that tax collection has to be based on law, tax law defines tax treatment and tax burden can be estimated based on the law³⁴². This means that the third angle of constitutional rules reflects tax authorities' power that is created and limited by law. Clarity creates predictability, which is an important value for financial activities defining the planning headroom³⁴³. Predictability also limits tax authority powers and creates justified expectations for taxpayers³⁴⁴.

Predictability creates also clear borders for taxpayers and should prohibit misuse of economic freedoms. Even though freedom rights are important, they may not be misused and they are not unlimited³⁴⁵. Unclear terms and legislation are a threat to predictability and may create positions where tax authorities' assessments go beyond what was the purpose or the letter of the law or taxpayers cannot comply for the same reason³⁴⁶. Rule of law protects taxpayers and predictability reflects also the quality of legislative work.

Different types of anti-avoidance rules³⁴⁷ are challenging from a predictability point of view. They offer tax authorities the possibility to assess taxpayers' business behaviour based on tax authorities' views which may not be strictly in line with tax law, i.e. the rule of law. Transactions tax assessment is therefore often motivated

³⁴¹ For example, the Finnish Constitution, 2 § and 81 §.

³⁴² See for example the Finnish Constitution, 2 §, Äimä 2011, Hultqvist 2014, and Bentley 2007.

³⁴³ Planning in this sense means a choice between different options that are available based on facts and economic freedom rights and limited by tax laws. Taxpayers need to be informed about what is acceptable and what is not to be able to do business or financial transactions.

³⁴⁴ For example, Tikka 1972 considers that analogical interpretation is problematic when considering general anti-avoidance rules. This is due to rather general definitions (see pp. 192–193). General definitions are not clear and predictable and create a challenge for taxation. Even though tax legislation would be for the main part clear and predictable, poor GAAR may create an obstacle for the rule of law. Justified expectation is therefore one angle of predictability. Some countries, like the Netherlands, have included these justified expectations in their legislation.

³⁴⁵ Tikka 1972 makes a comparison to misuse of the law.

³⁴⁶ For example, terms like "mainly for business purposes" and "tax benefit" are rather unclear definitions that have been used lately. See Hultqvist 2014. For example, "tax benefit" is an unclear term. Tax authorities seem to regard for example tax rate differences as a tax benefit, although they are legitimate based on freedom of establishment. Another example is the scope when considering tax benefits: is it one stand-alone company approach, or perhaps a consolidated country approach, or the total consolidated group approach. The reasoning of tax consequences will look very different depending on the approach, this is why unclear definitions are problematic.

³⁴⁷ See for example Knuutinen 2020, p. 52–61.

purely by tax motivation³⁴⁸, in other words doing exactly what they are trying to prohibit: far-reaching, artificial outcomes. Even more extreme tax authorities do not have to assess the quality of business decisions³⁴⁹.

Quality of legislative work (second level protection), is connected to the third level of protection, the rule of law. The second level of taxpayers' protection creates a platform for the third level of taxpayers' protection and rights. They are therefore closely connected to each other³⁵⁰. The second level protection is connected to legislative process and the third level protection covers application of law.

4.3.4 Fourth level – Legal principles guiding the constitutional framework

Legal principles are long-term fundamental soft law guidance³⁵¹. Legal principles do not give a direct answer to a specific question. They are in this sense soft law and stabilise the legal framework for taxes and give guidance for the interpretation of the law, such as how to prohibit the misuse of rules³⁵².

³⁴⁸ Tax motivation may be the simplest solution for tax authorities if the law gives an opportunity for that. This is the case as the authorities do not most of the time understand businesses' operative logic and arguments.

³⁴⁹ Rule of law gives tax authorities authority to assess taxable basis based on tax law. As tax is a consequence of business, the tax authority mandate is limited to defining tax consequences, not to assessing business decisions. This belongs solely to the taxpayer. The tax authority may only assess it if a business setup is in place to abuse rights, but otherwise, the tax authority is bound to the form chosen by the taxpayer. Tax authorities' possibility to challenge business decision solely to change tax treatment should have a high threshold.

³⁵⁰ Bentley 2007 considers that clarity and quality of legislation suffer from the increased number of new laws and the urgency of the legislative process. Hultqvist 2014 makes an equal conclusion in his study of the legislative process. For example, Lehtonen has made the same conclusions on.

³⁵¹ See for example Hettne, who makes a difference between EU law and national law principles. Further, Vanistendael 2014 finds multiple levels of legal principles. Legal principles have different sources, such as general principles, constitutional principles, constitutional principles of state organisation, principles in the EU legal order, and tax technical principles offering offer different kinds of guidance. See also Knuutinen 2012 pp 54–55. All of them have a role in taxpayers' legal protection. For this study general principles, constitutional principles, and principles in EU legal order are the most crucial ones.

³⁵² Human rights, based on different international agreements, offer protection to taxpayers' fundamental rights. However human rights are not always necessarily directly applicable to tax issues due to limitations stated in the agreements. Despite that tax matters have been up in ECHR for questions like fair trials and discrimination. The case law is still limited, but increasing slowly in volume. Not only human rights protect

As considered earlier, taxes can be assessed only based on law. If the ethics and morals are changing, it should be reflected in law, which is approved by parliamentary majority. Ethics and moral may impact taxpayer behaviour, but they will not eliminate conflicting interests. Change in the tax basis has to be decided by the government and the legislator. Due to the nature of legislation, there is and has to be some flexibility in the wording³⁵³. This leaves room for interpretation, which is finally allocated to the courts. Judges use different interpretation methods but in conflict situations, they take help also from legal principles.

Stability and the soft nature of legal principles create a level of protection for taxpayers in the legal system. Due to the nature of legal principles, they highlight also taxpayers' behaviour as one component. For example, the proportionality principle puts taxation in relation to the public interest. Equally, it requires a commitment from taxpayers to behave proportionally, in other words not seeking all reliefs, but rather to stand for taxpayers' obligation equally³⁵⁴.

Legal principles are permanent and reflect often principles identified in the constitutions or preparation of constitutions during a longer time. As Vanistendael states "principles inspire legislation and help interpretation and therefore are not directly enforceable"³⁵⁵. The principles of proportionality and legality are good examples of these more permanent principles³⁵⁶. Due to their permanent nature, they create stability and predictability and therefore protect taxpayers from different political short-term trends³⁵⁷. The protection that legal principles offer is indirect and the enforcement methods are soft but systematically used by courts, especially the ECJ. This is why I consider this to be the fourth level of protection for taxpayers' rights.

taxpayers. The proportionality principle is a good example of how taxpayers are protected from excessive taxation.

³⁵³ Tax legislation especially requires some flexibility as tax law cannot be changed as frequently as the financial circumstances and new kinds of financial solutions and details appear in practice. The flexibility of the wording gives tax legislation the possibility to cover different levels of questions, though this flexibility has to be limited.

³⁵⁴ This is where taxpayers' commitment to responsible tax management steps in – taxpayers cannot expect to refer only to their rights, but also commit to their obligations. Vanistendael 2014. The legal principles should inspire legislators as well as taxpayers.

³⁵⁶ When drafting new laws or rules legislators may state some principles that have guided them in the legislative work. These principles may be more detailed, at-target than the fundamental principles. These at-target principles outline more the purpose and idea of the legislation, not still being legal principles.

³⁵⁷ The principle of proportionality as an example sets requirements that limit legislators' options as freedom rights may be violated only to the extent that is needed to reach the justified target. This principle is not setting limits only to how to assess taxes, but also to legislator's work. Restrictions to taxpayers' fundamental rights can be legislated, but they need to "hit" the target and be proportional.

4.3.5 Fifth level – Administrative rules

Before tax assessment is delivered tax authorities create their final position on the substance issues, tax authorities have some obligations to be performed. These obligations are part of taxpayers' legal protection. Taxpayer have an opportunity to express their views on the issue³⁵⁸. These obligations set formal and systemic approaches for tax authorities as a process. This is crucial if tax authorities are to be considered objective³⁵⁹.

The effectiveness of tax collection is a counter power to taxpayers' rights and interests³⁶⁰. It regards speed and collected amount into the focus meanwhile taxpayers' rights emphasize certainty³⁶¹. Balance is reached when tax assessment is based on well-presented facts and understandable argumentation. This will serve the taxpayers' interests and also prohibit unnecessary legal processes³⁶². Clear and respected administrative rules are a joint interest of taxpayers and tax authorities³⁶³.

Administrative rules defining transparency of tax authorities' behaviour and decisions are crucial, not only for creating a reliable base for tax assessment but for

³⁵⁸ If these obligations are treated as a formality, their importance is ignored. This aspect is equally important as the importance that taxpayers comply with regulation, if not even more important as tax authorities represent the legal order. If tax authorities do not respect the legal order, that is procedural and governance rules, what is the reliability of authorities? On what mandate are tax authorities stating that taxpayers did not comply with the law?

³⁵⁹ This is to ensure that different factors affecting the result are in reality taken into account. Obligations ensure also, at least in some countries, the transparency of tax authorities' process and argumentation. These kinds of rules "promoting" tax authorities' objectivity are crucial for taxpayers' legal protection as courts often regard tax authorities to be more reliable than taxpayers, taxpayers have a personal and direct interest in the matter meanwhile tax authorities should be more remote to the issue not having the same kind of interest. The more tax authorities are becoming a party in the case, the more this basic assumption is failing.

³⁶⁰ Effectiveness is however not a reason for the excessive use of anti-avoidance rules. Anti-avoidance rules should be in place to tackle misuse of rights or exceptional, abusive behaviour (like artificial setups), not to expand taxing rights in normal operations.

³⁶¹ Here new transparency rules set a new era. If taxpayers need to report to the tax authorities online, the tax authorities should respond and assess equally in a speedy manner. This is the only way taxpayers can adjust tax treatment and be compliant.

³⁶² Bentley 2007, p. 180. Bentley regards the mutual understanding of issues to be a key factor in finding willingness to comply with tax rules. Understanding creates trust and eliminates the escalation of conflicts efficiently.

³⁶³ Extreme effectiveness ignores taxpayers' rights lowering certainty and especially trust in tax authorities' operations. This creates a risk for conflict escalation resulting not only to a lengthy legal process in an individual case but also in unwillingness to comply with tax authorities' requests and assessments. This will clearly lower the effectiveness.

creating trust between tax authorities and taxpayers³⁶⁴. This fifth level of protection of taxpayers' rights may include even clear enforcement methods, such as the use of ombudsmen, as a difference to legal principles.

4.3.6 Levels six to ten

Taxpayers' rights are protected also by different rules on post-tax assessment, such as by different procedural rules, statements of taxpayers' rights³⁶⁵, rules for fair trial, dispute mechanism, etc. These protection methods for rights could be classified on levels six to ten depending on the stage of protection method or type it is in the chain of final resolution. Levels could be regarded as obligations for hearing and making the assessment, transparency of the assessment, national dispute resolution process better known as court process, international dispute resolution process, and finally use of human rights procedures.

My goal is to consider how taxpayers' rights are protected already prior to the actual tax assessment. Therefore, rules and aspects that offer a method for independent revaluation of the tax assessment, in other words, appeal processes, are not in the scope of this research.

4.4 Levels one to four are key levels for taxpayers' legal protection

This research is about how taxpayers' fundamental legal rights are protected and can be enforced in comparison with fiscal interests and powers, partly the same considerations that for example courts such as the ECJ are doing in stand-alone

³⁶⁴ Bentley 2007, Bentley considers trust to create a willingness to accept well-argued views and eliminate time-consuming processes.

³⁶⁵ Such as in Australia, the US, and the UK. For example, Australian tax authorities have created a governance system with different kinds of commitments to improve their processes and to improve trust for taxpayers, see Bentley 2007. The Australian Tax authorities governance includes an Executive Committee, which is supported by a number of senior management and assurance committees, such as: 1) Audit and Risk Committee – providing independent assurance to the Commissioner of Taxation on the ATO's risk management approaches, and system of internal control, 2) Strategy and Integration Committee – which shapes and guides the ongoing development to ensure the ATO is focused on the right priorities at the right time, 3) Improving the Client Experience Committee – which drives continuous improvement in the client experience across the ATO, 4) Enterprise Risk Management Committee – which guides the ATO's ability to manage risk associated with achieving the strategic objectives that enable the ATO to fully carry out its purpose. See www.ato.gov.au/about-ato/who-we-are/executive-and-governance/key-committees.

cases. The scope of this research starts from the constitutional rights and includes also the legislative process in the scope³⁶⁶.

I am approaching taxation from the taxpayers' view, especially from a MNE point of view³⁶⁷. I find this as an interesting angle in the current environment. Tax sovereignty can be indirectly a source of discrimination. A strong focus on purely tax policies may put more weight on purely fiscal interests than on other global mega policies³⁶⁸. This may result in conflicting regulations, such as tax policies creating challenges or even obstacles for other, non-tax policies³⁶⁹. This is where taxpayers' fundamental legal rights and their protection step in. How are taxpayers' rights respected in the legislative process and taxation? These policies³⁷⁰ are at the heart of this study³⁷¹.

Constitutional principles and fundamental rights offer protection on a national level and on the EU level. On the other hand, businesses are often more cross-border and international. Taxpayers' rights may be protected on a national level, but not for taxation taking place abroad³⁷² or dealing with the actual allocation of taxing powers.

³⁶⁶ In countries, such as Finland, where there are no constitutional courts, the constitutional aspects of tax legislation are not normally considered at all.

³⁶⁷ The BEPS and ATAD actions were targeted to MNEs (multinational entities). Therefore, the scope naturally is more in taxation of MNEs than smaller entities or private persons even though all taxpayers have same or close same legal protection.

³⁶⁸ The green transition that is needed to impact climate change has high attention but is seldom considered when new tax rules are proposed or drafted. For example, the OECD's and the EU's Pillar 2 rules make no reflections on how the proposed rules actually impact the crucial climate policies. Climate policies are again driving multiple business policies and strategies.

³⁶⁹ See for example ECJ C-350/07, *Kattnen Stahlbau*, para. 78.

³⁷⁰ The new policies and legislative projects, such as BEPS and ATAD are aimed at fighting against so-called aggressive tax planning creating new tools for tax authorities in the name of effective tax collection and regaining trust in tax authorities' operations. All of them are important, but as tax is a consequence of business, not actually separate from the other policies.

³⁷¹ One aspect in the public discussion is that it is not only the taxpayer's behaviour that is in the scope but also tax authorities' behaviour: have they granted tax benefits by sweetheart deals or without actual support from the law or facts. Even here the aspects are not balanced. The depth of fiscal interest can be seen in the European Commission's paper on the future tax system (2021). Commission is estimating EU Member States to lose 30–70 billion euros in multinational companies' tax planning. This number is based on research from 2015, i.e. time before all the new measures such as ATAD and DAC 6, to name a few. It looks like fundamental rights are somehow ignored, or not considered, – as well as the fact that taxation is a justified infringement of taxpayer's rights, but only to a certain extent.

³⁷² Taxing income based on circumstances in another country or applying beneficial ownership definition differently for withholding tax offers a good example. Definitions and tax consequences differ between countries (two different understandings of the same term) and the tax burden increases as there is almost no attempt for certainty and a unified understanding of terms.

The new BEPS and ATAD environment with a number of anti-avoidance-oriented rules initiated by the OECD, put in place on the EU level by the EU and implemented on the national level by Member States³⁷³ and lower interest on predictability and certainty creates a platform for several aspects on taxpayers' legal protection. The question is whether traditional legal protection exists and has sufficient enforcement.

Currently, policymakers and politicians have their main interest and scope in how to limit tax avoidance and aggressive tax planning, not actually in the consolidation of policy trends to tax, how tax rules impact business or business opportunities³⁷⁴. Regulative process³⁷⁵ and preparatory work are split between the OECD, the EU, and Member States ignoring what is the impact of taxation on business, the actual tax base³⁷⁶. This means that taxpayers' interests and rights are impacted initially by tax-driven policy discussion and regulative processes, less by legislative processes³⁷⁷. This is the reason why this study concentrates more on pre-assessment than post-assessment legal protection.

³⁷³ The OECD and the EU have traditionally no tax legislative powers. In the new era of BEPS both the OECD and the EU have stepped into the area of tax legislation when taking action to reach positive harmonisation. In this new approach, the EU is drafting rather detailed substance-related tax rules without actually having a tax legislative process in place. This creates a new level of consideration from taxpayers' legal protection point of view.

³⁷⁴ Mitchell presented already in 2013 a view that OECD, EU, and most of the Finance ministers are supporting so-called capital export neutrality. Capital export neutrality drives for harmonised tax policy and businesses would make all their decisions based on pre-tax returns as all the tax rates would be the same. This seems to be still the same line of argumentation. One of the reasons for this may be that it somehow assumes that more tax revenue is available for all countries. Mitchell pointed out that this theory has some flaws, such as it assumes that tax rates are exogenous, that economic activity is fixed, and overlooks the "public choice" theory (Mitchell 2013). Also, Krister Andersson raised already in 2013 that the focus in the EU and the OECD is on anti-avoidance measures and not on investments and growth (Andersson 2013).

³⁷⁵ Instead of speaking about the legislative process it is important to talk about the regulative process as neither the OECD nor the EU are actually tax legislators. They are policy-makers.

³⁷⁶ The focus is on taxation, not the underlying factors. Global policies such as digitalisation (which as such is a technology only) or especially climate policies are disconnected from corporate income tax discussions as a whole. For example, the European Commission paper on future tax system discusses climate change and taxation, but it concentrates on environmental taxes as a source for tax collection, not showing how taxation is steering the prohibiting of business operations. Moreover, taxes and other policies are seldom analysed together, to get an overall view and synchronisation of taxation and other policies.

³⁷⁷ The frame for tax legislation is often already set with limited space to adjust by non-regulative instances, i.e. the OECD, prior to the new rules arriving for national legislation.

How are then taxpayers' fundamental, more permanent rights considered in comparison with interfering interests that governments have on these rights in the form of the right to tax? There are multiple conflict levels. It is not only taxpayers' rights that are affected, but also countries have conflicting interests. These aspects, rights between countries³⁷⁸ as well as between countries and taxpayers' rights in each relevant country, have strong legal and social angles. Each of these angles creates tension on multiple levels. This is the reason why this research focuses only on the four first levels of taxpayers' legal protection³⁷⁹.

To understand better the role and importance of taxpayers' legal protection and what kind of efforts taxpayers can make to secure the availability of economic freedoms it is crucial to understand how tax matters are managed.

³⁷⁸ More precisely, the right to tax the income between countries and issues related to that. This is an outcome of tax sovereignty.

³⁷⁹ I consider the fifth level not to be any more a pre-assessment but an assessment stage issue. It could be the subject of a separate, more detailed study.

5 Responsible tax management – An effort to ensure legal rights, gain legal protection and ensure social contribution

BEPS-related discussion is often one-sided and concentrates on topics like aggressive tax planning³⁸⁰ or tax avoidance³⁸¹. To understand better taxpayers' legal protection and whether taxpayers can somehow contribute to it, I want to raise also business-related perspective. To really understand different angles when discussing tax, taxing rights, tax burden, and taxpayers' legal protection also tax management in a company needs to be described and explained³⁸².

Taxes are a consequence of business³⁸³. Neither paying taxes nor tax planning is the driving reason for running a business unless managing taxes is separated from the origin of taxes, in other words, business. In most cases, profit generation or value

³⁸⁰ The EU describes aggressive tax planning in 2019 (p. 16) in relation to behaviour “**Aggressive tax planning** constitutes a form of tax avoidance behaviour on the part of corporations:”. Aggressive tax planning is connected strongly to taxpayers' behaviour, that BEPS-generation rules intend to change. BEPS is naturally more complex than just a simply taxpayer behaviour issue.

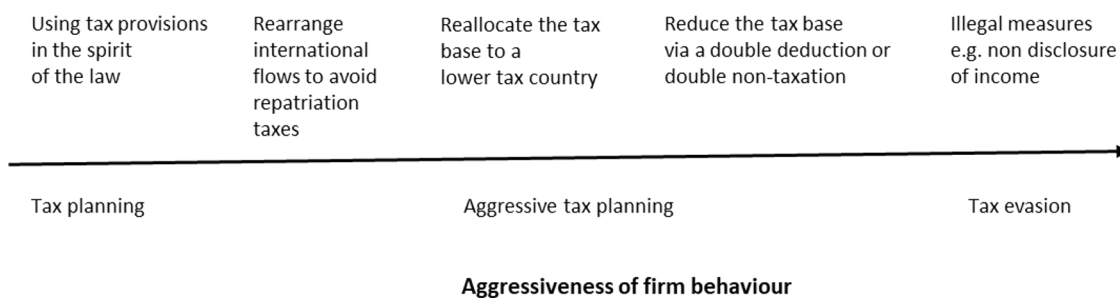
³⁸¹ Enden & Klein talk about “acceptable fiscal behaviour” concluding that it is difficult, if not impossible to define what this would be due to so many different angles. This illustrates how different this discussion is from creating clear rules for tax behaviour on top of the law as the minimum standard of behaviour, pp. 1–2.

³⁸² I will approach tax management from a multinational company viewpoint as these entities have a variety of topics in their business. Such angles and topics are differences between local and international accounting standards and their relation to taxable income, the need to manage relationships with tax authorities in multiple countries with opposite interests, and international tax rules.

³⁸³ Income taxes are a consequence of a transaction or series of transactions on profits generated on the transactions, transactional taxes are due to the transaction itself independently whether they are profitable or not, property taxes are due to ownership or equal rights, and so on.

creation is the business driver³⁸⁴. Business drivers are reflected in the operative steering; operative measurement is often based on EBIT (earnings before interest and tax). Where many stakeholders see taxes as one key issue for business decisions, operative business leaders consider taxes often to be outside of their KPIs³⁸⁵. High taxes are often seen as a result of high profitability. Instead of looking for loopholes, the purpose of tax management is often to ensure compliance with rules and ensure that the tax burden is not excessive³⁸⁶.

BEPS actions were targeted to fight against aggressive tax planning. Multinational entities (MNEs) are said to have more opportunities to use mismatches between countries and other technical details to avoid taxes instead of acting in line with the spirit of the law. This approach is well illustrated by the following picture³⁸⁷:



³⁸⁴ BEPS action plans are initiated based on too low effective tax rates. The relationship between consolidated profits and country-by-country profits is complex especially if the difference between effective tax rates and nominal rates are taken into account. For example, the European Parliament study of 2015 considers that the “rate is considerably lower than the statutory tax rates for this period (but is not out of line with prevailing business tax rates across the developed world). The reason for this is that tax-reported profits were well below macroeconomic profit”. Simplified conclusions from effective tax rates may be strongly misleading. It also assumes that tax planning is a separate profit-generating unit, especially in a multinational entity (MNE). Instead, sometimes companies and businesses are also set up to fulfil a regulative obligation, which is not targeting to generate profit. Nevertheless, the purpose of ensuring compliance with regulative tasks is equally a purpose for a company and generates a certain value for the owners.

³⁸⁵ If taxes are not considered within business tax management becomes a separate reason.

³⁸⁶ Target of a tax team is naturally dependent on the risk profile, but also on the culture of the company. Where US-based companies have traditionally seen taxes purely as a cost and subject to creative savings, European companies have been more conservative in this area. My experience is that Nordic companies have been the most reluctant to treat taxes purely as cost with cost-cutting targets. Exceptions naturally exist.

³⁸⁷ EU Taxation Papers 2017, p. 23. Note, that the approach is tax-centric and not put in the framework of business objectives nor the functioning of the EU internal market.

The aggressiveness of a firm's behaviour naturally becomes more obvious the more the characteristics from the right-hand side exist. On the other hand, the more there are characteristics on the left-hand side of the picture, the more they are connected to the appropriate functioning of the EU internal market assuming that they are not artificial solutions. In this frame, it is crucial to understand what the key factors for a firm's behaviour to enjoy the benefits of the EU internal market. Another aspect is to understand if the new BEPS spirit rules, i.e. anti-avoidance kind of rules based on assumed hallmarks, change taxpayers' tax behaviour at all³⁸⁸.

Predictability is the most important factor for business. When an investment decision is made, also the tax consequence needs to be understood to evaluate if the investment is profitable enough to be done³⁸⁹. Any surprise, positive or negative, illustrates that management is not in control of or has not understood key issues well enough³⁹⁰.

I am now describing how taxes are managed in a company and what factors should be taken into account in responsible tax management. I will move onto different components of tax management.

5.1 Measuring business and tax parameters vs businesses' impacts

Business is measured through numerous key indicators, such as EBIT, ROI, ROA, sales, EPS, and so on³⁹¹. Indicators depend on the business that is measured and key value drivers. Even though the indicators are well known, their use varies a lot across

³⁸⁸ There are different types of tax behaviour. Tax planning targets ensuring the optimal tax burden or at least avoiding unexpected tax burden. There is a risk that BEPS rules actually create new, different kinds of behaviour targeting to eliminate the BEPS effects or that the BEPS rule impacts are actually extensive impacts creating excessive tax burden independently of how the MNE has behaved for tax purposes.

³⁸⁹ Investments and the nature of investments differ from business to business. One solution, for example using royalties in the investment, may be a normal solution meanwhile not a typical solution for another company. This means that it would be an artificial setup.

³⁹⁰ Wrong business decisions mean that the management would have decided differently if they had understood all the factors. This is crucial as only the management has the right to decide what is crucial for business, what are the strategies, and how to react. They also carry the risk of bad decisions.

³⁹¹ Earnings before tax, return on investment, return on assets, earnings per share. Measures on environmental, social, and governance are still lacking but my guess is that even they will be included in KPIs at some point in time. They are operative measures that are based on other than tax metrics. Tax metrics, such as ETR (effective tax rate), are a complex measure that is dependent more on other factors than tax planning. Surprisingly ETR relates only indirectly to nominal tax rates.

different industries³⁹². Indicators are also used differently depending on the purpose: businesses may measure and illustrate the success of a business, business area, division, or just one project³⁹³.

Operative internal reporting measures³⁹⁴ business by business units and divisions, which often are not connected to a certain location, a company or a country. As the purpose of operative reporting is meant to measure indicators connected to business units, not legal units, up to a selected level or purpose, they do not measure profitability from a taxable income point of view at all³⁹⁵.

External reporting, separate from internal reporting, communicates the income of a certain period³⁹⁶ and the balance sheet of a certain day based on selected accounting standards consolidated for a group of companies or one single company³⁹⁷. International accounting standards identify income and cost for consolidation purposes taking into account the future aspects, i.e. differently than what tax law does. Managing taxes requires therefore understanding the correlation of business, tax laws, and accounting standards³⁹⁸. Tax management should be

³⁹² The indicators vary between industries, which makes their comparability difficult.

³⁹³ Typically, when measuring a future investment focus is on a project, not as tax authorities might consider, a company. Measurements quite often do not have any connection to a legal entity at all.

³⁹⁴ Internal reporting means reporting created to follow business-related KPIs. These KPIs are closely connected to business objectives and targets of business units that are not connected to any legal entity as such nor to any accounting standard as such. These KPIs may measure the profitability of a project or unit up to EBIT, cash flow, or return on investment. Most of the time it is difficult to make direct conclusions out of these indicators for tax purposes as they are not meant for that kind of purpose.

³⁹⁵ This may create a risk from a tax management point of view. Tax authorities tend to sometimes use operative data for tax purposes even though it is not suitable for that purpose. This may partly be because this data could give an outcome that the tax authorities in one country wish to reach. Most of the time, at least in my experience, tax authorities do not understand the different parameters and purpose of the reporting resulting in misinterpretation. This could be the reason for the so-called Orsted assessment done by Danish tax authorities: "According to the decision, Ørsted is to be taxed in Denmark on the full future value of the two offshore wind farms, despite the fact that they are developed, owned, and operated by British subsidiaries of the Ørsted group and are already taxed in the UK." Orsted press release 2020.

³⁹⁶ Period can be a year or a quarter of a year, i.e. 3 months.

³⁹⁷ One single entity reporting would be the case if each subsidiary reports separately their profit on a stand-alone basis (which may or may not be the case, or the reporting of especially quarters may be a so-called light version of a year-end process) or if the operations are only in one entity. Consolidated financial information differs from local financial reporting, not only as it is consolidated, i.e. internal transactions are eliminated. Country-by-country reporting fails in the same aspect. It is difficult to understand the content as consolidation and accounting standard impacts are complex.

³⁹⁸ Actually, tax management should understand the same aspects of taxation as legislators, and perhaps even policy-makers, to reach out for a balanced outcome.

capable of communicating in business language, not in a tax technical tone to become a true business partner.

Even though consolidation means that group internal transactions are eliminated from the group profit, it does not mean that all group internal transactions would be only nominal³⁹⁹. Allocation and shielding of different risks, such as different regulations in countries, and financial circumstances in different areas, have an impact on external factors even within consolidation. These factors need to be considered for risk management purposes⁴⁰⁰.

As taxes are a consequence of business operations, they also indirectly impact different operative business measures⁴⁰¹. Taxes play a role when considering for example investments and acquisitions. This means that taxes play a role in business and impact investment opportunities⁴⁰².

Listed taxpayers communicate tax-related information and data also to other stakeholders than just tax authorities. External reporting and investor relations use tax-related indicators. The effective tax rate is a typical measurement used by all

³⁹⁹ Knuutinen 2009 (p. 146) considers that all group internal transactions can be ignored for example when measuring business reasons as they will be eliminated for group accounting.

⁴⁰⁰ Allocation of risks and risk shielding can be reached by isolating some operations and risks to companies incorporated for that purpose. In this sense, the view Knuutinen presented is a narrow approach. To measure the performance of the total group from a parent company, i.e. shareholder view, this is correct. I see that Knuutinen 2009 reviews consolidation based on company law stand point of view. However, there are more angles to the issue than a strict company law approach, such as what I call TESH (tax approach to environment, social, and governance). As B Team (bteam.org) defines a business has also other stakeholders than just the investors. This creates complexities for measuring business, but it does not mean that investor views should be ignored. TESH is in one way in the core of taxpayers' legal rights.

⁴⁰¹ Especially income taxes have an indirect, but very visible impact. Other taxes borne have instead a very direct impact on businesses and their KPIs, but this impact is not visible in practical terms at all. This is because income taxes are reported in the income statement (and also on the balance sheet as deferred tax items) meanwhile other taxes borne are "hidden" in the income statement among costs. I think that this is a paradox. Income taxes are not included in the business KPIs as the focus is on earnings before taxes (sometimes called comparable operating profit) but are often the focus of the public discussion meanwhile often the bulk of taxes is not considered at all. The moral aspect considering that income taxes can be planned could be an argument for this, but in fact most of the taxes can be optimised in one way or another.

⁴⁰² This factor is often ignored in the discussion that is focused on nominal tax rates. I would state that rules within income tax law and other taxes have a greater impact on investment calculations than just nominal tax rates. Clarity, predictability, certainty, compliance easiness, and alignment of taxable income to accounting profits play a role when assessing return on investments, in other words when deciding what to invest and where. This brings the total tax rate into focus, see for example EBTF (ebtf.com).

listed companies⁴⁰³. Effective tax rates include several different variances from pure ETR to comparable ETR. Effective tax rate does not measure cash taxes, but tax cost. ETR includes different deferred tax items that reflect timing differences between tax and IFRS and reflect how they behave in the future.

The effective tax rate is a rather complex indicator. Its complexity is not respected in the public discussion. It is the result of a purely mathematical process and as such does not measure quality or even quantity of cash taxes. Effective tax rates can vary based on profitability, and historical and future taxes⁴⁰⁴. Effective tax rate illustrates at best the expected level of taxation taking into account the best estimate of future profitability. Concluding MNEs' or firms' current tax burden through ETR is most likely misleading⁴⁰⁵.

⁴⁰³ There are different ways to measure ETR depending on the business and company. A straightforward ETR is a measurement of tax cost (current tax & deferred tax) in relation to IFRS-related profit. Adjusted ETR often relates to measuring ETR in relation to ongoing business (see for example fortun.com/taxfootprint). However, I have not seen ETR measure tax rates in relation to taxable income.

⁴⁰⁴ A negative effective tax rate may be the result of operating loss and a tax receivable or a high effective tax rate may appear due to booking a future tax cost and a low profit. Differences in tax rates between countries, accounting treatment of some one-time transactions, and hedging of financial instruments are examples that may impact ETR. Also lacking tax consolidation within a country will create complex impacts on ETR.

⁴⁰⁵ For example, Fuest, Spengel, Finke, Heckemeyer, and Nusser refer to low foreign income effective tax rates of Apple Inc., and Google Inc. Meanwhile this reference may be correct, it is hard to judge these two companies purely based on ETR. The OECD 2013 action plan (p. 8) makes a note that "MNEs may face significant reputational risk if their effective tax rate is viewed as being too low". Taking into account that ETR is not connected only to current tax charges, the factors impacting ETR are mostly not dependent on tax planning, and if they are, the consequences are often surprising. A negative ETR is not surprising as such, and neither is a high ETR, it is the outcome of a mathematical exercise: for example, if profits are low, but tax charge is high, ETR may become extensively high or if MNE is making a loss, but still paying tax, ETR may be negative. Extreme tax rates surely require explanation. Kammarrätten in Stockholm (case 4572-17) in Sweden compared effective tax rate with nominal tax rate ("Kammarrätten har härvidlag fäst stor vikt vid att beskattningsnivån på de ränteinkomster som motsvarar yrkat ränteavdrag ligger närmre den svenska bolagsskattesatsen") as an illustration of aggressive tax planning. The nominal tax rate illustrates the tax level to be assessed on the taxable income whereas ETR measures taxes to book profit. The more there are different treatments between book and tax, the more ETR differs from the nominal tax rate.

5.2 How are taxes managed in a company?

Taxpayers are liable to pay a number of taxes. Taxes could be classified as taxes borne and taxes collected⁴⁰⁶. A company needs to manage all these taxes⁴⁰⁷ as the total tax burden as a whole impacts taxpayers' financial and legal position making taxpayers' legal protection an important point. Taxpayers' fundamental rights may be infringed on any of these taxes on a stand-alone basis or as a combination of these. This is why understanding tax management is important when analysing taxpayers' legal protection.

Discussion of the fair tax, as well as tax avoidance, boils down to some key cornerstones; MNEs are not seen paying their fair share of taxes, and international operations seem to offer an opportunity to lower their tax burden by using mismatches and loopholes. One angle is connected to a strictly legal approach. Is a company, most often referred to as an MNE, applying strictly letter of the law purely representing shareholder interests⁴⁰⁸ and is this acceptable. A strict and perhaps also narrow understanding of company law speaks for the shareholder value as the sole purpose of the company.

Another view could be, as Knuutinen considers, that a company should take into account also other stakeholders that are crucial for a company's operations on a longer time horizon. Such stakeholders could be employees, financial lenders, governments, and civil societies⁴⁰⁹. This view is broadening the nature of a company or a business⁴¹⁰. The company as a legal body is a creation of law as a framework for individuals to do business together. As the existence of companies or

⁴⁰⁶ Taxes borne reflect taxpayers' tax liability and consist of tax on profits, production taxes, property taxes, transactional taxes, and even the cost of VAT. Taxes collected are taxes where the taxpayer collects taxes on behalf of tax authorities, such as VAT, withholding taxes, or excise duties. In these cases, the taxpayer has multiple obligations to be followed and carries the risk of non-compliance. Classification described is in line with public reporting practices, see for example EBTF or GRI 207.

⁴⁰⁷ This is why a tax organisation is a cost centre, not a profit centre.

⁴⁰⁸ Company law is putting shareholder value to be the key aim for a company. This could be understood as management's obligation to minimise taxes and maximise shareholder value. See for example Knuutinen 2014, pp. 58-62. On the other hand, as Knuutinen describes, a company's purpose is to generate profits also on a long-term basis within the legal framework. This offers a different angle taking into account more stakeholders. See also Airaksinen, Pulkkinen & Rasiaho, pp. 26-27 and Enden & Klein.

⁴⁰⁹ Knuutinen 2014 considers businesses' obligation to take into account other stakeholders as part of the legal framework to widen the stakeholder approach from strictly shareholder value approaching the issue of responsible tax contribution, p. 65. Equally for example B Team is approaching the same topic through responsible tax management (Bteam.org). This list could be extended to customers and the societies in which taxpayers operate. Different stakeholders have different weight.

⁴¹⁰ See more Knuutinen 2014.

corporations is dependent on the legal framework, it should be taken into account when doing business. This is a reason to take these other stakeholders into account to ensure also shareholder value on a long-term basis. This approach has a strong impact on how taxes are managed⁴¹¹.

The third angle in the discussion of stakeholders impacting tax management could be closer to tax optimisation. Some civil societies request MNEs to interpret existing rules, such as arm's length rules, to pay more tax in developing countries, in other words, to "maximise" tax payments⁴¹². This approach is surprisingly often used also by stand-alone national tax authorities in relation to protecting their own tax basis⁴¹³.

The approach a company or corporation is taking in consideration of its stakeholders impacts deeply how taxes are managed⁴¹⁴. To ensure that key stakeholder interests are regarded a MNE has to define its tax principles, vision, strategy, governance, and management of taxes connected to MNEs' code of conduct and strategy⁴¹⁵. I am going to explain in brief what these components are and why they are important when considering taxpayers' commitment to tax regulation and

⁴¹¹ For example, Norges Bank Investment Management considers that "Boards should take the lead in setting corporate tax policies, which should be publicly disclosed. The OECD BEPS actions, the OECD Guidelines for Multinational Enterprises and the G20/OECD Principles of Corporate Governance all provide useful guidance for boards on the elements of responsible tax practice. Responsible tax practice requires a commitment to compliance with the letter and spirit of the tax laws." This is a clear indication that at least some investors identify more stakeholders than just the shareholders of a corporation, see <https://www.nbim.no>.

⁴¹² See for example Oxfam. Oxfam, Gabriela Bucher, Executive Director of Oxfam International, responded for example on OECD Pillar 2 global minimum tax: "It's absurd for the G7 to claim it is 'overhauling' a broken global tax system by setting up a global minimum corporate tax rate that is similar to the soft rates charged by tax havens like Ireland, Switzerland and Singapore. They are setting the bar so low that companies can just step over it." (see [Oxfam.org](https://www.oxfam.org)). I think this statement illustrates quite well the opposite angle to tax minimisation, i.e. tax maximisation, through the same tools. If some MNEs are focusing strongly on shareholder value, civil societies sometimes concentrate on everything else than shareholder value.

⁴¹³ The ECJ has not considered purely lower taxation in another Member State as a reason for infringement of EU freedoms by requesting a more fundamental application of the proportionality principle to measure whether there is an abuse of EU rules, see *Urpilainen* 2012, pp. 154–156.

⁴¹⁴ Depending on how and whom top management and shareholders in a company consider the stakeholders to be.

⁴¹⁵ Code of conduct defines the rules of how to act meanwhile strategy defines the focus areas and the plan going forward.

entitlement to legal protection. My approach will be more in the middle of the approaches supporting B Team's responsible tax management approach⁴¹⁶.

5.3 Function management and governance – Changing recognition of corporate accountability

Wide public discussion as well as the OECD's BEPS project has initiated a change⁴¹⁷. MNEs are increasingly recognising that they are accountable not only to shareholders but to a range of stakeholders and have obligations to those stakeholders⁴¹⁸. This new approach has been manifested in many ways, including the US Business Roundtable release on 19 August 2019 of its new Statement on the

⁴¹⁶ Responsible tax management principles or organising properly tax management does not ensure taxpayers' legal protection. Tax authorities' transparent governance and responsible behaviour would improve taxpayers' legal rights as tax authorities would need to consider the same aspects as taxpayers, such as what kind of targets and KPIs are set for stand-alone employees. Would the KPIs be driving speedy decisions without a proper assessment process just to reach the set targets? See Leen Ketels 2021 on how the Belgian tax authorities KPIs have resulted in fundamentally questionable assessments. Equally, the legislator may ignore some of the basic processes in legislative work conflicting with taxpayers' fundamental rights.

⁴¹⁷ On one hand there is a claim for MNEs to change their behaviour: to pay their fair share of taxes and to align tax planning with the spirit of the law. This claim is complex as organisations such as the OECD and the EU are claiming that taxpayers should apply the law in line with what they see to be the spirit of the law independently of what is the letter of the law or what is the interpretation of tax authorities. This is complex in the sense of the rule of law. On the other hand, the same organisations are claiming that new rules should be drafted to eliminate mismatches and loopholes as a reaction to the digitalisation of business. Taxpayers can respond to the first claim by taking steps towards responsible and sustainable tax management meanwhile governments having the taxing powers need to adjust the rules. With respect to taxpayers' legal protection, taxpayers' behaviour and new regulation should be synchronised, not separate and penalizing each other.

⁴¹⁸ The question is who these stakeholders are, how they benefit from the tax function management and governance, and how they can be sure that the governance principles are followed. Governance is typically a self-regulation and may be converted into a greenwash, or perhaps "taxwash" if the principles are only published, but not followed. Enden & Klein found (pp. 4–6) that surprisingly often an MNE or any taxpayer can fail to follow these self-regulated principles by having just a box-ticking compliance. So the governance makes a difference for defined stakeholders only if the MNE can illustrate that it is following the principles it has defined. On the other hand, stakeholders should respond to this behaviour. For example, tax authorities should consider how tax authorities illustrate equal governance.

Purpose of a Corporation⁴¹⁹, replacing and updating its previously issued Principles of Corporate Governance. The significant change in the 2019 Statement is that the previous principle of shareholder primacy changed. This was followed on 2 December 2019 by the World Economic Forum releasing its updated Davos Manifesto 2020⁴²⁰.

These two examples illustrate already quite well the trend within MNEs taking taxes more seriously as a contribution, especially taking into account more stakeholders than just shareholders, or tax authorities⁴²¹. I see this as a response to worries raised in the public discussion. In the light of taxpayers' legal protection, the aim and commitment to responsible tax management justifies also the request to consider taxpayers' rights.

⁴¹⁹ US Business Roundtable identified the following stakeholders with commitment: 1. Customers; Delivering value to our customers. 2. Employees; Investing in our employees. 3. Suppliers: Dealing fairly and ethically with our suppliers. 4. Communities; Supporting the communities in which we work. 5. Shareholders: Generating long-term value for shareholders. This commitment was signed by 181 CEOs of large US-based multinationals. US Business Roundtable 19 August 2019, <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>. Different stakeholders will have different rights and different reactions. Shareholders may withdraw financing, tax authorities or countries may tax MNEs, and employees may not be committed to MNEs' business and so on. Taking into account all stakeholders is a complex matter.

⁴²⁰ Davos Manifesto 2020 states for example: "A. The purpose of a company is to engage all its stakeholders in shared and sustained value creation. In creating such value, a company serves not only its shareholders, but all its stakeholders – employees, customers, suppliers, local communities and society at large. The best way to understand and harmonize the divergent interests of all stakeholders is through a shared commitment to policies and decisions that strengthen the long-term prosperity of a company, B. A company is more than an economic unit generating wealth. It fulfils human and societal aspirations as part of the broader social system. Performance must be measured not only on the return to shareholders, but also on how it achieves its environmental, social and good governance objectives. Executive remuneration should reflect stakeholder responsibility and C. A company that has a multinational scope of activities not only serves all those stakeholders who are directly engaged, but acts itself as a stakeholder – together with governments and civil society – of our global future. Corporate global citizenship requires a company to harness its core competencies, its entrepreneurship, skills and relevant resources in collaborative efforts with other companies and stakeholders to improve the state of the world."

⁴²¹ This topic is not new on the "agenda", but seems to be that it is understood and accepted, see for example OECD guidelines for multinational enterprises 2011 edition.

5.3.1 Managing taxes

Tax management can be organised in multiple manners. The head of a tax organisation can report to the CFO, general counsel, head of strategy, head of financing operations, group treasurer, or even to the CEO. The tax department may be a small central function approaching taxes only from a corporate view or it may be in charge of even operative and local compliances⁴²². Independently of how tax management is organised, a company should have a tax strategy and tax governance guidelines⁴²³ in place, at least if a company claims to manage taxes systematically.

As said, managing taxes has different components. Before discussing tax strategies⁴²⁴ and tax governance setting limits to tax management, it is important to explain these different functions shortly⁴²⁵.

1. Strategic planning.

Strategies, policies, or principles set the scene for a company's tax management. Those principles nor governance will not dictate how the actual transactions are done, they merely create a frame for the tax department to work within.

Prior to actual planning, tax position should be understood and connected to company or group strategy. The strategy in this context is a rather concrete plan of the strategic and tactical target set for the entire group. Strategy will define what operations are or will be core operations, which not, what kind of financing targets are, how to get there on a high level and what are the main development areas⁴²⁶.

⁴²² The way taxes are managed is a business decision dependent on multiple factors. Mostly, it depends on efficiency and governance model: who are seen as accountable and responsible for tax. Investors and civil societies have raised the request for taxes to be on the board agenda. As taxes are quite often outside the board agenda and are dealt with in a tax "silo", this request is well argued. The question of how taxes should be on the board agenda may generate differing views.

⁴²³ When considering board commitment, tax strategy, policy, or principles, terms that are commonly used for high-level statements on taxes, should be approved by the board. As boards have a wide range of topics on their agenda, taxes cannot be an exception where boards would have a detailed agenda, rather board should give guidance to management and get reports on how the strategy is put in place in practice.

⁴²⁴ Tax strategies are called by different names in different companies. It can be called tax policy, strategy, or principles.

⁴²⁵ There are multiple ways of naming and describing tax management functions. Independently of the name and scope, most of these functionalities are included in a developed tax management organisation.

⁴²⁶ This is not an attempt for a complete definition of strategy.

Strategic planning defines the key focus areas that are crucial from a tax point of view to ensure tax contribution is balanced with the business objectives⁴²⁷.

Strategic planning looks further in the future than normal business planning. It should assess and review future tax policies and regulations. This may lead to tax advocacy work contributing to future tax legislation and regulation⁴²⁸. Even some lobbying or alternatively participating in public discussion.

2. Tax planning

Elgood, Fulton & Schutzman defined tax planning as work ensuring "that opportunities are considered and, where appropriate, implemented"⁴²⁹. This definition was written in 2008 and it still is valid to a certain extent. Fact-finding of the issue at hand, aligning business objectives, facts and tax position, and best guess of how the future will "treat" these facts should be included in the definition of tax planning⁴³⁰. Elgood, Fulton & Schutzman state later that the success of tax planning is dependent on alignment to business⁴³¹. This thinking is, at least to my mind, supported by the ECJ's fundamental decisions looking through artificial arrangements⁴³². I would redefine tax planning as ensuring that opportunities for the business⁴³³ within defined risk appetite, based on an assessment of existing and

⁴²⁷ Strategic tax planning will identify the main drivers of the group's tax contribution, how to react to the foreseen threats, and what aspects should be taken into account in the decision-making.

⁴²⁸ Tax advocacy will contribute to the legislative process in the form of statements and participation in public hearings in order to illustrate different impacts arising from the business point of view. In order to avoid questionable ways of lobbying tax advocacy needs to respect transparency.

⁴²⁹ Elgood, Fulton & Schutzman, 10-3 & 10-4.

⁴³⁰ Business plans may or may not succeed, rules may change, operative environment or even the whole business strategy may change. Planning should try to understand what all this would mean for the business and taxation. Tax planning should create readiness for future events in the form of exit strategies or considerations of what new tax regulations are going to mean for business.

⁴³¹ Elgood, Fulton & Schutzman 10-4. This statement is in line with my statement that tax is a consequence of business. See also B Team principles and ECJ decisions on artificial arrangements. In case tax planning is separated from business, the setups easily become artificial.

⁴³² C-196/04 Cadbury Schweppes is the most fundamental decision in this sense confirmed even in later ECJ decisions. Artificial arrangements are not aligned with business and should be assessed critically.

⁴³³ Enden & Klein raised a question concerning the freedom to choose. If different options are left open for example in labour law and it is acceptable to choose between legally acceptable options, why is it seen as questionable to choose between two legally acceptable options for tax purposes? This question is relevant even for this study.

future circumstances and regulations, facts, and agreed tax policy, are considered and, where appropriate, implemented⁴³⁴.

Tax planning needs to be executed early in the business process⁴³⁵. Its purpose is to ensure the increase of shareholder value by identifying the best available alternative for business and simultaneously ensuring that all taxes can be paid on time there where they should be paid in line with existing and foreseeable regulations⁴³⁶. The key to managing future risks is to have proper tax planning in place to ensure that also future rules can be respected and followed. Tax planning is about predictability. This means that a taxpayer's behaviour is dependent⁴³⁷ on the law.

3. Tax compliance

A business, especially an international business, has multiple angles of compliance⁴³⁸. Tax compliance is often understood to cover tax returns, payment of taxes, and other issues fulfilling requirements set by tax regulation and in relation to tax authorities. From a tax management point of view tax compliance is broader than that. Tax organisations must also comply with other regulations depending on the size and nature of taxpayers and operations. Typically, businesses, especially

⁴³⁴ In the existing environment double taxation is most likely the most critical question for tax planning due to BEPS 1 and BEPS 2 programs, see for example K. Andersson 2013, p. 686. One of the key factors for tax management is alignment with business. No alignment leads easily to formally acceptable but artificial solutions that are not fit for business. On the other hand, implementation of a global minimum tax eliminates purely tax-driven arrangements as low taxation, at least based on the purpose of the new rules, is eliminated by a minimum tax of 15%.

⁴³⁵ Early engagement is key to tax planning. When taxes are considered early, before any execution of any transaction, the compliance costs are lowest with the best success. The later taxes are considered, the higher the compliance costs become. Costs are at the highest in a controversy process. Equally tax planning should consider multiple angles from execution to a possible future carve out and exit.

⁴³⁶ How the company then applies “in line with existing and foreseeable regulation” defines the taxpayer’s profile. A conservative taxpayer may choose options that are based on stable, well-secured practices even though it could result in a high tax burden. Responsible taxpayers could be looking for optimal business-need-based solutions respecting the purpose of the law. More opportunistic taxpayers would concentrate on maximising profits by following the word of regulation.

⁴³⁷ As Fuller states, law is the lowest level of morality that can be defined and agreed upon.

⁴³⁸ When looking at a MNE organisation one can identify “compliance officer” as a common title. Compliance officers may be responsible for code of conduct, corporate governance, stock exchange compliance, accounting compliance, ESG compliance, and, of course, tax compliance. This means also at the same time that tax compliance cannot be covered by separate guidance on all areas, rather being a part of other compliances with some individual nuances.

international businesses' tax organisation needs to comply with rules concerning accounting and stock communication, public reporting of taxes, and even some obligations related to investments⁴³⁹.

A listed business normally has to comply with financial reporting obligations, and IFRS or US GAAP concerning tax also for accounting purposes. Both IFRS and US GAAP differ from most local accounting standards, especially in definitions of taxable income. Financial reporting together with stock exchange regulation creates a large area of compliance⁴⁴⁰. This means that a successful tax organisation will comply with taxable income measures in different countries, international accounting standards, and the differences between these reporting standards⁴⁴¹.

The different approach creates differences that are either temporary or permanent from a timing point of view. Temporary differences are differences in items that basically have the same treatment for both tax and accounting purposes, but recognition of the item will differ from a timing perspective, in other words, tax treatment is deferred. Good examples of these sorts of differences are tax depreciations⁴⁴² and loss carry forwards⁴⁴³. These temporary differences are called deferred tax assets or liabilities.

⁴³⁹ Increased focus on sustainability is forcing MNEs to include taxes even to sustainability reporting and compliance, see for example EU Taxonomy and CSRD.

⁴⁴⁰ International accounting standards view financial information in respect of future actions instead of a historical view, as normally taxable income is measured. The new CSRD will bring new aspects to reporting. GRI 207, which is a voluntary ESG measure, brings in a wide range of transparency requirements.

⁴⁴¹ This illustrates the importance of taxpayers' rights to tax management. A tax organisation needs to be able to define the tax treatment of each transaction reliably historically (taxable income), looking forward (IFRS), and income versus balance sheet treatment. Clarity of tax laws is the basis for defining the tax treatment, and predictability of any business transaction executed gives the basis for IFRS-based future tax impact assessment of these transactions to be booked at the same time with the historical view. The new BEPS regulation is not making compliance easier as the new rules are often overlapping and there are many. Also, the frequency of new regulations to be complied with is a challenge. The time to set up appropriate reporting systems for complex rules is short.

⁴⁴² Tax depreciation differs from accounting depreciation (or depreciation in accordance to plan). If tax depreciation is higher than depreciation in accounting, taxable income will be lower than book income creating then a deferred tax liability for IFRS purposes. When tax depreciation becomes lower than depreciation in accounting, taxable income is higher than book income, and taxes paid will be booked against the deferred tax liability. Lower actual taxes paid in the beginning mean then only a cash flow benefit but do not actually impact the effective tax rate as the future liability is already taken into account.

⁴⁴³ Loss carry forward is a loss that the taxpayer made and which will be deducted from the future profits in case the taxpayer makes a profit. Loss carry forward is treated as a

Deferred tax assets need to be valued in relation to future perspectives. In other words, any recognised asset needs to be considered if it has the booked value in light of what is known for future purposes. If no sufficient evidence can be presented to support the use of deferred tax assets, the asset needs to be written down in value creating a tax cost for IFRS purposes⁴⁴⁴. This valuation has no impact on taxable income whatsoever.

Also, different legal processes need to be considered in the light of likelihood of the outcome. This assessment normally requires legal analysis of an existing legal process, where the outcome is estimated. If the outcome is less likely than not to be positive for the taxpayer, the taxpayer needs to book an impact in line with the accounting policies to taxes⁴⁴⁵. New IFRIC 23 rules will require taxpayers to consider also any uncertain tax position, not only legal procedures⁴⁴⁶.

Complying with accounting rules requires not only deep knowledge of the business cases at hand including current business, strategies as well as future plans, and the existing tax regulation, but also a good picture of what may be the

cost for accounting purposes immediately meanwhile tax impact will be visible later. This is why a loss carry forward creates a deferred tax asset.

⁴⁴⁴ This kind of tax cost is treated equally with taxes borne when calculating the effective tax rate or earnings per share. Further writing down the value of, say for example loss carry forward, has no impact to the existence of such item in the records of tax authorities. It is purely an assessment of whether the asset has any future value.

⁴⁴⁵ Policies may differ between companies. Some taxpayers book the whole impact as taxes meanwhile some taxpayers book a likelihood percentage to tax cost of each recognised item. Also, the assessment of likelihood may differ between companies depending on multiple factors, such as whether the claim is paid or not or some businesses may set a “should” opinion as a border. “Should” opinion is normally the best likelihood that an external advisor gives representing a 75% likelihood. In some countries, such as Russia, advisors and even auditors calculate an exact percentage of success, which may be used for accounting purposes.

⁴⁴⁶ Some countries are planning or have already taken into use a reporting obligation of uncertain tax positions even to tax authorities. The UK is an example of such a country. The challenge on this kind of rule is the definition of “uncertain”. If the definition is very broad, such as if a court might disagree with the treatment, the rule is unclear and may lead to automatic non-compliance. This is due to the difficulty of assessing with certainty what courts at different levels will decide. Further, this is due to the fact that most of the things can be disagreed – a business is dependent on tax authority policy. If a tax authority has a policy that they will assess a case and are willing to go to court with a low likelihood, say 15%, to win, the taxpayer will have a material volume of uncertain tax positions. This also creates a mismatch. As each international business has to ensure that whatever they do is more likely than not (over 50% likelihood) accepted by tax authorities, tax authorities behave more based on the opportunistic approach in assessments (likelihood of winning less than 50%) to initiate a controversy creates an uneven situation resulting in material challenges for tax management. My example of 15% likelihood is based on discussions with tax authorities in one of the Nordic countries.

interpretation of tax authorities in the coming years for the cases. Compliance with the existing accounting rules is possible only if there is sufficient predictability of taxation⁴⁴⁷.

In traditional definition tax compliance is related to reporting and paying taxes to tax authorities⁴⁴⁸. Tax compliance is in the post-BEPS world more than just filing tax returns. In the new paradigm of transparency, it means an obligation to report transfer pricing-related issues in more detail⁴⁴⁹, report tax-planning-related issues to tax authorities, data concerning transaction by transaction, and ruling-related topics, to mention a few. Reporting to tax authorities is not limited to one country but covers in actual terms at least all the EU countries where taxpayers or related companies have operations. Additionally, there is a new level of reporting obligations: public country-by-country reporting of tax data.

Tax compliance is a crucial part of tax management impacting materially the effectiveness of tax function. Tax compliance relies on tax planning findings finalising reporting and payment obligations of the planned and executed transactions towards tax authorities. The challenge is that at the time, when the final outcome of a planned transaction realizes tax rules or tax authorities view may still change, in other words tax authorities' view is unknown or rules change within the lifetime of an investment⁴⁵⁰.

⁴⁴⁷ Global minimum tax, so-called Pillar 2, is a good example of a truly challenging compliance burden. While the spirit of the law is simple and fair, the rules themselves are extremely complex. The new rules rely on international accounting standards though not fully and partly to taxable income standards though not being taxable income standard either. This new standard is implemented speedily by EU directive leaving national legislators very little space to improve the regulation. Some countries, such as Finland, do not allow rulings on the Pillar 2 rules that taxpayers need to comply already in 2024 when finalising their financial reporting meanwhile tax authorities assess tax returns first after first filing in 2026. Tax assessment offers the first opportunity to tax authority's view. Late filing of tax returns has a positive intention but is not sufficient to safeguard taxpayers' financial compliance needs. Regulator has most likely had a very narrow understanding of compliance obligations.

⁴⁴⁸ Elgood, Fulton & Schutzman, pp. 10–5.

⁴⁴⁹ C-b-c-r reporting is a good example of an increased compliance burden. In the post-BEPS, environment the number of different filing obligations has increased dramatically. The trend seems to be that it is not sufficient to make the best effort to be compliant, but companies, especially MNEs, are expected to report evidence even to illustrate that they are not non-compliant.

⁴⁵⁰ A good example of this is the change in deductibility of interest costs in the case of group internal restructurings in 2009 in Sweden. Deductibility of interest on loans granted for restructurings years before the new rules were connected “retroactively” to business reasons. Business reasons were defined differently than what was expected when the loans were granted resulting in a situation in which the taxpayer could not make any sensible change to avoid being taxed twice (interest is taxed, but no deduction).

4. Tax controversy

The tax management approach is longer than perhaps any other corporate function's interest when measured in the scale of time. Where taxes are considered early in the investment phase with a future view, it ends not when filing a tax return, but when closing a tax audit or appeal process following the tax audit⁴⁵¹.

Tax management should not only translate business objectives into tax language and the other way around but also combine a forward-looking approach and a historical view⁴⁵². Time spent in a controversy process highlights the importance of taxpayers' legal protection as the courts are actually judging old cases where the existing regulation and policies have already changed.

Tax controversy deals with the historical approach. Tax authorities review each transaction after it has been decided or closed and assess based on information that was not necessarily available, needed, or crucial for the taxpayer during the transaction. The historical approach sets challenges for controversy work⁴⁵³. Data and information management is difficult as tax audits depend on, not only detailed documented data or information, but also on explanations and interviews.

Controversy function normally organises the taxpayer's process in a tax audit to ensure that tax authorities get valid, sufficient, and correct information, look after the taxpayer's interests, and has legal discussions with tax authorities. Controversy function involves also possible legal actions after the assessment, that is litigation⁴⁵⁴.

Controversy work often has international aspects. Managing an international tax position in controversy is even more complex than in a stand-alone national process. This is due to the increased powers of tax authorities in each jurisdiction meanwhile

⁴⁵¹ Optimally, preparations for controversy start with planning by ensuring that facts are booked and stored for future purposes. This is crucial as controversy processes start late and are long. The longest controversy processes I have experienced are beyond 10 years, meaning that more than 15 years have passed from the transactions that are taxed and the facts and background information used are older than 20 years old. The complexity is increased by the fact that operative terms differ from tax terms, taxes are defined differently by different rules and standards, and income taxes are assessed after all these measures.

⁴⁵² Time as an angle is a challenge when considering the future, but it becomes a problem when trying to maintain data and information, and understanding the underlying approach to a business throughout a decade.

⁴⁵³ This makes the possibility to early discussion and consultation with tax authorities valuable, when possible.

⁴⁵⁴ Appeals, litigations and other legal actions are often dependent on a likelihood assessment and a cost assessment. Is it likely enough to win the case, i.e. how strong the case is and is the interest big enough when compared with the cost connected to the legal process. Sometimes the issue may of course be of a fundamental nature.

development of dispute resolution or procedural rules concerning audits have not developed in proportion at the same time.

These tax management functions are key to successful tax management, but insufficient if they are not joined with tax governance principles expressing mandates, risk assessment process, risk profile, internal controls, and transparency.

5.4 The principal elements of “Good Tax Governance” (“GTG”)

All taxpayers manage their taxes in one way or another. Taxpayers cannot rely on anything else than tax law as taxes are based on law. Civil law in a single country leaves a wide range of alternatives for taxpayers to execute and comply with, for a good reason: economic freedoms⁴⁵⁵. Also, the EU is offering an internal market created by fundamental freedoms such as freedom of establishment. Utilising these freedoms is not self-evident. It requires a commitment not to misuse these freedoms, but rather illustrate that taxpayer respects the purpose of the law⁴⁵⁶. Good tax governance is crucial⁴⁵⁷ when claiming legal protection for rightly utilising these freedoms.

Overall MNEs take managing taxes very seriously. Governing taxes, in other words, tax planning, compliance, accounting, controversy, and other functions, are steered by policies, principles, and strategies consisting of natural parts of governance rules that are defined specifically for tax management or for all functions

⁴⁵⁵ See for example Urpilainen 2012. The taxpayer has the right to choose the best possible method for the business.

⁴⁵⁶ Reference to the spirit of the law is often somewhat unclear as the spirit is not clearly spelled out, see for example Hultqvist 2017. Reference to the spirit of the law is usually used only to refer to that the taxpayer has not paid a sufficient amount of taxes due to solutions that are difficult to understand or look complex. The spirit of the law, not being a legal principle as such, can refer also to the opposite; taxes are levied beyond what is the spirit of the law, as some sort of reflection of the proportionality principle. For example, in the global minimum tax, the spirit is demonstrated clearly when explaining the background while this spirit is difficult to find from the substance paragraphs of the directive and laws themselves. As the outcome may be that a global minimum tax is levied meanwhile a normal tax is levied, the spirit of the law would mean that no tax would be actually charged. I cannot see this happening. Further reference to the spirit of law due to complex-looking setups is an easy solution. The solutions should be always reflected against the circumstances and facts to assess whether they are in line with the letter of the law and even with the spirit or purpose of the law.

⁴⁵⁷ My description is based on the European Business Tax Forum’s, B Team’s and Executive Tax Council’s paper on best practices for good tax governance (<https://cbtforum.org/good-tax-governance/>).

within a MNE⁴⁵⁸. Good Tax Governance in itself should include 1. Documented Group Tax Strategy, Policies and/or Practices, 2. Oversight of these tax guidance principles and management expectations from the highest level in the organisation; and 3. a Tax Control Framework applicable to all group companies, with related processes and controls to allow senior executives and stakeholder representatives to understand tax governance and its practical effects⁴⁵⁹.

It is fundamental to the expectations of Good Tax Governance for MNEs that wish to be able to demonstrate to stakeholders that they take 1. a responsible and principled approach to tax risk management, 2. there is clear *inter partes* and public communication of how the MNE group establishes⁴⁶⁰ and 3. cascades that approach through the organisation⁴⁶¹. To create trust tax strategy should be published so that all key stakeholders understand it and can evaluate it in accordance with their targets⁴⁶².

It is essential that the goals, processes, and procedures, that are documented, are frequently reviewed and form the basis of robust internal control processes⁴⁶³. Controls enable taxpayers to ensure that governance is followed and complied with.

⁴⁵⁸ Quite often civil societies request to have separate, only for tax-designed functions, such as whistle-blowing programs on top of the normal programs. Meanwhile, this would illustrate that taxes are taken seriously. It also separates taxes from other functionalities of business. Most likely this would result in multiple programs and create silos. This will not improve attention and real functioning of the program, rather becoming a tick-the-box exercise.

⁴⁵⁹ See EBTF, B Team and TEC joined document on “Best practices for Good Tax Governance”. Most of the topics presented here align with these best practices.

⁴⁶⁰ Public communication aims to create trust between taxpayers and stakeholders who do not get sufficient information about taxpayers’ tax positions based on their legal position meanwhile *inter partes* communication is a commitment towards for example tax authorities or auditors.

⁴⁶¹ Some publications refer to this as the “Group Tax Strategy” and in the UK, it is a requirement introduced by the Finance Act 2016 that all companies with turnover greater than £ 200 million or assets greater than £ 2 billion must publish annually a Tax Strategy for the UK activities or Group Tax Strategy. There is no common understanding of what a “strategy” is or should be or what it should include, and different groups have varying internal processes and nomenclatures. For some MNEs the Tax Strategy is more a policy document, principles of tax management, for some more concrete document illustrating risk appetite and specific plans.

⁴⁶² An MNE should consider who are the critical stakeholders to ensure that tax strategy contributes to all the key stakeholders.

⁴⁶³ The documents must not be prepared and then left as a record of an ideal, but be checked at annual or biannual intervals, updated, and be the subject of critical internal and potentially external review on a regular basis.

It is crucial that the taxpayer “walks as the taxpayer talks”, i.e. that the shown values are actually also the used values⁴⁶⁴.

5.4.1 Tax review of material business decisions

Appropriate processes should be in place for tax review of material business decisions as part of the Tax Control Framework. The materiality level would be dependent on the circumstances and often size of the group.

Tax is rarely, if ever, the only determinant of any decision. Tax advice may even be ignored in the final commercial decision unless this would conflict with existing legislation. Non-compliance however cannot be tolerated, especially if business respects the principles of responsible tax management. As tax function manages the compliance process tax function has to ensure that a business complies with tax rules simply by treating transactions in line with tax law when filing tax returns.

5.4.2 Compliance with local and international regulations

All financial activity is taxed in one way or another. If taxes are considered for the first time when tax returns are to be filed, not only efficiency but also certainty will suffer. Good tax planning is crucial for compliance work and on the other hand, planning is not finalised unless compliance is done properly. As part of cascaded enterprise governance requirements, compliance with national and international laws and regulations is therefore crucial. This can be complex as national rules are sometimes in conflict with rules in other countries or with international rules⁴⁶⁵. Tax governance should give guidance on how businesses solve these kinds of situations⁴⁶⁶. As an example, taxpayer should define how taxpayer utilises the possibility for early discussions with those tax authorities that are able and willing to such discussions.

⁴⁶⁴ Internal controls are crucial as this offers tax authorities one option to review how well the taxpayer is actually committed to the approved and set governance and policies.

⁴⁶⁵ This non-compliance of national rules is the source of ECJ decisions. If all the national rules were aligned with EU rules, no ECJ decisions would exist. National interests, legal culture, and funding needs are driving national tax legislation and interpretation.

⁴⁶⁶ For example, how to look for certainty: is the business seeking a ruling from tax authorities, trying discuss the topic with tax authorities, or seeking advice from external advisors. Tax policy and governance should state also the risk appetite in these kinds of cases.

To manage taxes responsibly an MNE should have processes in place at all levels to ensure appropriate tax authority communication, timely filing and payment⁴⁶⁷. Control processes should also be in place to identify and correct any errors or omissions, and should be regularly tested and reviewed. Controls are one and important method to ensure compliance in cases where tax returns may be filed by different parts of the organisation⁴⁶⁸.

Even good tax regulation includes interpretative parts including multiple views on the correct understanding⁴⁶⁹. Disputes with tax authorities will naturally inevitably happen⁴⁷⁰. There should be documented, periodically reviewed, and tested processes to ensure that the existence of disputes, audits, and other interactions are known to the tax organisation and that these proceed based on full disclosure and professional relationships with tax administrations⁴⁷¹.

5.4.3 Tax Control Framework

MNEs are large organisations operating in many jurisdictions and frequently with multiple business segments, business units, physical locations, and legal entities. Because of the number of activities, locations, and internal reporting structures, direct control over all operations is rarely practical or possible. This is why devolved

⁴⁶⁷ This commitment should clearly state its commitment to complying with all local tax reporting and payment requirements. A public statement does not improve compliance with local regulation as such, but the public statement enforces the commitment to make sure that compliance actually exists. On the other hand, a public statement requires also a commitment from the whole organisation, not just the tax function.

⁴⁶⁸ In an MNE, tax returns are normally filed and taxes are paid by a combination of different functions. Especially other than income taxes are often almost purely dealt with operative business functions as these taxes have a close connection to certain types of transactions, such as customs or VAT.

⁴⁶⁹ Transfer pricing is a good example of tax regulation where defining the correct treatment is complex and difficult. There should be a specific or implied commitment to the consistent use of the Arm's Length Principle in setting intra-group pricing for transactions between legal entities, and a process for periodic review of prices and results to confirm appropriate prices are in place or amended where necessary. This is crucial as group internal transactions tend to create most of the unclarity on whether an MNE is compliant with all rules.

⁴⁷⁰ Tax authorities are typically reviewing taxes later than taxpayers. This may easily create some hesitation in the state tax authority's understanding of tax treatment before the tax return is filed. Sometimes even tax regulation does not allow taxpayers to get clarification on how tax law should be interpreted. The Finnish application of global minimum tax (Pillar 2) is a good example of this (HE 77/2023 vp).

⁴⁷¹ Professional relationships will not ensure good, appropriate relationships with tax authorities. If tax authorities' objectives are more fiscally-oriented, than in line with the principles of good administration, i.e. objective and not respecting the letter and purpose of the law, the outcome may be confusing.

decision-making, management structures and governance are put in place, giving a degree of autonomy to local or business unit organisation⁴⁷². This kind of autonomy also encourages entrepreneurial behaviours in local management⁴⁷³.

Central management has obligations to stakeholders, regulators, as well as national and regional governments to comply with internal and external standards and expectations. The MNE must therefore put in place robust controls and reporting obligations⁴⁷⁴ to confirm that obligations are met, or errors and shortcomings are identified and corrected⁴⁷⁵. The effectiveness of these controls is essential not only for the key stakeholders but also for the companies and businesses⁴⁷⁶.

There is no standardised Tax Control Framework. Each MNE (or company) needs to develop a process that is consistent and aligned with the overall control

⁴⁷² Often operative decision-making refers to the approval of a specific material item, for example, investment, acquisition, or divestment. Approval gives operative management a mandate to proceed if the transaction makes sense when finally, all the details are known. In some companies, this mandate may be given early and, in some operations, very late depending on corporate and HQ local culture. Control-oriented cultures tend to give this approval late in the process whereas trust-based cultures give the approval earlier in the process. Operative mandate is however not necessarily at all a legal decision that needs to be made in a legal entity or entities prior to any actual transaction can be done. It is a method for a central organisation to ensure that all key aspects are considered, irrespective of whether they are done efficiently. It creates a control for corporate functions. Legal companies may even in some rare cases stop a transaction if the operative approval process has ignored some aspects. In that case, the proposal is, if needed, returned for a new review for operative approval.

⁴⁷³ This promotes flexibility and responsiveness to business change, resulting in more effective commercial management and success. The entrepreneurial approach is in line with economic freedoms as taxpayers have the right to choose the best available method as the business structure. Control framework acts as a counter power to ensure that the entrepreneurial aspects are in compliance with regulation and that ethical, commercial, and operational standards are met, and that relevant national and local laws and regulations are respected and followed.

⁴⁷⁴ The internal controls are a crucial part of tax governance to ensure that governance is effective. According to Jon Thompson, FRC Chief Executive, “Concentrating on box-ticking compliance, at the expense of effective governance and reporting, is paying lip service to the spirit of the code and does a disservice to the interest of shareholders and wider stakeholders, including the public”, *Financial Times*, 9 January 2020. To avoid this and reach the target of tax governance, companies need to consider what is their governance and how they are monitoring the execution of their governance, see Enden & Klein, p. 5.

⁴⁷⁵ This confirmation is crucial for the management itself, and also for shareholders putting pressure on MNEs’ tax behaviour, for tax authorities when assessing taxes, investors, and other stakeholders as it illustrates how serious an MNE actually is on this topic.

⁴⁷⁶ If a company is found to have just box-ticking controls, it means that the company cannot rely on its own processes and is vulnerable to tax assessment in addition to that stakeholders cannot rely on the reports. It is crucial for responsible and sustainable operations to walk as they talk.

frameworks, the characteristics of the business operations, the level of central control over tax functions, and an assessment of risk. Tax control frameworks should cover all taxes including taxes borne and collected⁴⁷⁷.

An effective tax control framework can in the best case ensure that tax is a true business partner and thereby management within the MNE will have confidence⁴⁷⁸ that:

- The tax department operates within clearly defined constraints and does not implement or allow the implementation of tax structures, setups, or other arrangements that are not in line with company guidance, policy, principles, or relevant tax laws, i.e. request to change approach or ensure appropriate tax treatment⁴⁷⁹.

⁴⁷⁷ A tax control framework could include: a) reference of tax ethical code of conduct within enterprise ethical standards or codes of conduct or a separate tax ethical code of conduct or similar commitment to comply with all relevant laws and make full disclosure to national tax administrations, b) Internal communication at all levels within the MNE of the tax strategy, policies, practices or other guidance documents to ensure that all decision makers and leaders within the enterprise are aware of tax policies and behavioural expectations, c) Identification of the owners of key tax processes within each business and location and clear and regular communication with those process owners to ensure that they are aware of the obligations of process ownership, d) Clear guidance for process owners, their managers and all individuals and teams performing operational and reporting tasks which have tax effects, e) Structured and repeated education for operational leaders, process owners and those responsible for performing tax tasks and reporting and f) A cascaded systematic reporting process requiring process owners to confirm relevant tasks have been completed correctly. See the complete list from EBTF Best Practices For Good Tax Governance, p. 18 (as stated in 2023).

⁴⁷⁸ Taxpayers will be assessed on the poor behaviour of any part of the organisation. Therefore, the controls are so crucial to ensure that unwanted behaviour is eliminated as far as possible. This is contrary to what often can be seen on the tax authority side. Instead of strict internal controls tax authorities are emphasizing the obligation that every single civil servant has based on administrative regulation, for example in Finland. This is why a supervisor is not able to directly steer the decisions of a stand-alone civil servant. This kind of self-control does not support equal treatment of taxpayers, creates complexities, and emphasizes an individual approach by tax authorities. As taxpayers, it makes even tax authorities partly vulnerable to reputational aspects. See for example "Lainkirjoittajan opas, Finlex. ". When shifting over to digitalised tax assessment, the obligations of civil servants and authorities are becoming complex. An angle of digitalisation that has not been considered at all in the BEPS project.

⁴⁷⁹ Tax is not necessarily a showstopper as tax can be solved by paying the tax correctly. However, if tax becomes high, it may become a showstopper. Therefore, tax as a function needs to ensure that tax aspects are taken into account in the decision-making. The management will then decide whether to go ahead with the business or not to continue knowing the tax consequences and tax burden.

- Operational managers throughout the MNE are not able to put in place transactions or other arrangements that create tax or reputational risk
- Compliance processes are robust and timely, ensuring that tax returns are correct, filings and payments are made on a timely basis and all interactions with tax administrations are subject to review and oversight.

5.4.4 Risk assessment and mitigation

As with any group process, internal audit and external audit should review controls and processes⁴⁸⁰. Controls are identifying only items that have or are about to be executed. In addition to this, MNEs should understand proactively what kind of risks they might have within their tax positions or processes. It should not be assumed that risk mitigation and review are exclusively the responsibility of internal or external auditors: successful control frameworks integrate reviews and assessments into routine management activities. Risk identification will bring available add-on to this.

As part of the Tax Control Framework, tax-related risks of transactions or structures and risks originating from uncertainty over tax laws, their applicability to particular transactions, and their interpretation by tax administrations that have a significant element of tax effect will be assessed following relevant GAAP (IRFS/US GAAP) and reviewed by external auditors⁴⁸¹. This will be part of and augment the other managerial, transactional, and reporting reviews, which are undertaken ultimately for the benefit of the shareholders and other stakeholders of the parent company.

⁴⁸⁰ This review will complement a range of processes operated by the tax department, finance, and other operational functions that will be carried out on a regular and routine basis to confirm business activities operate effectively, issues or malfunctions are identified and addressed, and controls are suitably adapted when business changes.

⁴⁸¹ This kind of risk identification is separate from proactive risk identification. It correlates more to risk mitigation within a transaction to support compliance with the law.

5.5 Tax transparency or stakeholder communication

As I explained earlier, responsible tax management takes into account also other stakeholders than just investors and tax authorities⁴⁸². The new paradigm is more going towards transparency⁴⁸³ where tax authorities do not have to request information or data, but data is automatically available for them through new reporting obligations. I would say that tax authorities have first now become a true stakeholder for tax management⁴⁸⁴.

Additionally, tax authorities have become stakeholders for businesses together with investors, responsible businesses, including tax management, are recognising also important stakeholders, such as governments⁴⁸⁵, employees, and the societies where the businesses operate⁴⁸⁶. This creates a need for transparency for the businesses. Many of these stakeholders require more transparency but for different reasons. This is why I think it would be more logical to talk about stakeholder communication.

When discussing with different stakeholders it is apparent that each of them wants transparency to ensure their specific targets and interests. The request for public country-by-country reporting is one of these requests. I think that we need to question the purpose of this common transparency trend, as one piece of information cannot fulfil the needs of all stakeholders. I'll explain this with an example.

Investors and even some credit rating agencies promote transparency to ensure that companies', mostly MNEs', tax management is sustainable, MNEs top management takes tax issues seriously, and that taxes are paid where they should be

⁴⁸² See for example B Team principles. Tax management has always considered shareholders as not the only stakeholder, but almost the only one. Communication with tax authorities has been related to shareholder interest in eliminating risks, i.e. seeking predictability. See also "A Blueprint for Responsible and Transparent Tax Behaviour" by CSR Europe and PwC Netherlands.

⁴⁸³ Urpilainen 2017, Ehrke-Rabe (Zurich 2018).

⁴⁸⁴ Tax authorities differ from the other stakeholders in one respect: tax authorities are capable of understanding tax technical information and they have their source and standard of information – tax returns. The transparency that is meant for other stakeholders may be helpful for tax authorities, but it may also be confusing. This is due to different reporting standards having also deeply different definitions for the same terms used for tax purposes.

⁴⁸⁵ Companies need licenses to operate, so policymakers and decision-makers are important stakeholders.

⁴⁸⁶ These stakeholders are closely connected to companies' business in one way or another. Civil societies often promote the same interest as these stakeholders.

paid⁴⁸⁷. Civil societies are concerned about developing countries and these countries getting their fair share⁴⁸⁸. For that purpose information and data on tax havens and some KPIs are crucial for them.

Tax authorities are interested in how income is allocated to their country and whether they are getting enough tax revenue. They are competing with their peers in other countries and tax authorities need mostly technical data for this purpose. Tax authorities rely on the law to protect their fiscal interests, a totally different aspect than civil societies⁴⁸⁹.

As we can see, stakeholders need different kinds of information and data. This means that there is no one fit-for-all transparency in this respect. Information to investors is not necessarily informing tax authorities about what they need. Technical details may be misunderstood by civil societies or the information may be used for other purposes than what its purpose was. This creates a risk and would not be in line with taxpayers' legal protection⁴⁹⁰.

To respect taxpayers' legal protection it would be crucial to identify what stakeholders actually need⁴⁹¹ and whether information can be used reliably for other purposes. The purpose should be respected and thereby businesses should commit to delivering information⁴⁹².

Transparency has an angle from taxpayers' legal protection point of view. Taxpayers should be able to trust that information delivered to tax authorities is used for the purpose it is collected. If information is used for other purposes than it was

⁴⁸⁷ See for example Norges Bank Investments management guidelines Tax And Transparency Expectations Towards Companies. It is crucial to note though that tax governance and tax transparency are not the same topic. Being transparent will not convert tax management to being responsible, or having tax governance guidelines either. Having tax governance in place with transparency illustrates a commitment to responsible tax management and the possibility of assessing it.

⁴⁸⁸ See for example Oxfam messages on inequality.

⁴⁸⁹ Tax authorities do not take any position on the government spending or what is in fact fair and from whose angle. This is the only way to ensure predictable taxation. Claiming fair taxation is an open request that unfortunately can never actually be fulfilled.

⁴⁹⁰ The taxpayer needs to be capable of understanding for what purpose the information is used and should be capable of either explaining or defending its position in the worst case.

⁴⁹¹ CSR Europe has made an effort to combine multiple unofficial standards and make an index of how taxpayers are behaving with respect to responsible behaviour and transparency, see <https://taxindex.net/>.

⁴⁹² Willingness would, at least to my mind, be better, if businesses would see that there is a benefit and they are treated fairly when delivering the information.

meant for, the reliability of tax authorities' assessment becomes questionable⁴⁹³. This may easily lead to unnecessary processes.

5.6 Conclusion

Clarity, predictability, and certainty of a regulative framework are key factors for tax management to succeed. Tax organisation supports the business by managing the future, in other words trying to understand the key issues of business in the future and how they should be treated for tax purposes to assess the tax impacts of a business. If planning is done properly, compliance with rules should be easier.

Tax organisations have faced multiple new challenges that they have not been used to. Public pressure on, not perhaps transparency for understanding, but the availability of details for assessment, official or unofficial is seen as a solution⁴⁹⁴. Managing tax assessment risks in different countries based on national and international tax regulations is complex due to conflicting interests. The new layers of information, that are not always perhaps necessary, but available, creates a complexity in itself in an environment where rules are changed in one way to reach some objective and available information may be misused to reach this objective⁴⁹⁵. Tax organisations can mitigate risk related to future tax assessment and public

⁴⁹³ Seeking confirmation for a tax assessment based on information produced for another purpose, say marketing, is a delicate issue and should be utilised with care and attention. Further, if the information is used for some reason for criminal process purposes, fundamental rights such as self-incrimination may be violated.

⁴⁹⁴ Tax authorities make always the official assessment based on the data and information categories that they consider sufficient for decision-making. Taxpayers may disagree on what is key information, but in good tax management tax authorities and businesses will discuss what is needed and what is not. Some civil societies make also assessments based on the targets and objectives they have and label taxpayers to be good or bad often based on narrow analysis of irrelevant details. This assessment is trickier for businesses to manage as different organisations have different objectives and no fixed rules, but rather an objective-based view or assessment.

⁴⁹⁵ It appears that defined objectives are not the objectives the new regulation tackles. This leaves a gap that political decision-makers need to fill again resulting in no visibility going forward nor low predictability. As an example, I would mention the new BEPS project-based OECD transfer pricing rules with a look-through view to recognise value creation. It seems to be that it did not produce the tax revenue that was thought for developing or developed countries. Therefore, G20 initiated a global minimum tax. This will set a "global minimum level of taxation", but it will not generate tax revenue for developing countries as the low taxed income would be taxed in the headquarters country. I think that this illustrates well how key policies, such as green transition, are not considered at all when discussing how the tax system should look like. Taxes are considered as in a separate silo and not as a consequence of business. Taxpayer's legal protection is therefore ignored.

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understanding by adopting the principles of responsible tax management⁴⁹⁶, but only to a certain extent. Legislators and tax authorities have a great responsibility in this respect also. It is the businesses' right to expect clear and predictable regulation and responsible behaviour from at least tax authorities.

⁴⁹⁶ Such as B Team principles.

6 Taxpayers' fundamental rights as the first level of legal protection

Traditionally studies on taxpayers' legal rights are approached by analysing what is not acceptable for tax purposes, i.e. whether a taxpayer is misusing the legal framework to get beneficial tax treatment⁴⁹⁷. I approach the issue from another angle: when can the taxpayers' rights be interfered with by less beneficial tax treatment? This approach does not release taxpayers from the obligation to pay tax but rather analyses the factors of how taxpayers can enjoy economic freedoms and how these freedoms should be considered in tax legislation to reach a balance between different interests. Finally, this takes us to consider how the fundamental legal framework sets borders not only for taxpayers but also for tax authorities.

Economic freedoms offer entrepreneurial freedoms that create the first level of taxpayers' legal protection reflecting even to other levels of protection.

6.1 Responsible taxpayers' and governments' interests are not always in conflict

Tax being a consequence of business seems to be a self-evident issue⁴⁹⁸. In other words, if there is no business activity, there is no tax. This is why taxes impact

⁴⁹⁷ Beneficial tax treatment can be understood differently. Where the Swedish SAC (and the tax authority) seems to consider beneficial tax treatment to mean a choice between business models that create a smaller tax payment than another (see Swedish SAC 2011) ECJ seems to consider artificiality and whether tax has been the driving force without any real substance (see the Danish cases). In case C-585/22 X BV the advocate general seems to have a slightly different approach going beyond the traditional economic freedom approach. ECJ itself seems to confirm the traditional approach, even the outcome was negative for X BV On the other hand, we can ask if there are any more tax-driven setups in a post-Pillar 2 environment. See also OECD 2019 art. par. 64.

⁴⁹⁸ I think this conclusion has been almost a tradition. For example, Voipio concluded already in 1968 that the taxpayer has the right to choose the most beneficial solution even from a tax point of view (p. 278). Tax is therefore a consequence of the transaction itself, not that tax would steer the transaction, as it should not. Tikka considered in 1972

business considerations, not because taxes would be avoided, but because tax is an important financial factor⁴⁹⁹. Understanding this is important not only for business and tax planning⁵⁰⁰ but also when drafting tax laws⁵⁰¹. In other words, responsible tax management⁵⁰² has to start from business and then take into account its obligations to fund society⁵⁰³. Equally, the responsible legislator has to take into

that tax can be assessed based on circumstances easily in most cases, but in more complex cases the outcome is not necessarily that straightforward (pp. 56–57). It is the business case that is assessed based on tax rules, tax assessment is done as there is a business transaction, not the other way round. Ossa confirms Voipio's view in 2013 (p. 17). Knuutinen (2012) considers that taxable income is created as an outcome of civil law transactions (p. 3). This aspect is crucial from a taxpayers' legal protection point of view. If tax legislation is drafted based on purely fiscal interests, the effect on businesses may be unexpected. UN 2019 report considers that "in most countries there is a fundamental principle, explicit or implicit, that taxpayers are entitled to arrange their affairs to minimize their tax liability", p. 12.

⁴⁹⁹ Taxes have to be considered to understand the level of tax consequence and to allow every taxpayer the right to use the alternatives that the law allows taxpayers to use. I see tax considerations as a fundamental right that each taxpayer has, rather than an indication of tax avoidance. I have seen sometimes this kind of consideration by tax authorities especially in tax audit reports. More worrying, multiple peers have confirmed this approach. There seems to be a phenomenon where some tax authorities base their assessment on the possibility that business could have been arranged with a higher tax burden and as this option was not used, it illustrates tax avoidance purpose. I assume that this is however not the usual trend with tax authorities, but still clearly visible.

⁵⁰⁰ Business planning considers what business to operate and how. Tax has an impact on this surprisingly often, not necessarily by creating a benefit, but an obstacle such as the Green Energy Directive to clean power production from a tax point of view. The directive sets requirements that conflict with traditional business setups and their tax treatment. This means that taxes will have an impact on business that tax planning, as one item, is targeting to remove. Tax optimisation is a different angle, where normally taxpayers' tax position is aimed to be fully utilised, such as deferred tax assets.

⁵⁰¹ The steering effect of tax law is complex as it is difficult to estimate how tax adjustments impact business in reality. Businesses are so different that reactions may differ largely. Despite that, a responsibly behaving taxpayer must participate in public hearings to offer the legislator an opportunity to assess the views and react accordingly.

⁵⁰² Responsible tax management takes into account not only shareholders but also other stakeholders, such as financial investors, governments, employees, and environmental values, *ibid*.

⁵⁰³ This means that tax management should consider the tax cost efficiency for the business as well as the importance of correct contribution to societies where the business is done. The two angles should not be seen only as two opposite ends of a scale, but rather to balance them both to allow business operations and finance government spending. This is in the end a question of values, measuring different aspects and interests, and making corporate choices more than a spirit of law issue. If a business makes far-reaching choices, it will find itself to be vulnerable to multiple risks. Tax is surely not the only risk.

account taxpayers' rights to ensure full utilisation of legitimate business opportunities, i.e. in order not to create extensive taxation⁵⁰⁴.

Adam Smith has formulated perhaps the most well-known principles for a tax system or taxation as such. His principles were built on four blocks: equality, certainty, convenience of payment, and economy of collection. Knuutinen notes that the principles of a good tax system vary depending on the researcher and concludes that a good tax system could be based on justice, legal certainty, and efficiency⁵⁰⁵. These components follow quite closely Adam Smith's principles. To me, this illustrates that the relationship between members of a state, taxpayers, and the state, should be in balance.

Independently of how justice is understood⁵⁰⁶, the taxpayer has rights and legal expectations that are protected even against the financial interests of a state. The UN

⁵⁰⁴ If legislative work is focusing heavily on tax impacts only, legislation may not meet the objectives set for it. For example, Dyreng, Hanlon & Maydew 2008 consider that a low effective cash tax rate may indicate aggressive tax planning. As I explained in the previous section, the effective tax rate is a far more complex indicator that would allow us to draw simplified conclusions from it as regards tax planning strategies. This conclusion is in line with Drake, Hamilton & Lusch's 2020 conclusion that "declines in domestic firm GAAP ETRs are primarily a function of GAAP accounting rules for valuation allowance releases, rather than deliberate tax planning." Another example is OECD's Pillar 2 Blueprint 22 December 2021. Objectives for Pillar 2 were to ensure that all business income would be subject to a certain level of income tax. The blueprint proposed to assess taxation based on adjusted IFRS income in relation to adjusted taxes paid. This illustrates that the OECD had a poor understanding of IFRS accounting and effective tax rates. This is a weak starting point for responsible tax legislation. On the other hand, B Team principles (point 6, bteam.org) state that a responsible taxpayer should engage to develop tax regulation. Raising up unclarities or failures could be one way of implementing this.

⁵⁰⁵ Knuutinen 2009, pp. 33–37. There are counterarguments. Tikka has promoted the idea of a neutral tax system, i.e. a tax system that would not have steering impacts. In reality, we can see many attempts to steer business through tax systems, such as R&D incentives, accelerated depreciation, as well as carbon and plastic taxes. Nevertheless, I see a problem in a tax system that has steering targets. As all operations are taxed based on the same rules, the impacts of this kind of steering are most of the time unknown. In other words, some taxpayers are treated more beneficially (or worse) than the objective was. Or what the expectation of policymakers was. This results often in corrections that repeat the same problem.

⁵⁰⁶ Justice can be seen either through different measures, like equality, equity, capability to pay, or the public interest principle. In any case, there is an obligation to pay and a limit on how much should be paid, even though the limits may not always be clear. Knuutinen 2009 takes up that the interest principle (pp. 45–46), having its basis in the use of public services is the counter force for the ability to pay taxes. Knuutinen refers to a few researchers, such as Bird (2002), who consider that the ability to pay does not refer to corporations at all as corporations have a lot of money and therefore the ability

identifies this fundamental right by stating that it “allows taxpayers to engage in transactions or arrangements to reduce their tax payable”⁵⁰⁷. This is why taxation in a constitutional state is based on laws and principles set in the legal system targeting a balanced and reliable tax law and application of it in line with the rule of law principle⁵⁰⁸.

The legal system in a constitutional state sets obligations for taxpayers but offers taxpayers rights and protection on different levels in return. These different levels are on one hand separate, but on the other hand, closely connected to each other.

6.2 Constitutional level as a foundation of taxpayers' legal protection

In Finland, such as in other European countries, government powers are based on three tiers: legislative power, power to implement the legislation, and independent courts⁵⁰⁹. This creates the basis for a constitutional state⁵¹⁰ where the constitution

to pay a lot of taxes. This approach does not take into account the purpose of the corporations, that is to operate a business that will require money rather than to pay taxes. In this respect, the B Team approach is more neutral in this respect. It considers that businesses should take taxes into account as a contribution based on the profits, they generate rather than just the amount of money they have. Tax contribution is a result of spending the money wisely and generating financial value to be contributed to different stakeholders.

⁵⁰⁷ UN 2019 report concludes that this fundamental right gives taxpayers the right to tax avoidance. The UN raises the question of when the use of this fundamental right is unacceptable, p. 13. From a taxpayers' legal protection point of view, this question is extreme as it in one way or another questions the fundamental freedom rights. As the point is however important I think that the question should rather be “when are the fundamental rights misused?”

⁵⁰⁸ Efficient legal protection is part of a democratic society almost globally. It is also the basis for the EU convention on human rights (the so-called Rome convention) Articles 6 and 13. Efficient legal protection is also one of three basis of rule of law principle. See. Wattel. p. 183.

⁵⁰⁹ Shift of powers into the three basic components was defined by Montesquieu as well as Machiavelli, Locke, and Harrington already before Montesquieu. The role of the EU has an interesting angle in this respect. EU directives bind Member States and create rights for Member State citizens, but they need to be transposed into national legislation. This is specifically interesting as the EU has no direct power in the area of taxation (excluding VAT). The European Parliament is appointed through election, but not for taxation, which is a national measure. When the EU is proposing rather detailed substance related tax regulation, the basis for that should in this respect be well developed to fit into the idea of shifting powers into three blocks.

⁵¹⁰ Constitutional state (Ger. *Rechtsstaat*) is a central component of this study. Systematically constitution is the base building block for a constitutional state being more a consequence of than the reason for a constitutional state. Jyränki p 249 states

creates protection against the arbitrariness of administration and the execution of the law without predictability⁵¹¹. Protection created by the constitution is more stable than political trends as changing a constitution has developed approval limits⁵¹². A constitution therefore creates the fundamentals of a legal system, that legislative work, implementation of the legislation, and interpretation of the legislation have to respect. In other words, the constitution creates stability not necessarily by purely limiting taxing powers, but by steering them.

If we consider that legislation reflects the morals and ethics of the majority of citizens, as the legislative work is based on democratically selected parliamentary work, constitutions then reflect the fundamental morals and ethics of a state⁵¹³. These

that a constitutional state includes six components: 1. The state is organised through legal rules, 2. Legality principle forcing governmental bodies and citizens to follow these rules, 3. Governmental bodies and authorities are bound to the constitution which is approved in a complicated order, 4. The legal position of an individual can be defined only by bodies that the individual can affect him -or herself, i.e. election, 5. The laws and rules are applied by independent courts and 6. Rights that an individual has are protected against both government and other individuals by the constitution.

⁵¹¹ See Jyränki and also Vanistendael 2014. The importance of a constitution is a traditional and also permanent value. It was created to protect citizens from greedy kings. This need has not disappeared even currently strongly tax-focused interests can lead to greedy governments collecting extensive taxes. Tax laws and rules need to be assessed against constitutional rules. A good example of this is the global minimum tax rules that OECD has drafted. The outcome of the new tax is unknown, in other words, it may be that top-up tax will be paid when it was not expected to be paid and/or not paid as widely as it was expected. In drafting the new rules, the OECD has not included any wording for dispute resolution or a global ruling system, both crucial for legal certainty and predictability. All this may illustrate a new angle of the old challenge. Instead of a king collecting extensive taxes we have international bodies that initiate new tax regulations to ensure sufficient tax collection, but fail to understand and synchronise this to the extensive and complex regulative framework.

⁵¹² Changing the constitution in Finland has to be passed and approved by two parliaments or alternatively to be supported by a 5/6 majority to be passed within one parliament. Kimmo Sasi claimed in the UTU International Tax Seminar 2018 that laws are essentially not limiting tax legislators. This is true but it is also somewhat generic. Legislators can always decide to create conflicting rules if they are proportional (valid reason, meeting objectives, and not going beyond the need) or have a sufficient majority in the parliament supporting the rule. The Finnish Constitutional Law Committee considered that confiscatory taxation is not allowed due to the protection of property (PeVL 97/2022 § 11). This would lead to the conclusion that constitutions steer legislators and that this steering power protects taxpayers from extensive taxation.

⁵¹³ As Fuller considers law represents the lowest level of morality that can be agreed. In other words, morality is aspiring, i.e. aims high in values and depends on personal views. That is why very detailed rules are difficult to agree upon.

fundamental values change slowly⁵¹⁴. When considering taxation, the spirit of law, as well as morals and ethics are often brought into the discussion. Typically, in a case of tax avoidance⁵¹⁵, that is for example locating operations in a country that has a lower tax rate, should be put in the fundamental framework⁵¹⁶. Tax avoidance in this meaning is seen as legal, but not ethical⁵¹⁷. Free movement of capital and freedom of establishment are seen as so fundamental that taxing rights are secondary to fiscal interests⁵¹⁸, in other words, national taxation should not limit the functioning of the EU internal market by discriminating taxpayer from another Member State.

⁵¹⁴ This kind of fundamentality is the reason they are also protected. The values of individuals may change and are changing in the current society, but the fundamental values are changing slowly. This can be seen for example in the reactions to geopolitical changes in 2022 that impacted attitudes and values in the short term. In the long term, when the situation calms down, we most likely will see some changes in international human rights treaties, but not as extensive as one could think and see when the crisis is at its worst.

⁵¹⁵ Tax avoidance is understood as a legally justified transaction that could have resulted in a higher tax burden in a case structured differently. Tax avoidance is raised often if operations are located outside headquarters or industrial operations. There is therefore a clear difference between tax avoidance and tax evasion even though for example in the Finnish language same term is used for both purposes.

⁵¹⁶ Often the reference to ethics and morals in this sense illustrates more the different understanding of personal views on ethics and morals with the law. In Fuller's context, high moral value is compared with the lowest agreeable moral value. This is why tax has to be based on law, to be included in the constitutional state as Jyränki defines it. Reference to the spirit of the law, which is a secondary source of interpretation, may illustrate merely that the law has not succeeded in defining the regulative target properly. Again, predictability will disappear if the spirit of the law is given too much weight. It, however, illustrates the importance of the legislative process as taxpayers' legal protection as the legislative process should manage to catch up key issues into the legislation for predictability purposes.

⁵¹⁷ The challenge of this discussion is often that the non-ethical aspect is connected to fairness, especially in comparison to other taxpayers, often individuals. As especially income tax is based on profits, the tax burden is a combination of all business circumstances, accounting, and tax rules. Often the ethical view ignores this completely.

⁵¹⁸ Availability of EU freedoms, such as free movement of capital and freedom of establishment are efficient only if the restriction involves EU law to the matter. Further, the ECJ stated in case C-31/11 *Scheunemann vs. Finanzamt Bremerhaven*, para. 23 that "[...] it should be noted that, according to settled case-law, national legislation which is intended to apply only to shareholdings enabling the holder to exert a definite influence over a company's decisions and determine its activities is covered by the Treaty provisions on freedom of establishment. On the other hand, national provisions which apply to shareholdings acquired solely with the intention of making a financial investment, with no intention of influencing the management and control of the undertaking, must be examined exclusively in the light of the free movement of

Denying these fundamental rights raises interesting factors, views, and aspects. Basically, the OECD's BEPS projects⁵¹⁹ were both going at least partly beyond tax avoidance interfering with fundamental freedom rights⁵²⁰. Meanwhile, BEPS 1 was targeting to eliminate losses on corporate income taxes that “arise from a variety of causes, including aggressive tax planning by some multinational enterprises (MNEs), the interaction of domestic tax rules, lack of transparency and coordination between tax administrations, limited country enforcement resources and harmful tax practices”⁵²¹, BEPS 2 was something else⁵²². I would rather state that BEPS 2 is an exercise to fulfil the expectations gap that BEPS 1 created⁵²³. Andersson considered already in 2017 that BEPS 1 rules may create another kind of change to tax basis and

capital.” The ECJ has confirmed in case C-307/97 *Saint Gobain*, para. 35, case C-446/03 *Marks & Spencer*, para. 30, and case C-471/04 *Keller Holding*, para. 29 the concept of establishment within the meaning of the Treaty and that this right is “a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom”, see case C-386/04 *Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschaften*, para. 18.

⁵¹⁹ BEPS 1 that was reported in 2015 and BEPS 2 consisting of Pillar 1 and 2 was reported in November 2021.

⁵²⁰ The objectives strongly referred to base erosion and profit shifting, but some measurements in some rules did not refer to actual base erosion and profit shifting at all, but rather to normal business. Interest deduction limitations are a good example of this. Interest deduction limitation (the so-called SAAR rule) refers to financial performance, not to profit shifting at all, *ibid.* See also Knuutinen 2020, pp. 53–54.

⁵²¹ BEPS 2015 report Explanatory statement paragraph 2 on page 4. Especially the reference to “some taxpayers” is critical. Changing tax treatment to focus on “some taxpayers” will automatically impact also those taxpayers and their businesses, that have been operating in a fully justified way. This means that the legislator should be extra cautious to ensure that only the set objective is met, nothing more.

⁵²² BEPS 2, Pillars 1 and 2, in 2021 forewords (p. 3) stated that “there was still one of the key outstanding BEPS issues – to address the tax challenges arising from the digitalisation of the economy, – remained unsolved.” This seems to be referring to transfer pricing challenges for the new digital business. The definition of value creation is complex and very different than in traditional international business. Neither Pillar 1 nor Pillar 2 finally touched on the taxation of the digital economy at all, but rather targeted extra-large MNEs (Pillar 1) and MNEs (Pillar 2) regardless if the operations are digital or not.

⁵²³ It appears to me that policymakers expected a rapid increase in fiscal income after launching BEPS 1, which was not the case as it takes some time to implement the new rules, or that the BEPS 1 outcome was not in line with the expectations set for BEPS 1.

work opportunities than what is expected⁵²⁴. BEPS 2 would in fact tax profits based on another basis than where the operation and profit was created⁵²⁵.

After all the BEPS 1 actions focusing on base erosion and profit shifting, BEPS 2 focused on the minimum level of taxation. The EU implemented BEPS 1 rules partly by ATAD, i.e. the Anti-Tax Avoidance Directive. The ECJ has slightly sharpened its judgment in the Danish cases by stating that transactions being executed solely or almost solely for tax reasons can be a justification to interfere with EU freedom rights. "Solely or almost solely" refers to a strong tax benefit and in this context not belonging to the EU's legal system and objectives to create that kind of benefit. By giving a directive on minimum tax EU has in essence changed this legal pattern. A tax benefit is not any more a reason to deny a tax benefit as sufficient taxation will be ensured by minimum tax⁵²⁶. This is where the EU is interfering with national constitutional aspects. By doing this the issue may be bounced back as an EU law matter. I will come back to this point later.

Taxpayers' rights are based on the principles of a constitutional state. These, mostly economic, freedoms create protection for taxpayers against excessive taxation. If tax rules are not seen to reflect ethical and moral understanding, they can be changed through governmental proposed parliamentary legislative work within the set fundamental framework⁵²⁷. Constitutional rules create normally a framework

⁵²⁴ Krister Andersson 2017 considered that multinationals did not necessarily bring back operations from low-taxed countries (if they had been moved), but moved even more true operations there. If this were the case, they exercised their freedom rights, which is seen as targeted activity. Meanwhile, BEPS action plans were needed to update the tax regulation, but the sensitivities were not necessarily understood nor considered in the speedy process. This illustrates well that tax is not driving business, but it can steer business in good and bad. Responsible tax management tries to eliminate the bad and ensure the legitimate good.

⁵²⁵ See for example Mason, p. 473. The question could be also raised whether the BEPS projects actually aimed to transfer business between countries for fiscal reasons, compare Krister Andersson.

⁵²⁶ This conclusion is valid of course only in the case of income taxes and in cases when the taxpayer is subject to minimum tax. Even though no minimum tax would be levied, the legal form and tax treatment should be respected. Low taxation would in that case be within the purpose of tax law.

⁵²⁷ This is challenging in situations where the legislation is drafted globally by the OECD or on the EU level by the European Commission to a level with very little space to adjust. These bodies do not take into account national aspects even though they touch the national fiscal basis in multiple different ways. This means that the OECD and the EU are dictating how tax laws should be without actually exercising the necessary legislative process steps in line with what the legislator with constitutional power has, and should have.

for tax legislation within which to set taxation rules, which are missing from the international legislative process⁵²⁸.

6.2.1 Constitutional steering tax legislative work from taxpayers' legal protection perspective – A Finnish view

The constitution is a fundamental building block for our legislation and legislative system. Legislation may react sometimes slowly to new phenomena and megatrends, but for a good reason. The threshold to speedy legislative changes, whether in the case of a new law or material adjustment of existing law, needs to fit in a well-defined existing framework to allow if not all, but at least most of the aspects related to the issue to be considered. Each law must meet its objectives⁵²⁹.

⁵²⁸ There is a tension between national tax legislation and OECD / EU regulation, norms, or other forms of “binding” guidance. Tension is created by the “global” rates that may have negative national impacts and that a national legislator would never draft. The fundamental policy decision is made outside the national parliamentary process and the regular legislative process as defined for example in 8 § of the Finnish Constitution. This means that national facts and circumstances are not properly analysed at all as the “global” regulators are not pointing out winners or losers.

⁵²⁹ When talking about objectives, we often mean the ultimate purpose of the law. Hultqvist 2018 considered that the true spirit of the law is difficult to define or know as it would go to the personal level of what was the target of the majority of members in the parliament when dealing with the law and voting for it. The objective or the purpose of the law however should be however known. The objective and spirit of the law become even more complex when the legislator and parliament finally decide the law that is outcome of a regulation set by a body that is not part of the legislative process. If we take the so-called Pillar 2 as an example, it is hardly an overstatement to say that legislators have a very thin understanding of the set of rules they were deciding. The objectives stated by the OECD are understandable and easy to agree on, but the regulation itself is not connected to the objective. This illustrates not only the weakness of “the spirit of the law” as a guiding rule to be weak and hardly fair, but also the importance of a proper legislative process. Specifically, the Finnish Constitutional Law Committee referred to the objective of the law and the importance of impact assessments in its statement 97/2022 § 7: ”Hallituksen esitys ei siten ainakaan välittömästi sellaisenaan vaikuta toteuttavan asetuksen mukaista tavoitetta. Perustuslakivaliokunnan mielestä ehdotettu verolaiksi varsin poikkeuksellinen järjestely edellyttäisi tuekseen myös huomattavasti nyt esitettyä seikkaperäisempää vaikutusarviointia”. The Constitutional Law Committee considered that the proposed law does not reach the set objectives, i.e. lowering power prices and would require more thorough impact assessment.

The alignment of objectives should be measured against freedom rights and formal legislative process⁵³⁰. As the parliamentary process may, if so is appropriately decided on, infringe taxpayers' fundamental rights for the benefit of fiscal interests, proportionality of the decision should be measured⁵³¹. In other words, that infringement is justified when rules meet the objectives, the rules are not going beyond what is required, and the law is approved by the required majority. Even the equality aspects should be measured in the legislative process⁵³². In this case, the economic freedoms are not limited more than necessary⁵³³.

Each law should be aligned with the constitutional rules. Constitutions should be respected to ensure protection against momentary political pressure and arbitrary decisions⁵³⁴. Stability's function is protection.

6.2.1.1 Preparatory legislative process – An important reflection of the constitutional framework

Preparatory works for legislation are crucial from taxpayers' protection point of view. Preparatory works should not only define the objective of the law but also ensure that this objective does not violate the taxpayers' rights⁵³⁵. Impact assessment and public hearings as part of legislative process offer the basis for measuring the proportionality of the proposed law⁵³⁶.

⁵³⁰ In other words, the legislative process is dependent on what kind of process and majority is required. If the objective is in clear conflict with fundamental rights, the legislative process and the majority requirements for decision-making should be adapted accordingly. This is a typical example of the pre-control in the legislative process.

⁵³¹ See for example Finnish Constitutional Law Committee statement PeVL 54/2022: "Yhdenvertaisuudesta poikkeamista perustelevan yhteiskunnallisen intressin ja poikkeamisen merkittävyyden on oltava keskenään oikeasuhtaisia". See also PeVL 97/2022, § 22. Proportionality was considered even in statement PeVL 9/2023.

⁵³² Violation of equal treatment should also be proportional; *ibid.* Constitutional steering includes elements of proportionality principle.

⁵³³ Tax is not becoming a driving force for business. This could be the case if tax becomes an extensive cost and creates an obstacle. From an economic freedom point of view intensive, i.e. aggressive tax collection is equally bad to aggressive tax planning.

⁵³⁴ Vanistendael 2011 and 2014 considers that constitutions are in place to protect taxpayers from arbitrary government actions. This function has stayed the same since the Magna Carta.

⁵³⁵ Primarily, only natural persons have constitutional rights at least in Finland. Also, legal persons can have constitutional rights, though more limited depending on the nature of the issue and the size of the taxpayer, see PeVL 97/2022 § 13. Taking into account even EU law economic freedoms are included.

⁵³⁶ Preparation of tax laws is currently done on multiple levels. The European Commission drafts directives that intend to harmonise tax laws to a certain extent. As the European

Clarity of the rule is also possible when the impacts are known. Even relation to other laws and especially constitutional aspects can be considered well. Tax laws, or any other law, should not force taxpayers to be in non-compliance due to conflicting rules⁵³⁷. Well-balanced and planned preparatory process is crucial for taxpayers' rights as for well-working law and the functioning of the legal state.

In countries where there is no actual post-control for legislation, parliamentary work creates an important control. Countries like Finland and Sweden⁵³⁸ have constitutional committees that should review law proposals from a constitutional point of view. The efficiency of this process depends, of course, on how high a threshold different committees and boards in the parliament have referring the proposal to the constitutional committee⁵³⁹. Further, the efficiency of this pre-control depends on how well the comments are considered and implemented⁵⁴⁰.

6.2.1.2 Constitutional post-control in Finland

The threshold to apply 106 § of the Finnish Constitution is high. Pålsson states that this is due to the abstract nature and common language of the constitution⁵⁴¹. Courts have hardly used this possibility that is offered in the Finnish constitution. This can

Commission stipulates the main outlines of the rules leaving very narrow legislative room for Member States, the preparation of directives has also become a crucial issue. Unfortunately, the quality of European Commission preparation is questionable. This is understandable as the EU has no taxing powers nor a process to draft tax legislation. Typically, directives touching on taxes have left enough space for Member States to manoeuvre their legislation within the constitutional limits. Urgency and lack of actual impact assessment are unfortunately common features of European Commission work. Good examples are ATAD (the Anti-Tax-Avoidance Directive), DST / DAT (digital service tax or digital advertising tax), and global minimum tax, where urgency and political pressure were the main methods of progress and implementation.

⁵³⁷ See for example Fuller.

⁵³⁸ Finland and Sweden have constitutional committees but no constitutional court.

⁵³⁹ See for example Myrsky 2012. It is also crucial how the Constitutional Law Committee's comments are taken into account. The more there are law proposals, the less the Constitutional Law Committee has resources to analyse and comment. Lehtonen considers that the Constitutional Law Committee's enforcement is somewhat weak. See also Bentley 2007.

⁵⁴⁰ Compare for example Lehtonen. He considers that comments from the Constitutional Law Committee of the Finnish Parliament are not respected properly, and often if adjustments are made to the law, they are not controlled any more later. My view is that, currently, the volume of legislative work is an obstacle to well-performed preparation, which in turn underestimates taxpayers' rights. See also Bentley 2007 and Hultqvist 2014.

⁵⁴¹ Pålsson 2007, pp. 65–66. The constitution is applied to a wide range of topics. This makes the constitution more a statement of fundamental principle than clear guidance in a specific case. See also, Hettne p. 18, and Vanistendael 2014, p. 29.

be understood as a high threshold for courts to utilise their mandate under 106 § of the Constitution as courts respect the authority and role that the constitutional parliamentary committee has when executing the pre-control of legislation⁵⁴². This is how the parliamentary powers are not shifted from the parliament to the courts⁵⁴³.

Transferring the preparatory powers from the government to tax authorities or other bodies can be problematic⁵⁴⁴. The main challenge, in this case, is the lack of segregation between fiscal and private interest and measurement of proportionality⁵⁴⁵. As considered already earlier, the same complexity and challenges from constitutional and taxpayer legal protection points of view exist, when for example the OECD or the EU has drafted tax rules⁵⁴⁶. In case tax authorities have too much of a role in drafting legislation, the challenge is at the heart of the legislative process.

⁵⁴² Pålsson 2007, pp. 65–66. This may easily lead to a circular consideration. The fact that courts have used their powers based on 106 § of the Finnish Constitution is presented as a well performed pre-control. A high threshold on the other hand prohibits courts from measuring laws in relation to the constitution efficiently. Meanwhile, the Finnish courts are reluctant to take on the role of lawmaker, which illustrates the softness of taxpayers' legal protection in case pre-control has failed.

⁵⁴³ Tikka 2003. This statement illustrates well the allocation of democratic powers, see Jyränki. On the other hand, the same should apply to tax authorities. Tax authorities, having the role of implementing the tax legislation, should not have any legislative powers. For example, in the case of the Trace system in consideration of withholding tax on dividends tax authorities' guidelines for banks and listed companies go far beyond what the law requires and what is possible in a process with large volumes. It can be argued that at least some parts of Finnish tax authorities' guidance should have been included in the law itself.

⁵⁴⁴ The legislative initiative is at least partly shifted from the law-making body to the executing body. In other words, the authority implementing the rules drafts the underlying proposal and later is requested to deliver a statement of the law proposal, shifting to a certain extent governmental legislative work from the government and the parliament to tax authorities.

⁵⁴⁵ Especially tax authorities create a challenge: their focus is purely on the consequence, i.e. tax, not how it impacts the business or what the driving business requires. Tax authorities are tax assessment experts, not business experts. Meanwhile balance and neutrality require that the business environment be included in tax authorities' work. A good example is that managing risk is often not seen as a real business reason as "the risk has not been realised". However, for businesses especially a risk with high impact event with a low likelihood creates a reason to take steps to mitigate the risk. The higher the risk, the lower the threshold to take action to mitigate it.

⁵⁴⁶ In the case of the OECD or the EU, the challenge is that they may have equal-looking processes, such as a public hearing on the international level as a legislator would have for national purposes. The challenge is that the legal framework for these process components is not the same, not even from a purpose point of view. For the EU or the OECD, the question is often about policy-type statements rather than a specific rule on the national level setting rules for governments rather than taxpayers. In the case of the OECD, the rules are more of a guidance or a political statement by nature.

When considering the powers of a Finnish court, the court never the less has in stand-alone cases the possibility to execute post-control of a law in concrete terms. The conflict between the existing law and the constitution must be obvious⁵⁴⁷. Even though the threshold for post-control is high, the importance of the fundamental principles, often verified, confirmed by, and connected to the constitution, is apparent. This can be seen for example based on Tikka in the fact that if the court is using its right to post-control, it should take into account the equality principle⁵⁴⁸. I see that the high threshold on the post-control, when aligning law with the constitution, underlines the importance of the existing pre-control as regards taxpayers' rights⁵⁴⁹. Pre-control does not necessarily replace true post-control⁵⁵⁰.

6.2.1.3 Failure in process

Consequences for taxpayers may be severe in case the legislative process fails. If no post-control exists, the taxpayers' possibility to enforce their rights is soft and the means are extraordinary. An example concerning the Swedish hydropower real estate tax could illustrate the importance of this issue.

Swedish real estate taxation is based on the valuation of the property at fair market value as well as on a tax rate. Valuation of the property (in brief) is normally based on transactions between unrelated parties or if no sufficient transactions are identified on a technical valuation. Value of power plants is based on a valuation calculation including several factors such as volume and power price produced in a historical six-year period. The common real

⁵⁴⁷ Meanwhile, the courts have an extremely high threshold to apply this rule but the tax authorities do not have this right, not necessarily the interest either.

⁵⁴⁸ Tikka 2003. Also, the proportionality principle has to be considered. This is a complex topic to a court that usually takes a position of how law should be interpreted rather than making a statement on whether the law actually has been drafted in line with the constitution. I see the judges as having a challenge to take this decision without considering that they are interfering with the legislative powers.

⁵⁴⁹ The 2022 revenue cap is a good example of the importance of proper pre-control. In the case PeVL 9/2023, the Constitutional Law Committee commented specifically on the poor preparations.

⁵⁵⁰ In this respect the current threshold for post-control in a regular court is most likely too high. It is understandable that the regular courts, i.e. non-constitutional courts, have difficulties in assessing legislation from a constitutional point of view within their regular mandate. See for example Finnish SAC 2016:180. The conclusion is that 106 § of the Finnish Constitution can be applied only in case the conflict with the constitution cannot be solved through constitutional interpretation.

estate tax rate is 0.5%, while it is 0.2% for wind power plants, and 2.8% for hydropower plants⁵⁵¹.

Increased real estate tax rate for hydropower was argued by offsetting a shortfall in the Swedish budget arising from the removal from small companies of the obligation to have an auditor⁵⁵² and tax away the “high profits” allegedly (and in any case legitimately) derived by hydropower producers partly from the operation of the EU emissions trading regime⁵⁵³. The real estate tax rate for hydropower was higher than the tax rate for other power producers.

Property tax does not reflect changing profitability but the taxes are based on the value of the property. The fact that the Swedish real estate tax valuation method for taxing hydropower takes into account power price for historical six-year periods, does not convert real estate tax to reflect profitability. It is not a tax that would, by its purpose either, tax profits.⁵⁵⁴ The question is if the set target can be reached by increasing real estate tax for one production form, and would it impact fundamental rights?

⁵⁵¹ Real Estate Tax Assessment Law of 1979:1152. The rates of real estate taxation are laid down in the Swedish Real Estate Tax Act; Law 1984:1052, as amended. Prior to 1 January 2006, the real estate tax on all electricity producers was imposed at the 0.5% standard rate for industrial buildings. The rate of real estate tax for nuclear and bio- and fossil-fuelled producers has remained constant at the standard rate, i.e., 0.5%. The rate of tax for wind power was reduced from the standard rate to 0.2% from the 2008 tax assessment year (amending Law of 4 July 2006, SFS 2006:1008). The rate of tax applied to hydropower producers was progressively increased from 2007 until 2012: 1) for the 2007 tax assessment year the rate was 1.2% (amending Law of 13 January 2006, SFS 2006:3). Simultaneously a temporary law was enacted stipulating the rate of 1.7% (law 13 January 2006, SFS 2006:2.). 2) for the 2009 assessment years the rate was 1.7% (amending Law of 28 December 2007, SFS 2007/1417). Simultaneously the temporary law was amended stipulating the rate of 2.2% (amending law 28 December 2007, SFS 2007:1421) and 3) for the 2012 assessment year the rate was 2.8% (amending Law of 6 July 2010, SFS 2010:773). In June 2016 the Swedish government announced that it intended to gradually reduce the estate tax on hydropower down to the 0.5% standard rate over four years beginning in 2017 (Government bill 2016/17:142).

⁵⁵² Government bill 2009/10:206, p. 7.

⁵⁵³ Government bill 2007/08:11, p. 53

⁵⁵⁴ Even in the case of hydropower production, business operations profitability is dependent on other factors than real estate value. It depends on currency risks, power prices in the market, weather conditions, bad debt risks, and political risks. This means that power price cannot be the main driver for real estate valuation as power price should cover also other than real estate tax-related risks.

In Sweden⁵⁵⁵ spot prices reduced from the top year 2010⁵⁵⁶ to less than half of that in 2015⁵⁵⁷. At the same time, the real estate tax burden for hydropower production increased due to higher tax rates as well as the impact of the valuation of fair market value⁵⁵⁸. The low profitability of hydropower production, caused by high real estate tax and low power prices, impacts the capability to make investments into maintaining the capacity or to make new investments⁵⁵⁹.

The impacts of the real estate tax were different than expected. Questions that can be raised, such as if there is a component of state aid in the higher tax rate for hydropower, are all producers treated equally, or if the property tax is arbitrary by nature, are legitimate questions. My understanding is that these aspects were never considered when drafting the law.

Another example could be the EU ATA directive-based interest deduction rules⁵⁶⁰. These rules were presented as harmonised EU-level rules limiting interest deduction in order to limit aggressive tax planning and base erosion on the Member State level. Rules present minimum level rules leaving each EU Member State an option to consider what level of taxable EBITDA is the limit⁵⁶¹. In addition to that,

⁵⁵⁵ Power prices are set in the power exchange NordPool by areas, where Sweden consists of two areas (area prices).

⁵⁵⁶ 2010 spot price 543 SEK / MWh.

⁵⁵⁷ 2015 spot price 202 SEK / MWh.

⁵⁵⁸ Fair market value of hydropower in 2015 was based on high price years from past years. Tax burden was almost doubled compared with the high price year 2010. Most of the hydropower production was loss-making in 2015 due to high real estate tax, the tax being the highest cost for the operations. Fortum Sverige AB facts based on Administrative Court in Stockholm 30 June 2017.

⁵⁵⁹ Svensk Energi statement: "For hydropower, the higher taxable values will have a severe impact. The property tax for 2012 at a tax rate of 2.8% amounted to around SEK 4 billion. With the new taxable values in 2013 and the same tax rate, this amount will be pushed up to SEK 6 billion. This is equal to approximately SEK 0.09 per kWh in property tax on hydropower as of 2013. The sharp increase will act as a disincentive for investments in hydropower". (The Electricity Year 2012, p. 13). The Swedish Energy Agency explained in its submissions on Parliament Bill 2009/10:206: "The price of electricity will be affected in the medium to long-term since reinvestments and investments in new generation may become unprofitable or be deferred." (on p. 8)".

⁵⁶⁰ Council Directive (EU) 2016/1164 Article 4. The directive binds the Member States, which have to transpose the piece of legislation into national law.

⁵⁶¹ Directive states that a maximum of 30% of taxable EBITDA can be deductible. The directive gives Member States some alternatives for exemptions in certain defined cases. The rule does not create the same tax treatment across the EU, just the same minimum layout with measures not reflecting tax planning.

the directive gives each Member State the option to use some carve-outs or exemptions⁵⁶².

When implementing these rules in line with Member States' obligations to national law each EU Member State has limited room to adopt the rules for local purposes. In other words, to adopt the directive to fit national circumstances and constitutions. For example, Finnish nuclear and hydropower producers are hit by the rule due to historical and structural reasons⁵⁶³. The legislative process did not take this kind of national circumstances into account in the preparatory work⁵⁶⁴ of the directive. The Finnish government had limited, if any possibility to adjust the new rules to solve the problem on the national level⁵⁶⁵.

These examples illustrate that pre-control and sufficient qualitative preparation of the law considering even underlying key business factors is important for taxpayers' rights. In case the pre-control fails and if the threshold for questioning constitutional aspects is high, the taxpayer is most likely set in a difficult position as the question has not been considered in the legislative work properly. This takes us to consider the first level of taxpayers' protection, the freedom rights.

6.2.2 Freedom rights limiting taxing powers through the steering impact

As in most of the European countries, freedom rights are defined also in the Finnish constitution ensuring these rights in the Finnish territory. As the fundamental rights, including economic freedom rights, are primary law, i.e. they are based on law and legislation, authorities and courts have to take them into consideration when

⁵⁶² Knuutinen 2020 classifies this rule to be a so-called SAAR, a special anti-avoidance rule.

⁵⁶³ The so-called Mankala principle is commonly used in nuclear and hydropower operations. This setup allows multiple investors to join forces to make a capital-intensive investment.

⁵⁶⁴ No true public hearing was arranged on the EU level, nor any actual impact assessment. The EU Commission did not know in actual terms the true consequences. As the regulative process focused more on BEPS impacts, the relation of the proportional measures to normal business was not taken into account properly. This is illustrated well as the problem becomes real when the interest rates have increased after a record-low period of interest. Equally, low profitability has an impact on the capability to deduct interest.

⁵⁶⁵ Note, perhaps not strictly in line with the wording. The challenge is that the Mankala principle, though with a very long-term tradition, even a legally binding principle, which is not defined in law, but is confirmed by long term tradition. This means that a more dynamic interpretation of interest deduction rule in line with the Mankala principle itself should have been implemented in the legislative process.

fulfilling their duties⁵⁶⁶. This applies to all authorities and courts, even when considering tax.

The second aspect of constitutional protection is created by the way taxes have to be regulated. Based on 81 § of the Finnish Constitution, taxes have to be based on law. Taxpayers' right to choose the best option is protected as well as how the tax burden on the business is defined. In other words, taxpayers should be capable of assessing tax consequences on the best-chosen business model.

When compared with fundamental legal principles, we can find here the main difference: freedom rights, i.e. business considerations, have to be considered when authorities and courts are using their powers defined by the law. Meanwhile⁵⁶⁷, legal principles do not have direct legal enforcement to authorities and courts⁵⁶⁸. Even freedom rights are somewhat abstract in their expression, which results in a soft nature of the law, although the law can be fairly enforceable when considering from a steering impact point of view and applied in a stand-alone case⁵⁶⁹. Nevertheless, I consider that they should not be ignored when assessing taxation⁵⁷⁰. However, the

⁵⁶⁶ This aspect takes us back to the question of the high threshold for post-control of constitutional aspects. Even though authorities theoretically have an obligation for post-control in Finland, the quality of post-control is not unified due to the diversity of authorities and the high threshold transferring the case to higher courts on top of the high threshold on constitutional questions.

⁵⁶⁷ This is what the Finnish SAC is doing when utilising constitutional interpretation of tax law. Business reasons illustrate that there were multiple objectives in the case in addition to tax considerations, see for example SAC 2017:78. The challenge may be that taxpayers are not clear enough with their business reasons or that the tax authorities see merely the taxable business reasons.

⁵⁶⁸ Zalasinski, p. 305. Fundamental legal principles still give guidance in a conflict situation on how to solve an issue. They support courts in their decision-making but do not have the same enforcement as primary law-based freedom rights.

⁵⁶⁹ With steering impact, I refer to constitutional interpretation.

⁵⁷⁰ See for example SAC 2014:119, SAC 2018:173. These decisions consider transfer pricing and the so-called re-characterisation that Finnish tax authorities have used. The Supreme Administrative Court has clearly stated, that transfer pricing rules do not give tax authorities the right to re-characterise the legal form of a transaction or business model for transfer pricing purposes. The legal form and the choices taxpayers have made should be respected. Further, the Helsinki Administrative Court confirmed this view in its decision 29.12.2017 17/0979/4, where it stated that assessing pricing based on functions performed and risks assumed may result in adjustment of transfer pricing, but does not mean that the underlying transactions would be re-characterised. My conclusion of these decisions is that tax authorities need to respect taxpayers' right to arrange their business optimally. Tax authorities may only assess if the taxpayer has set the terms at arm's length. See also SAC 2018:166.

Finnish system does not allow the whole law to be challenged due to a legislative error underlining the importance of pre-control⁵⁷¹.

Fundamental rights have been developed and created over a long period of time. This illustrates their stable and consistent nature. Fundamental rights, which Karapuu defines to be secured by constitution⁵⁷², are limiting the state's right to tax its members as taxation interferes with freedom rights. As I have said already earlier, this infringement is justified⁵⁷³ but as all infringements, it should be proportional. Proportionality should be measured both when drafting the legislation and when assessing taxes to ensure justified the infringement and taxpayers' economic freedoms⁵⁷⁴.

As considered earlier, especially an MNE has rather soft constitutional protection in Finland. The protection exists, but it is limited. As Finland is a Member State, the EU law protection is reaching even the Finnish MNEs. EU law creates an additional fundamental protection for taxpayers as taxpayers can refer to EU law in relation to their freedom rights.

6.3 EU law and freedom rights

EU's core "idea" is to ensure the functioning of the EU's internal market. The four fundamental freedoms aim to ensure that there would be no limitations for people, capital, and business within the EU internal market. This creates the EU-related freedom rights dealt with within this paragraph. They are EU-wide freedom rights binding governments. They offer taxpayers a second, but not secondary, level of freedom rights in addition to national freedom rights⁵⁷⁵.

⁵⁷¹ Members of parliament often defend the strength of pre-control and the court type of approach the Constitutional Law Committee has. A wider reflection on the quality of the legislative process and the functioning of pre-control could change the view.

⁵⁷² Karapuu 2011. There is therefore a difference between normal legal rights and fundamental rights. Rights (and obligations) may be based on the law being more volatile, but fundamental rights are based on the constitution and are to be respected by laws.

⁵⁷³ Tax needs to be collected to finance the legal framework that can ensure the constitutional freedom rights, *ibid*.

⁵⁷⁴ For example, the German constitutional court bases its decisions on the principle of equality before the law as well as principles of tax fairness and tax equity, see Englisch 2011, p. 288. Considerations of tax equity go in line with the ability to pay principle, both horizontally and vertically.

⁵⁷⁵ The EU freedom rights are not secondary for taxpayers as they are the basis of the EU's fundament idea: a well-functioning internal market. Meanwhile the national constitutional rights have a wider aspect and do not focus that strongly on the functioning of the national market.

Constitutions are the basis of the legal state and create a foundation for legislation. Any infringement should be considered separately⁵⁷⁶. EU treaty, being the foundation for the EU, stipulates the basic rules to be respected by all Member States⁵⁷⁷. As each Member State has approved these rules, they create not only a foundation for the EU's legislative framework but for each Member State. Juusela considers them to be provisions to even the national constitution⁵⁷⁸.

Urpilainen states, that the EU is after all a legal project, where the EU internal market is based on the four fundamental freedoms and is maintained by ECJ praxis⁵⁷⁹. The EU rules and general principles of law are to be implemented by the Member States. This is based on Article 51 of the Charter of Fundamental Rights⁵⁸⁰. Hettne presents a view that Member States are bound by the general principles of EU law when they adopt measures that restrict the four fundamental principles⁵⁸¹. This view is confirmed by ECJ case law⁵⁸². Further, the EU "is a system based on market economies with a protection of private property and the right to conduct business"⁵⁸³. These views, irrespective of their approach, highlight that the EU's four fundamentals limit and steer Member State's legislative freedom. Isenbaert makes a conclusion crucial for MNE's that companies and firms get the same protection as natural persons for the EU fundamental rights. This was confirmed by ECJ Case 79/85 Segers⁵⁸⁴.

⁵⁷⁶ Restrictions created to manage the Covid-19 pandemic were carefully measured against the constitutional freedom rights and principles. Restrictions were different in different countries, perhaps based on different toning of the importance of the restrictions and different measures of proportionality. Public reactions were not mild. Taxes are seen traditionally to have a fundamental justification to infringe on freedom rights but they are not unlimited. Even though taxes are not measured against freedom rights, it does not mean that they should not be measured. Ignorance will only challenge the post-control.

⁵⁷⁷ EU treaties as well as directives bind Member States by creating rights that citizens may claim. At the same time, EU directives do not create any obligations for Member State citizens prior to the Member State transposing the rule into national legislation.

⁵⁷⁸ Juusela, 2018. Juusela considers EU rules to be peremptory regulation for the Finnish constitution. See also Urpilainen 2012, p. 42.

⁵⁷⁹ Urpilainen 2012, pp. 42-43. In the post-BEPS world, the EU seems to take a more active role in the area of tax legislation. I trust that even these rules will be set against the four fundamental freedoms.

⁵⁸⁰ Article 51 states: "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers to the Union as conferred on it in the Treaties."

⁵⁸¹ Hettne 2014, pp. 18–21.

⁵⁸² ECJ Case C-617/10, *Åklagaren v. Hans Åkerberg Franson*.

⁵⁸³ See Nyman-Metcalf, Kumar Dutt, and Chochia

⁵⁸⁴ Isenbaert pp 292.

Member States have sovereignty over taxation in each Member State's territory. This means that the EU has no competence to legislate over taxation, such as tax rate or other tax measures that directly impact the tax burden in a Member State⁵⁸⁵. There is a conflict in this setup: the four basic freedoms are enjoyed by businesses creating one EU internal market meanwhile the consequence, income taxes, are levied and rules applied at the national level even for taxpayers from another Member State⁵⁸⁶.

The fact that national taxation may create obstacles for the internal market does not mean that tax in itself would harm the functioning of the internal market nor that EU-level regulation would solve the issue⁵⁸⁷. EU has lately published directives limiting Member States' freedom in the area of tax legislation⁵⁸⁸. I will come back

⁵⁸⁵ With an exception concerning VAT. See however the Commission proposal for a Council Directive of 22 December 2021 on ensuring a global minimum level of taxation for multinational groups in the Union. The proposal argues that the EU has a mandate to regulate taxes based on Article 115 of the Treaty on the Functioning of the European Union (p. 2). It argues that the "absence of rules ensuring minimum effective corporate taxation across the single market is such existing inconsistency." This statement is on the one hand not in line with earlier understanding of Article 115, but on the other hand missing inconsistency would most likely appear in the single market in the current situation. I see that Article 115 of the Treaty may not finally legitimate the EU to legislate on global minimum tax as the different levels of taxation have not been seen as inconsistency, but rather a natural outcome of the structure of the EU Treaty. ECJ case law illustrates how the financial fundamentals rights are guaranteed to ensure the functioning of the single market even though tax systems are different in different Member States, see Urpilainen 2012 p. 86. However, if Member States start to implement their own OECD proposal on global minimum tax, that may well result in inconsistency within the single market. Based on this, the EU might have legitimisation for this directive, but only in case Member States or at least a clear majority of Member States are strongly and unified committed to the OECD proposal and there is a threat that implementation of the proposal is not unified within the Union. As the OECD gave a recommendation equal to the EU directive, this may be only a theoretical threat. In any case, I consider that the EU has no right to take the initiative for this directive, but only in respect of Article 115.

⁵⁸⁶ Even though the EU may set tax rules, they are assessed on a national level without enforcement of EU-wide interpretation. Tax may still create discrimination and therefore set obstacles for the functioning of the EU internal market.

⁵⁸⁷ Taxes are still legislated and interpreted on the national level for activities in Member States territory depending on how liability to pay tax is defined.

⁵⁸⁸ EU has communicated harmonisation as the goal. EU's justification for this has been the functioning of the internal market. I see this in the big picture as an objective to create taxing powers for the EU as well as finalise the long-lived CCCTB (common consolidated corporate tax base). This political target can be seen for example in the EU's Covid-19 recovery package as "Own resource based on the reallocated profits of very large multinational companies" was mentioned as one of the funding sources in the NextGenerationEU proposal. It appears that Member States have not been willing to accept this idea as such leading to a status where European Commission is preparing to launch this objective piece by piece using the functioning of the internal market as a Trojan horse. See also the BEFIT proposal of 12 September 2023.

to this issue later to consider the mandate and the impact on taxpayers' legal protection. First, I will consider how EU rules interfere with Member States' tax sovereignty, the classification of EU rules, and the angle to taxpayers' legal protection⁵⁸⁹.

Tax legislation creates several national measures to define tax burden⁵⁹⁰. National tax law primarily defines taxation in the national territory, but it may impact also cross border situations falling within the scope of EU law. General principles having their justification in Article 19 TEU and Article 6(3) TEU interpreted by the ECJ, such as the principle of equality create a protection especially for the economic rights, like free movement within the internal market⁵⁹¹. National law may fall within the scope of EU law, but the impact is often indirect⁵⁹².

6.3.1 National law in the scope of EU law

National tax legislation may fall within the scope of EU law acting as an agent, derogating situation, or other area in the scope of EU law⁵⁹³. In that case, EU law

⁵⁸⁹ This is crucial to understanding how EU law protects taxpayers on a constitutional level.

⁵⁹⁰ Based on the legality principle, tax has to be defined by law so that taxpayers can conclude their final tax burden.

⁵⁹¹ Lennaerts and Gutierrez-Fons, pp. 1632–1633 consider that the ECJ accomplishes a mission of legal order within the EU. The ECJ has aligned the new legal order of the Union with the basic constitutional tenets common to the EU Member States, in other words, common to the Member States' constitutions. Article 19 TEU contains also a version of the rule of law in a supranational context recognised and approved in Member States' constitutions. Snell confirms that rights with an economic angle get stronger protection. See also Vanistendael 2014.

⁵⁹² On the other hand, as the EU has no taxing rights, and EU regulation on national tax rules may create overlapping rules, even contradictory rules. This will create a challenge for taxpayers' legal protection purely as there are multiple legislators for tax.

⁵⁹³ Involvement of EU law in national legislation and administrative rules is not simple nor automatic but needs to overcome thresholds. Lennaerts and Gutierrez-Fons, pp. 1640–1649 consider that there are two competing visions on primacy, both having merits but are also vulnerable to criticism. Both visions recognise the primacy or direct effect of EU law over national law (primacy and triggering model). On the other hand, I see the new attempts at harmonisation, such as ATAD or global minimum tax, create a different kind of tension. The EU stipulates specific, rather detailed rules for national taxation in the name of harmonisation, without considering how well they fit into Member States' legal systems, how the new rule creates a new tax, nor how they impact the functioning of the internal market. This may be challenging from the EU's legal order point of view. None of the EU's proposals have been looking at actually improving the functioning of the internal market through improved dispute resolution or alignment of tax assessment in cross-border situations, perhaps partly because this would be difficult to implement.

has an effect as the national measures have to be in compliance with EU law as well as the Charter of Fundamental Rights of the EU.

In basic terms there are four situations when national measures can fall within the scope of EU law, which all relate to basic freedoms⁵⁹⁴:

1. When a national measure implements EU legislation, such as interest deduction rules, as part of specific directives and also more general functioning of the internal market.
2. When a national measure derogates from EU requirements, such as the use of a specific anti-avoidance measure like beneficial owner.
3. When another connecting factor exists between the national measure and EU law such as taxing property so that it factually impacts all taxpayers equally, but indirectly only foreign investors are faced with a higher tax burden. This means that the free movement of capital is impacted⁵⁹⁵.
4. A new point could be the positive harmonisation EU-based rules where the EU creates EU-wide substance measures forcing Member States to transpose these measures into national legislation impacting intra-market situations⁵⁹⁶.

When considering the first situation, 'implementing EU law' should be understood in a broad sense. For this category the Member States act as 'agents' of the Union by, for example, transposing directives, adopting measures aimed at giving effect to regulations or other EU law provisions, applying EU rules, and

⁵⁹⁴ This view is based on a somewhat formalistic model of primacy.

⁵⁹⁵ See S. Prechal, pp. 8–10. See also Lennaerts & Gutierrez-Fons, p. 1639. All these three aspects may appear also in case the tax law is initiated by an EU directive. This could mean that each Member State should review all or a large part of its tax laws when the EU comes with a new EU "tax law" directive. The worst-case scenario would be that the ECJ would challenge the EU directives or their national implementation. Considering ECJ's respect for the supranational nature of EU law, the threshold is surely high, but it exists.

⁵⁹⁶ My consideration of the fourth point on top of a more "confirmed" approach is based on the fact that EU's post-BEPS-related regulation is implementing OECD recommendations in the EU through Member State binding directives without measuring the impact on the EU internal market. The implemented EU-based national measures are still national and may impact the internal market negatively as the OECD did not plan them for internal market purposes. The link to EU law is strong, but a different than in point 1.

enforcing Union law⁵⁹⁷. As we can conclude from ECJ case law, a coincidence of subject matter can bring a national measure within the scope of Union law.⁵⁹⁸

In addition, if and when a Member State exercises discretionary power granted to it by, for example, a directive, the Member State must exercise this power in a manner that is consistent with the Treaties⁵⁹⁹. Member State has here no choice as it is bound by the directive. Tridimas has argued that “the conferment of discretion on Member States makes the discretionary power subject to the normative framework of EU law and therefore not only the actual exercise of that discretion but also the decision whether to exercise it or not is reviewable on grounds of compatibility with the Charter”⁶⁰⁰. This view may be crucial from the taxpayers’ legal protection point of view as it could force Member States to make more extensive adjustments than was originally aimed to ensure compliance with the Charter as well as proportionality⁶⁰¹.

Tridimas conclusion is important. However, after Tridimas’ analysis, the EU has moved more to positive harmonisation within taxation. This means that EU has drafted directives creating a minimum level for tax rules or even detailed tax regulation itself to be still implemented on the national level⁶⁰². Taxpayers’ legal protection by the EU Charter is interesting and will be examined later when considering the fourth category.

The second category is based on the *ERT* case. In that case, ECJ ruled that “where a Member State relies on the combined provisions of Articles 56 and 66 in order to

⁵⁹⁷ S. Prechal, 2010, p. 8. The author refers to the following case law in connection with the examples of situations in which the Member States act as agents of the Union: Joined Cases C-20/00 and C-46/00 *Booker Aquaculture* ; Case C-14/04 *Mangold*; C-442/00 *Caballero* ; Case C-345/06 *Heinrich*, , Case C-384/05 *Piek*; Case C-300/04 *Eman and Sevinger*; Case C-349/07 *Sopropé* ; Case C-107/97 *Rombi* ; Case C-28/05 *Doktoer* ; Case C-276/01 *Steffensen* ; Case C-262/99 *Louloudakis* .

⁵⁹⁸ Case C-555/07 *Küçükdeveci*. Normally directives cover topics where the EU has legislative powers. In situations where the EU has taken over legislative powers by itself will be interesting to see the reactions of the ECJ to this when matters by coincidence become problematic. For example, directives defining a detailed minimum level are not harmonising even the tax rules, not to mention the internal market.

⁵⁹⁹ S.C.W. Douma, p. 230. Douma refers to the ECJ Case C-168/01 *Bosal Holding BV*, para. 26.

⁶⁰⁰ Tridimas, p. 365.

⁶⁰¹ For example, global minimum tax may have impacts on other legislation, such as CFC, hybrid rules, interest deduction rules, tax credits, exit taxes, etc.

⁶⁰² Good examples of this are ATAD (directive (EU) 2016/1164) and the directive on global minimum tax (COM(2021) 823 final). Member States may have a challenge in implementing the new rules in line with EU directives as they may be overlapping, not aligned with actual internal market needs, merely having a tax approach. The functioning of the EU internal market and EU Charter will be tested from the taxpayers’ legal protection point of view.

justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights.”⁶⁰³ This means that a national restriction on freedom of movement cannot be justified under the Treaties unless it respects fundamental rights⁶⁰⁴, i.e. national restriction can be justified only if justification is in line with the fundamental rights⁶⁰⁵. This is also clear from Case C-318/10, *SIAT*: the ECJ considered that the unclear wording of Belgian tax law and excessive obligations set for taxpayers were in conflict with the principle of legal certainty and not respecting the fundamental rights under EU treaties (paras. 54 to 59)⁶⁰⁶.

In the third situation, in *Kremzow*, the ECJ said that it would review “national legislation which falls *within the field of application* of Community law”⁶⁰⁷. In the case of *Carpenter*⁶⁰⁸, the ECJ presented the disruption of family life as an obstacle to the freedom to provide services. In other words, the violation of a general principle

⁶⁰³ The ECJ Case C-260/89, *ERT*.

⁶⁰⁴ T. Tridimas, pp. 361-392. This illustrates as well that the freedom rights have stronger enforcement and position than in the national law, at least in Finland. Compare for example to PeVL 9/2023.

⁶⁰⁵ This argument is interesting in case a Member State implements the new “harmonisation” rules. Even though they aim to harmonise tax legislation in EU Member States, it may fail in actual harmonisation. This is due to the directive creating only a minimum standard. Harmonisation (or co-ordination) of tax rules is reached only on the minimum level. As there is no limit to how much Member State can exceed the minimum standard, no real harmonisation of tax rules is reached. This could question the EU’s justification for the directive based on Article 115. Further, the harmonisation aims to harmonise tax rules in the internal market, but not the internal market itself. The functioning of the internal market is not dependent on tax rules only as tax is a consequence of business. The scattered harmonisation of tax rules may result in other indirect obstacles for business within the internal market resulting in not being proportional to the objective stated in Article 115. At the same time, there may be challenges with the proportionality of BEPS objectives, such as with interest deduction rules in ATAD.

⁶⁰⁶ The ECJ’s view makes a clear point: unjustified unclarity creating excessive compliance burden may impact economic freedoms. When reflecting case *SIAT* to the proposal for a Council Directive for global minimum tax paragraph 37 creates a connection. The ECJ states that “it has been held that a restriction on the exercise of freedom of movement within the European union can be justified in order to safeguard the allocation between the Member States the power to impose taxes”. The EU is taking a step further as the minimum tax proposal would give the headquarters country the right to impose taxes on operations in another Member State at least when all the three components have been implemented. I think that this would be the case even in case there would be a possibility for national top-up tax as Member States’ tax authorities assess situations differently.

⁶⁰⁷ Case C-299/95 *Kremzow*, para. 15.

⁶⁰⁸ Case C- 60/00 *Carpenter*.

of Union law may cause a restriction on free movement even in the absence of any discriminatory treatment of cross-border economic activity. This could be the case within taxation, which is always national even when lacking the cross-border element. The case of *Karner*⁶⁰⁹ shows that the ECJ is prepared to review national legislation for compatibility with general principles of Union law, even if that legislation as such does not constitute a restriction on free movement.

In cases like *Carpenter*, *Karner*, and *Society for the Protection of Unborn Children Ireland*⁶¹⁰, fundamental rights act as a constraint to the discretion of Member States to limit the right to free movement. This approach could impact situations such as interest deduction limitation. As Spaventa has observed what is applied, and what displaces national law, is the directly effective right rather than the general principle⁶¹¹.

A case seems to fall within the field of application of Union law if the national rule in question (also) applies to cross-border economic activity and the facts of the case also have a cross-border element. As a result, the national legislation is open to scrutiny for compatibility with general principles of Union law⁶¹². Applying this approach for example to interest deduction limitations under the ATA directive, which was targeted to cross-border situations, Union law may challenge the national legislation. On the other hand, the connection to Union law exists already as the rule is based on the ATA directive belonging to the fourth category defined earlier.

Prechal, Judge at the Court of Justice, sums case law up underlining the fundamental rights as follows:⁶¹³ “The potential connecting factors of the third category seem to be, up until now, that some EU law rules adopted by the institutions apply to the case or that the subject-matter is otherwise governed by EU law, for instance by the Treaty freedoms. Empowering bases in the Treaties are, however, not sufficient.” Indeed, in Case C-617/10, *Åkerberg Fransson*, the Court of Justice held: “Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights (*related to source, i.e*

⁶⁰⁹ Case C-71/02 *Karner*.

⁶¹⁰ Case C-159/90 *Society for the Protection of Unborn Childre Ireland*.

⁶¹¹ Spaventa, p. 16. For tax this could mean that the freedom of establishment or free movement of capital together with proportionality principle could replace the national interest deduction limitation. An interesting twist to the issue is naturally that the situation is created through ATA directive.

⁶¹² Compare with Ross, 2006, p. 478, Costello, 2006, p. 119; Hofstötter 2005, p. 558; Spavental, 2004.

⁶¹³ Prechal 2010, pp. 9 and 11.

business) being applicable⁶¹⁴. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.”

For the fourth category, I could refer to multiple new rules. However, referring to the proposal for a Council Directive on global minimum tax (2022) illustrates the topic as it creates a new kind of taxation on a new level⁶¹⁵. MNEs having operations in multiple countries are taxed not only where the profit is generated, but also in case of low taxation in the headquarters country. The right to tax profit earned may be in the country that is defined to be a low-tax country or in the headquarters country. This right to tax profits across borders lies in the size of operations⁶¹⁶. The rules are complex and may not necessarily, or even likely, meet the high-level objective set for the rules⁶¹⁷. I see it to be likely that new situations of business originating from the new directive may create an equally new set of scrutiny for compatibility with general principles of Union law, which cannot be overdriven by a poorly drafted directive⁶¹⁸.

Global minimum tax rules create even another reflection or tension, especially on the application of EU anti-avoidance rules and the ECJ's approach to abuse. As the ECJ considered in the Danish cases⁶¹⁹, taxpayers cannot fraudulently refer to EU law by abusing EU rights. Even though taxpayers may seek beneficial tax treatment, this may not be done through artificial arrangements. This ECJ decision creates an obligation to identify a tax benefit that is abusive from the EU law point of view. As the EU has now implemented the minimum tax system, an assumption should be

⁶¹⁴ Notes by author. In the case of the ATA directive, the connection is of course more direct in spite of the fact that tax law is within the national mandate, not the EU mandate.

⁶¹⁵ Pillar 2, the global minimum tax is a profit-based tax, but not the same tax as corporate income tax. The standards for these two taxes are both profit based but the approach to profit is different. The purpose of a global minimum tax is to ensure a sufficient level of taxation in case corporate income tax is not high enough.

⁶¹⁶ Rules are applicable only for MNEs having net sales exceeding € 750 million.

⁶¹⁷ This may be due to neither regulators nor policy makers understanding the complexities built into the rules and even the set metrics. In spite of the rule talks about the effective tax rate, the level has been set more with reflections to the nominal tax rate.

⁶¹⁸ See the proposal for a Council Directive “Results of ex-post evaluations, Stakeholder consultation and impact assessment”, pp. 4–5. Businesses and accounting standards laying as the basis for global minimum tax are dealing with a large variety of situations, such as assessing losses due to EU sanctions on Russia to high-interest rate impacts on business. Some of the situations are new even for IFRS rules, there are unexpected impacts on minimum tax rules. The consolidated impact may create situations where national law cannot be compatible with general principles of EU law or the Charter.

⁶¹⁹ Cases C-115/16, C-118/16, C-119/16 and C-299/16, N Luxembourg 1 (C-115/16), X Denmark A/S (C-118/16), C Danmark I (C-119/16), Z Denmark ApS, paras. 96, 97, 98, 107, and 108.

made that there is no such benefit for any taxpayer subject to global minimum tax rules. There seems to be a conflict within the EU rules.

There are solid grounds to conclude that the EU Treaty and the EU Charter of Fundamental Rights have a crucial role in protecting the four basic freedoms, the fundamental cornerstones of taxpayers' legal protection. This protection of economic freedoms is stronger than for example what the Finnish constitution offers for taxpayers organised in the form of companies. Protection of taxpayers' legal rights on this level is still not automatic, there needs to be one of the three traditional or the new links to EU law⁶²⁰. When EU law is transposed into national law, it derogates from EU law or there is another link to EU law⁶²¹. The impact seems nevertheless to go deep into the Member States' legislative and administrative activities. There are also other views on this so-called *federal approach*. Snell considers that the EU Charter of Fundamental Rights, despite its restrictive wording, did not narrow the applicability of the fundamental rights, but maintained it in *the scope* of EU law⁶²².

Based on this I conclude that EU law and its principles bind not only national courts applying national legislation in cases linked to EU laws under fundamental rights in the EU treaties, but also national legislators in legislative work covered by the EU treaties and EU law⁶²³. Therefore, these fundamental rights in the Charter are part of the taxpayers' fundamental legal protection with enforcement.

Complexity is tax sovereignty: taxes will, as already considered, always interfere with the fundamental rights on a national level in one way or another, but only indirectly on the functioning of the EU internal market. The question is when is this indirect violation not justified anymore in the light of the EU Charter of Fundamental

⁶²⁰ The fourth link seems to be automatic as tax rules possibly limiting fundamental rights are directly connected to EU law.

⁶²¹ The fourth aspect relating to directives creating Member States an obligation to regulate taxation creates a new link to EU law. The link is however complex, as the new national rules have to be aligned with directives. These directives are argued based on the functioning of the internal market but through the indirect aspect, i.e. taxation. As Member States must align the rules with EU law it may not be capable of being competitive with the four EU freedoms. This is a complex situation that the ECJ will need to solve sooner or later.

⁶²² Snell 2015.

⁶²³ This would mean that when transposing directives, national governments should ensure, despite the transposition of the EU directive, compliance of the implemented rule with the EU Treaty and the EU Charter. The fact that the rule is drafted in the EU does not guarantee compliance with the EU Treaty and the EU Charter as we can see how narrow impact assessments have been at least in directives around the field of taxation.

Rights⁶²⁴. The challenge is that proportionality, especially the new EU-based tax rules, is not compared against the freedom rights or constitutional economic rights⁶²⁵. The rules are to a large extent copied from the OECD⁶²⁶.

I would conclude that there is a challenge from taxpayers' legal protection point of view when the EU is regulating taxation, an area where Member States have sovereignty. Based on Prechal's analysis, it is not self-evident that national tax rules interfere with EU law⁶²⁷, in other words, they do not automatically interfere with the functioning of the internal market. As the new regulation is not selective to the situations that would necessarily be in the scope of EU law, the new directives may create a challenge for taxpayers' legal protection. The ECJ will be a key gatekeeper in this respect.

6.3.2 The role of the ECJ

The core of the EU's legal framework is set in the Treaty on the European Union, the Treaty on the Functioning of the European Union, and the EU Charter of Fundamental Rights⁶²⁸. The final form is however formed by ECJ case law where the ECJ makes a judgement whether the rules are in line with general principles of EU law⁶²⁹. EU has no direct legislative power in the field of taxation⁶³⁰. ECJ case law is built on the four freedoms respecting the general principles based on "common

⁶²⁴ Justification has to be measured on a national level based on the national constitution and, if there is a connection to EU law, also on the level of the EU Treaty and the EU Charter.

⁶²⁵ The proportionality test is mostly ignored by statements that refer to the functioning of the internal market and harmonisation of the tax rules. The internal market is not a tax measure and that is why partial harmonisation will not necessarily result in improved functioning of the internal market.

⁶²⁶ As said, the OECD has no intra-market objective nor has it intended the rules for the EU internal market, merely to create a worldwide recommendation, if possible. This means that these rules may violate the functioning of the internal market as any other national tax rule.

⁶²⁷ See also Lennaerts & Gutierrez-Fons.

⁶²⁸ See Juusela and Urpilainen 2012.

⁶²⁹ Lennaerts & Gutierrez-Fons consider on page 1629 that the general principles of EU law have a gap-filling function allowing the ECJ to fill the normative gaps left by either EU Treaties or by EU legislation. Further, they conclude that "general principles of EU law serve as an aid to interpretation, since both EU law and national law falling within the scope of EU law must be interpreted in light of the general principles". General principles of EU law must be used as grounds for judicial review. This means that "EU legislation in breach of a general principle is to be held void and national laws falling within the scope of EU law that contravenes a general principle must be put aside". This means that the ECJ is considering even EU legislation in comparison with general principles of EU law creating an angle for taxpayers' legal protection.

⁶³⁰ Especially when considering the level of tax burden and substance rules impacting tax burden. See also the comments earlier about Article 115.

constitutional space”. The ECJ determines how general principles affect the legislative powers⁶³¹. The internal market's fundamentals for tax regulation is traditionally negative harmonisation of national rules defining when national rules violate the four freedoms⁶³². Meanwhile the post-BEPS actions have converted the harmonisation towards positive harmonisation of tax rules, not the harmonisation of business opportunities. This changes taxpayers’ position, but the general principles are still applicable even for post-BEPS EU legislation⁶³³.

At the first stage of taxpayers’ legal protection, ECJ praxis has, at minimum an indirect, impact on national court praxis. Courts have to consider EU rules in those cases where the issue has an EU relation, the link to EU legislation, as considered earlier. On the national level, the highest court has an obligation to refer the case to the ECJ for a ruling if EU law is applicable⁶³⁴. To ensure the correct interpretation of Union law, national courts alone cannot be relied on to reach unity in interpretation. If that were the case, there would not exist a unifying supreme court at all⁶³⁵. For taxpayers, it is crucial that national courts have an obligation to refer

⁶³¹ Lennaerts and Gutierrez-Fons state on page 1630 that general principles must be assessed in the light of a “mutual cross-fertilization” creating an exchange of opinions between the ECJ and national counterparties. Application of general principles is consistent with the principle of separation of powers as the ECJ does not rely on general principles to replace legislative choices by the ECJ’s preference, but rather attempts to determine how general principles affect the vertical and horizontal allocation of powers. This again illustrates how the consistency of general principles has a protective nature for taxpayers against excessive taxation.

⁶³² Naturally, the ECJ case law covers also the area of fraudulent or abusive use of the basic freedoms or in other words EU Community law. See De Broe, 2007, pp. 754–865.

⁶³³ In this respect, the assumption that EU legislation is always EU law compliant is perhaps too far-fetched. Already in line with the powers within a constitutional state taxpayer has the right to appeal and the court is using its powers to judge the case within the legal framework based on all applicable regulations. The court will take into account all the applicable legislation and create a consolidated judgment. Even the law in question (and the legislative process) would not have done this kind of consolidation. As Lennaerts and Gutierrez-Fons (p. 1630) state, they (as ECJ judges) attempt to determine how general principles affect the vertical and horizontal powers instead of replacing legislative choices.

⁶³⁴ Bernitz considers this obligation to be an important obligation for the Swedish courts, which is new and without any earlier praxis in the field. Bernitz has reported and analysed the reasons behind ruling requests made by the Swedish courts (and their low number). Bernitz 2010.

⁶³⁵ Dourado & de Palma Borges, pp. 21–25. Both national courts and the ECJ have a role. National courts know the local circumstances better leaving them some power. Meanwhile, the ECJ acts as a supreme court dealing with principles. As Lennaerts and Gutierrez-Fons consider (p. 1630), the general principles of EU law act also as an exchange of opinions between the ECJ and national courts giving rise to a “common constitutional space” defined by dynamic dialogue.

the case to the ECJ when the case is in the scope of EU legislation and exists as an issue of interpretation of the EC Treaty⁶³⁶. Obligation to national courts creates legal protection for taxpayers from national non-harmonised use of EU laws and is therefore important for the enforcement of EU law⁶³⁷ and the protection of taxpayers' rights. This means that the ECJ has an important role in taxpayers' legal protection as the general principles can be enforced wider than for example in the Finnish constitution.

The ECJ has created the *acte clair* (and *acte éclair*) principle in its case *CILFIT*⁶³⁸. *Acte clair* means in short terms that each national court being the final instance is liable to ask for an advanced ruling from the ECJ if there are Union law topics and there is no existing court praxis in an identical case. Only if it is seen as unnecessary due to the clarity of the case, there is no obligation to ask for a ruling. Even though the principle leaves national courts seemingly quite a wide range of room for assessment, it acts in favour of taxpayers' legal protection⁶³⁹.

6.4 Are BEPS 1&2 changing the EU's role in taxpayers' economic freedoms?

The EU has in the last decade been active in BEPS-oriented tax regulation. EU's objective is to ensure the functionality of the internal market in line with Article 115

⁶³⁶ Article 243(3) of the EC Treaty. See Snell 2015. As Snell states, the ECJ's jurisdiction may be wide, if the EU has extensive powers to legislate. In this sense the approach the EU has taken in tax matters is interesting. Is it a sufficient argument to refer a case to the ECJ based on a BEPS-initiated directive where the EU has no direct taxing power and is basing its legislative actions on the functioning of the internal market? The risk could be in extreme cases that the ECJ would consider that national tax legislation has relevance from the EU law point of view as it affects only national situations. This would be an unexpected outcome: the EU relying on the functioning of the internal market as a basis for its legislative powers, but the ECJ stating that there is no relevance from an EU law point of view as the situation is not harming the internal market. This is possible as many of the situations the new directives refer to are purely national situations covered by an EU directive. For example, general anti-avoidance rules and interest deduction limitation rules cover national and cross-border situations.

⁶³⁷ Enforcement is soft if courts are reluctant to refer the cases to the ECJ, taxpayers face not only long legal processes when seeking their rights based on the EU Treaties, but sometimes may be denied the rights, at least to have a final word from the ECJ, due to soft enforcement.

⁶³⁸ C-283/81, *CILFIT*, supported by C-391/95 – *Van Uden Maritime v Kommanditgesellschaft in Firma Deco-Line and Others*. See also Dourado.

⁶³⁹ The principle may look broad but, for example, the question of an identical case is in reality quite a complex measure that may be easy to hide behind but is not actually valid. For example, the Swedish Supreme Court seems to use this as a formal argument, see for example SAC 4210–4216-21.

of the Treaty on the Functioning of the European Union⁶⁴⁰. There are several examples on the BEPS related EU regulation, but just to mention the directive regarding hybrid mismatches⁶⁴¹ and the proposal for global minimum tax as examples⁶⁴². The argument of a well-functioning internal market may be justified but is not automatic⁶⁴³. The fact that some countries offer “private” tax solutions for some taxpayers does not directly impact the functioning of the internal market⁶⁴⁴ and resolving the issue through tax rules may not be the correct solution. These kinds of situations create unfair competition in the EU that should be solved perhaps by state aid rules based on the legality principle (Article 51). The BEPS-related issues are important, at least to a certain extent, but solving these kinds of competition issues through tax-focused tax legislation may lead to negative impacts on businesses and ignore taxpayers’ economic freedoms. Even justified solutions are impacted creating inequality for businesses⁶⁴⁵. Protection of economic freedom rights requires extraordinary national and EU-level dispute resolution action.

⁶⁴⁰ Article 115, referring to the functioning of the EU’s internal market, has been used as base justification for the EU’s legislative actions in the area of taxation for most of the BEPS 1 and 2 related directives. EU has regulated once in the post-BEPS era directly on tax. The Emergency Regulation (EU) 2022/1854 was not a BEPS-related regulation at all as it referred to managing a situation with high energy prices. This regulation (note, not a directive) has been already subject to multiple appeals, such as an Exxon lawsuit (based on Politico).

⁶⁴¹ A good example of this is 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 laying five different programs in the fight against harmful tax practices. For example, it is stated in the proposal for a Council Directive amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries that: "Hybrid mismatch arrangements exploit differences in the tax treatment of an entity or instrument under the laws of two or more tax jurisdictions to achieve double non-taxation. These types of arrangements are widespread and result in a substantial erosion of the taxable bases of corporate taxpayers in the EU. Therefore, it is necessary to lay down rules against this kind of tax base erosion". Rajamäki confirms the narrow approach taken by OECD. The hybrid arrangements are aimed to tackle arrangements whereby MNE’s can structure their revenue and costs to reach zero taxation, Rajamäki pp 262–263. Further Rajamäki states the EU Commission defined hybrid arrangements to be included in tax avoidance work to be solved urgently, Rajamäki p. 268. While this may be true, even legitimate situations may be covered creating a risk for double taxation. Branch set up one example of this kind of situation.

⁶⁴² Proposal for a Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union (COM (2021) 823 final).

⁶⁴³ See for example the ECJ case C-279/93 *Schumacker*, para. 21.

⁶⁴⁴ It may though create free riders and have an impact on plain playing field as not all are receiving these benefits.

⁶⁴⁵ This should be obvious: as setups are closed for those who are utilising them artificially, those who have a genuine need for these kinds of setups will suffer and their freedoms

The question of the internal market becomes even more complex when directives aim to create new tax regulation. EU has no legislative power in the area of taxation and therefore should not be able to reallocate tax basis, set a certain level for taxation nor regulate actually on the detailed level on taxes based on Article 115. Harmonised minimum rules do not eliminate the fact of independent national measures nor a direct improvement of the internal market, the foundation of economic freedoms⁶⁴⁶.

On the other hand, supporting the OECD's implementation of a global minimum tax within the EU could be an important initiative but only if it is measured against the EU's internal market as a totality. Unfortunately, an EU directive leaves space for national level of selections and unclarities, which create complexity from this point of view⁶⁴⁷. Further, the OECD has developed tax rules, but not to improve the functioning of the internal market.

Even though Member States have the sole right to tax, this taxing right should not infringe on the general principles of EU law including the four fundamental freedoms that protect taxpayers. In other words, taxing powers are effectively limited based on the EU's fundamental rights. This protection could be argued to exist based on a federal approach⁶⁴⁸ representing a wide approach to the EU's mandate, at least on a general principle level⁶⁴⁹. This does not create a justification for EU tax legislation. Even, based on the other end of the spectrum, which has a narrower approach to applicability of

will be restricted. This may be a question also from a proportionality point of view on the EU's attempts to solve the issue.

⁶⁴⁶ When comparing how BEPS actions were considered against the functioning of the internal market to how state aid Article 117 has been built for that purpose, it becomes evident how thin the attempt to improve the functioning of the internal market is. The measures, such as in Article 117, are missing. A minimum rule approach with few optional exemptions is not sufficient.

⁶⁴⁷ I think that the EU should only promote OECD regulation, not co-create it. This would mean that the EU's directives would be more fundamental in outlining the main principles, the dos and don'ts. Promotion of identical rules and processes to align the assessments when needed would support the functioning of the EU's internal market meanwhile co-creating moves into the area of tax legislative actions already.

⁶⁴⁸ Snell refers to the US federal system where case law has a strong centralising impact reducing diversity among States. This is due to the Bill of Rights covering based on the incorporation doctrine not only the Federal Government but also the States. In case this learning is applicable to EU law, it would justify the ECJ's role and approach as Lennaerts and Gutierrez-Fons have described.

⁶⁴⁹ Concerning the US experience, the incorporation doctrine would limit Member States' freedom. This, however, is not necessarily directly comparable to EU tax legislation. The incorporation doctrine sets an obligation for the States to take the Bill of Rights limitations into account as Member States have to take into account the EU Charter and the Treaties. In relation to EU tax law, it should be carefully drafted to ensure that it actually is proportional to general principles of EU law as well as the EU Charter and the Treaties.

fundamental rights, they are applied only when Member States implement EU law⁶⁵⁰. According to this approach, the fundamental rights have the centralising impact of protecting the four freedoms, not national, decentralised taxing rights.

The question of whether the EU has legislative powers within direct tax is not therefore clear⁶⁵¹. Meanwhile, the ECJ has been looking for competence to rule in tax issues, but the same analysis does not cover necessarily the EU's competence for legislative powers. As Lennaerts and Gutierrez-Fons put it: "Even in areas where the Union does not enjoy legislative competence as such, the joint application of the substantive law of the Union and of general principles may force the national legislature to accommodate its policy choices to EU law"⁶⁵². Even if the EU were to legislate the rule, it has to be implemented on a national level in compliance with the general principles of EU law also in these cases⁶⁵³. This creates complexity, as the EU is theoretically legislating on tax without having an actual mandate⁶⁵⁴. Neither general principles of the EU law nor the national constitutions are considered as objectives of Article 115 to be tax measures⁶⁵⁵. This has not been considered properly.

⁶⁵⁰ See Snell, p. 2, and his reference to FG Jacobs.

⁶⁵¹ The EU may be taking actions step by step towards this direction, but as long as the EU Treaty is not changed, this is not the case. Further, despite the EU having legislative powers in the area of taxation, even this regulation should respect the fundamental EU freedoms.

⁶⁵² Lennaerts & Gutierrez-Fons, p. 1629.

⁶⁵³ The fact that the EU is regulating tax specifically does not mean that the rules would be in line with EU legislation. In this respect the situation is even worse than for example the constitutional pre-control in Finland; there is no organisation that would make this consideration, nor is there any directly available EU-court exercising a clear post control on the regulation. The OECD is not considering the EU internal market impacts.

⁶⁵⁴ These substance rules do not bind taxpayers, but governments that have to implement them into national law. In simple terms, if the EU's centralised proposal fails in improving the EU internal market most likely the decentralised part fails also.

⁶⁵⁵ Article 115 could give some level of competence if the EU aims to improve the functioning of the internal market through existing legislation. As tax impacts the functioning of the internal market only in limited cases and is dependent on other factors than tax, this objective is not self-evident for tax legislation for the functioning of the internal market. The EU's interference in tax legislation should therefore be strictly proportional with respect to the total functioning of the internal market to be fully legitimate. This would ensure that EU-based regulation is not going beyond what is needed for example to reallocation of tax basis between Member States. Proportionality could be reached by leaving sufficient space for Member States in tax legislation. This may be opposite to the Commission's aims to cover the area of corporate income tax with related directives and finally to take over what is left of tax sovereignty from the Member States. See, Penttilä 2022. Further, it is important to remember that the ECJ has multiple measures to ensure balanced taxing powers between Member States, see for example case C-231/05, *AA Oy*.

As we can see, the EU's role as a tax legislator is challenging and complex. The second level of complexity is due to detailed directives not being drafted with clarity, predictability, and certainty in mind, the standard requirements set for tax law⁶⁵⁶. This takes us to the question of dispute resolution, which relates not only to taxpayers' legal protection or legal rights. It relates also to the EU's mandate to legislate tax matters. If the rule would improve the internal market, there should be efficient dispute resolution to ensure a harmonised approach. For example, the directive proposal on the OECD's initiative on global minimum tax creates a new cross-border tax system as well as new cross-border impacts without EU-wide clarity, alignment, efficient escalation, and appeal method. This limits economic freedoms. As an add-on, all taxpayers are not going to be taxed equally⁶⁵⁷.

Relying on national courts referring the cases to the ECJ is ignoring taxpayers' economic freedoms. For example, Nordic countries are reluctant to refer cases to the ECJ⁶⁵⁸. Taxpayers have an unequal possibility to enforce their economic freedoms. This illustrates the urgency and fiscal focus in drafting new EU rules rather than

⁶⁵⁶ See for example 81 § of the Finnish Constitution. Also, the ECJ has been of the same opinion, see C-318/10 *SIAT*, para. 73: "The situation of the Belgian taxpayer is further complicated by the fact that he does not have any information on which Member States have tax regimes which are appreciably more advantageous than the Belgian regime. He is thus compelled, if he intends to use the services of a person established in another Member State, to carry out his own assessment as to whether taxation in that Member State is appreciably more advantageous than in Belgium, in order to determine which of the Belgian tax arrangements governing deduction of business expenses will fall to be applied in his case, which places him in a situation of legal uncertainty. In addition, it is particularly difficult to identify precisely the situations which the adverb 'appreciably' is intended to cover. [...] Furthermore, and whatever the case may be, it seems particularly difficult to foresee all possible applications of such a provision.", and para. 74: "In conclusion, it is my view that, even though it is possible to regard some of the specific characteristics of the Belgian legislation in question as compatible, the legislation considered as a whole establishes a disproportionate, hence unjustified, restriction of the freedom to provide services". See also the ECJ case C- 70/83 *Clobbenburg*, para. 11: "Court has already done on several occasions, that Community legislation must be unequivocal and its application must be predictable for those who are subject to it".

⁶⁵⁷ MNEs are also in the future subject to normal CIT and they are assessed based on local CIT rules as well as tax treaties on withholding tax issues and transfer pricing. Additionally, MNEs are taxed differently than operations having a turnover below € 750 million.

⁶⁵⁸ Bernitz 1010 considers Nordic countries to be restrictive in getting cases referred to the ECJ, with Sweden being consistently passive (pp. 20–27) in spite of Commission process against Sweden, Bernitz, pp. 18–19. See also Bernitz 2016.

focusing on the BEPS objectives⁶⁵⁹ or the balancing powers based on general principles of EU law.

New EU directive-based anti-avoidance regulation represents the new era of anti-avoidance approach⁶⁶⁰ and applies to a wide range of setups without measuring the actual purpose of the setup, in other words, they impact equally normal business setups⁶⁶¹. For example, the interest deduction rules presented in Council Directive (EU) 2016/1164 restrict interest deduction to part of taxable EBITDA⁶⁶². The EU aims to eliminate profit shifting but impacts all financing. There is no measure in place whether financing has been arranged to avoid taxes or purely or mainly for

⁶⁵⁹ The main focus has been perhaps to ensure the collection of taxes in EU Member States with an assumption that taxable bases are hidden, not to ensure for example fair tax base allocation between developed and developing countries. New rules allocate only minimal income to developing countries and the national interests of big industrial countries have had the majority of the weight in drafting the rules.

⁶⁶⁰ The BEPS-based anti-avoidance-minded regulation seeks to identify tax avoidance from multiple angles. Penttilä (2022) raised the question of whether there are limits to GAAR applicability at all.

⁶⁶¹ Knuutinen 2020 considers that tax avoidance can be eliminated by two methods: preventive and repressive, i.e. pre or post methods (pp. 48–50). Knuutinen makes a point that clear tax legislation is a key method for the preventive elimination of tax avoidance as the rules can be built in a way that they are difficult to circumvent. I agree with this, but this conclusion illustrates also strongly the importance of taxpayers' legal protection. Unless the law is clear and predictable, taxpayers cannot rely on the tax treatment of the selected setup. Further, Knuutinen has identified different types of anti-avoidance rules, such as general and specific anti-avoidance rules and anti-avoidance-initiated rules not including anti-avoidance measures at all (pp. 52–55).

⁶⁶² Interest deduction limitation is interesting for the purposes of this study: financing, especially group internal financing, is often seen to erode tax base and be aggressive tax planning, especially if financing is located to a Member State with lower tax rate. In genuine business cases this would be only utilising freedom of establishment.

genuine business reasons⁶⁶³. It will affect all taxpayers randomly⁶⁶⁴ depending on the financial environment rather than tax planning, in other word rule of law⁶⁶⁵. They create a hinder for taxpayers' economic freedoms by disturbing neutrality and creating additional compliance and tax burdens.

Freedom rights ensure the possibility to choose the legal form and models for financial activities established within the EU internal market even though tax treatment could be more beneficial in one way of doing compared to another solution⁶⁶⁶. This is crucial as one solution fits one business and another solution some

⁶⁶³ Interest deduction rule is a good example of a rule that originally had an objective to eliminate profit shifting. High-interest income in a low or zero-taxed country with a deduction in a high-tax country was seen as tax avoidance. There seems to have been a strong assumption of tax avoidance connected to internal financing. OECD inclusive framework considered in 2014–2015: “The use of interest (and in particular related party interest) is perhaps one of the simplest of the profit-shifting techniques available in international tax planning. The fluidity and fungibility of money make it a relatively simple exercise to adjust the mix of debt and equity in a controlled entity.” Still, in the 2016 action 4 update, the OECD considered: “Thus, multinational groups may achieve favourable tax results by adjusting the amount of debt in a group entity. The influence of tax rules on the location of debt within multinational groups has been established in a number of academic studies and it is well known that groups can easily multiply the level of debt at the level of individual group entities via intra-group financing.” It is not difficult to agree with these statements creating the objective of the interest deduction rule, but they seem to lack proportionality: statements ignore totally that average (group consolidated equity debt ratio) has nothing to do with actual funding needs in a stand-alone investment and that tax planning can be distinguished from pure tax avoidance. The selected measure illustrates well also the lack of understanding the basic business logic and facts in financing; central financing requires always internal financing and decentralised financing is not a tax choice, but a business choice.

⁶⁶⁴ Interest deductibility depends on profitability, grade of capital intensive, and financial strength, not on tax avoidance purposes. Interest deductibility is also dependent on whether investments or acquisitions are domestic (and will result in increased taxable EBITDA in the investing country) or if they are cross-border transactions.

⁶⁶⁵ Interest deduction rules apply to all taxpayers. It limits the deduction of negative financial net in relation to taxable EBITDA. The rules impact more capital-intensive businesses by nature, i.e. those of financing, both external and internal financing, is a material business issue. Especially investments create the material need for financing while net finance cost is dependent on market interest levels and EBITDA on taxable profits, i.e. on profitability, not on tax planning. The rules impact capital-light businesses less. These businesses can employ artificial setups to utilise a tax benefit and artificially shift income between countries.

⁶⁶⁶ Different tax treatment as such is not a justification to restrict the use of freedom rights as can be seen from the ECJ's rule of reason test (*C-436/00 X, Y and Riksskatteverket*, para. 49). Free movement, for example, can be restricted, but only if the rule of reason test is fulfilled and the justification is proportional, see Urpilainen 2012, pp. 80 and 107.

other business⁶⁶⁷. Inappropriate non-focused and fiscally-oriented tax measures may create obstacles for legitimate businesses as they also influence other situations than just tax avoidance⁶⁶⁸. Constitutions, independent of whether we consider national constitutions or EU law-based fundamental principles⁶⁶⁹, set limits for taxing powers⁶⁷⁰.

Before considering the qualitative aspect of legislative work it is important to review the aspects of freedom rights offered to different kinds of taxpayers.

6.5 National and EU Freedom rights – Comparison of entrepreneurial aspects

Fundamental rights according to the Finnish Constitution belong mainly to individuals⁶⁷¹. Part of fundamental rights in national constitutions are applicable only to natural persons⁶⁷². Simultaneously some, more financially oriented rights, may be applied at least indirectly to all taxpayers⁶⁷³. Some taxpayers are natural persons meanwhile others, such as corporations, can be seen as joint ventures of

⁶⁶⁷ For example, capital-intensive operations need to consider group internal financing totally differently than net sales-based business. This means that what is the crucial and deeply business-related solution for capital intensive business in relation to financing may be artificial for net sales-based operations.

⁶⁶⁸ For example, high market interest rates alone may create challenges for interest deduction, especially for capital-intensive businesses. Market interest rates are not connected to tax avoidance but impact the EBITDA test. Equally, the Russian invasion of Ukraine impacted the business environment in a way that influences capabilities of deducting interests, not interfering with EU freedom rights, but by possibly creating excessive taxation.

⁶⁶⁹ Vanistendael 2014 considers EU law as interpreted by the ECJ to represent a kind of a majority view of national constitutions.

⁶⁷⁰ This is applicable even in the era of BEPS type of rules. Changing the rule of law-based approach would mean a return to the arbitrariness of taxation at least to a certain extent. The rules would fail in their objectives as King Rex failed in his efforts to be a good king, see Fuller.

⁶⁷¹ Karapuu.

⁶⁷² Such rights are often closely connected to a person, such as social and educational rights or the right of religion or opinion.

⁶⁷³ Protection that the Finnish Constitution offers is often regarded to be restricted to corporations, especially if they are listed or have large financial capabilities, see PeVL 97/2022, para. 13. This does not however mean that there would be no protection at all. The Finnish Constitutional Law Committee considered in the same statement that it does not take a position on the EU law substantive aspects as they are mainly outside its mandate (para. 4).

many individuals⁶⁷⁴. On the other hand, legal form does not necessarily define the nature of a taxpayer⁶⁷⁵. Independently of the legal form of business, businesses are liable to pay tax⁶⁷⁶. Even when considering corporations, the link between the tax burden on the business and the shareholders of the corporation exists⁶⁷⁷.

Many of the fundamental rights, especially freedom rights, are based on equality⁶⁷⁸. On the other hand, equality does not mean equal treatment among all taxpayers, it can also create “discrimination”⁶⁷⁹. When considering the applicability of fundamental rights to legal persons, we can see two levels: on one hand, national and EU level regulations and the business operator, the company itself as the first

⁶⁷⁴ Avi-Yonah (2006, pp. 2–3) corporations or companies can be approached from three different angles: 1. artificial entity view meaning that the corporation is a creature of the state (by legislative actions), 2. real entity view meaning that the corporation is separate both from the state and shareholders or other stakeholders land, and 3. nexus of contracts view meaning that corporation is an aggregate of its individual members meaning shareholders or partners. Knuutinen considers that the approach has an impact on how the liability to pay taxes is considered (Knuutinen 2014, pp. 63–65). In my opinion this is a valid view: when small family-owned businesses consider taxation of the business, they see it as part of their individual tax burden meanwhile large corporations are often seen more as separate from their owners.

⁶⁷⁵ Posner, p. 409 considers that “the firm is a method of organizing production; the corporation is a method, like a bond indenture, for attracting capital into firm. The typical large business is both firm and corporation.” In this respect, the remark that the Finnish Constitutional Law Committee made in its statement PeVL 97/2022 (and referring to multiple earlier statements) on how the size and form of the taxpayer impact constitutional protection is a valid point, but perhaps a bit narrow. Meanwhile, listed companies and large taxpayers have better financial capabilities, but proportionally their capability is not necessarily any better than a natural person unless their business consists of other operations that are not impacted by the tax. The capabilities may be created by having operations in multiple jurisdictions or having multiple branches of businesses.

⁶⁷⁶ It appears that on a political level corporations are seen to be real entities in Avi-Yonah’s way of defining them. This can be concluded from, for example, the proposal for a Council Directive on ensuring a global minimum level of taxation, 2021: “[...] to ensure that all corporations pay their fair share of tax on profits generated [...]” (p 1). This view on the other hand entirely ignores the totality, i.e. other approaches identified by Avi-Yonah: what is the total tax burden when even shareholders are considered.

⁶⁷⁷ Shareholders’ value creation depends on the value of their participation and the profit distribution. High taxation of the business will not only impact the balance sheet of the corporation (and the value of the corporation), but also the capability to invest. This again has an impact on the owner. Owners use often return on capital as a key performance indicator. This includes tax burden. Taxation of the profits also naturally impacts profit distributions. For example, the Finnish tax system taxes the income of a corporation twice: once in the hands of the corporation and a second time when distributed as dividends.

⁶⁷⁸ Equality is also one of the foundations of the EU, see Vanistendael 2014, p. 31.

⁶⁷⁹ See Prechal, pp. 14–15. Equality requires justification and comparable situations.

level and investors of the company on the second level. I will explain this through a "real life" example:

Sweden increased the real estate tax on hydropower to 2.8% in order to tax extra profits of hydropower after the EU's emission trading was implemented. The biggest operator in Swedish hydropower market is Vattenfall AB, a wholly Swedish government-owned company. Vattenfall AB's market share is ca 50%. Other material players, creating a market share of appr. 35-40% were foreign-owned. When the power price decreased, real estate tax in practical terms ruined the profitability of hydropower production. The increased real estate tax was harmful to the hydropower operators independently of the owner and did not discriminate against any taxpayers, in this sense, it was equal among hydropower producers⁶⁸⁰. First-level consideration is therefore for this part in line with both the national constitution and EU law. On the level of investors, the shareholders were treated differently. For the Swedish government, it in actual terms does not matter whether they receive the profits in the form of dividends or tax – the return on investment is safe. For foreign investors or private investors, this is not the case. They need to satisfy the investors' expectations through dividends which in turn may impact the collection of capital. This may limit the free movement of capital, but also the freedom of establishment within EU law⁶⁸¹.

The basis of freedom rights is different when we consider them on the national level and the EU level. National freedom rights by nature have a wider objective than the EU's fundamentals. The EU is built on the four pillars creating an internal market⁶⁸², which means that also corporations and companies enjoy these fundamental rights. The ECJ has multiple decisions where the right to establishment

⁶⁸⁰ The question of equality among all power producers still remains: were hydropower producers set in a worse position as they were taxed at a higher rate than any other power producer?

⁶⁸¹ This may not be the case based on the national constitution as the connection is seen indirectly between the tax burden and ownership. The connection is not seen to be passed on from the company to its owner.

⁶⁸² As the EU is built on the internal market based on the four pillars, the objective differs from the objectives of national constitutions. The EU's four pillars are built on the Member State constitutional fundamentals and, as Lenaerts and Gutierrez-Fons consider, the EU general principles are based on Member State constitutional principles. The objective of the EU includes naturally not only natural persons but all taxpayers in the scope of EU freedoms.

and free movement of capital and services are considered⁶⁸³ for all taxpayers. Snell considers that the ECJ case offers more protection to those fundamental rights that are connected to financial interests than other, more individual rights⁶⁸⁴.

The protection is not unconditional as certain thresholds need to be exceeded⁶⁸⁵. The purpose of the fundamental rules is not to create a competitive advantage for one taxpayer⁶⁸⁶ but to ensure a fair and equal playing field. Each business will carry the entrepreneurial risks and enjoy the benefits based on choices made.

All businesses cannot be treated equally due to differences between businesses and taxpayers. First of all, the Finnish Constitution makes a distinction on the type and nature of taxpayer: corporate taxpayers' protection is weaker than individual taxpayers' protection. Within EU rules further horizontal and vertical differences need to be considered. I will now consider how EU law covers different kinds of situations. I will briefly analyse aspects of small operations compared to large ones.

6.5.1 Small operations vs. large operations

When comparing fundamental rights, their purpose, and importance in respect to large operations versus small operations, the argument has been that large multinational enterprises have more opportunities to minimise their taxes, in other

⁶⁸³ For example, Case C-318/10, *SIAT* where the taxpayer was protected from unclear legislation based on the principle of legal certainty. See also the ECJ case C-446/03 *Marks & Spencer plc*, paras. 31 and 34, as well as ECJ C-279/93 *Schumacker*, para. 24.

⁶⁸⁴ Snell, p. 15. Snell considers that “the free movement provisions of the Treaty are only breached if the aim pursued is purely economic or if the selected means are not appropriate or necessary”.

⁶⁸⁵ *Ibid.* There needs to be a connection to EU law, see Prechal as well as Lennaerts and Gutierrez-Fons. As taxation is not within the mandate of the EU, this connection needs to be visible as explained already earlier. This part of the protection is legal. Another requirement is that the freedoms may not be misused. For this part see Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg I (C-115/16)*, *X Denmark A/S (C-118/16)*, *C Danmark I (C-119/16)*, *Z Denmark ApS*, para. 96, with references to other ECJ decisions: “It is settled case-law that there is, in EU law, a general legal principle that EU law cannot be relied on for abusive or fraudulent ends Case C-212/97 *Centros Ltd and Erhvervs-og Selskabsstyrelsen*, para 24 and the case-cited; Case C-255/02, *Halifax plc* para 68; C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas*, para 35; Case C-251/16, *Edward Cussens, John Jennings, Vincent Kingston v T.G. Brosnan* para 27; and Case C-356/15 *European Commission, v Kingdom of Belgium* para 99”). The new era of responsible tax management is responding to this point raised by the ECJ: taxpayers need to respect the purpose or the spirit of the law and make lawful contributions to society to have also the protection offered by the legal system.

⁶⁸⁶ This illustrates the indirect impact that may justify EU tax directives, but only if they are proportional.

words, they have better possibilities to employ freedom rights⁶⁸⁷. This somewhat narrow statement is true to a certain extent as multinational entities have operations in several countries and the possibility to utilise differences of tax systems in these countries but meanwhile, they also have an obligation to comply with multiple different rules and regulations⁶⁸⁸. The second angle, which has been discussed already earlier, is that the constitutional protection at least in Finland decreases in relation to the size of the business⁶⁸⁹.

Operating in multiple countries or having a certain size of operation, like MNEs do, cannot create an assumption of tax avoidance⁶⁹⁰ nor are the freedom rights creating an absolute right to use them contrary to the purpose of EU law⁶⁹¹. MNEs

⁶⁸⁷ The European Commission stated this view in its report on aggressive tax planning indicators, Taxation Papers 2017, p. 21. The report does not represent scientific research, perhaps more a report with a clear agenda including strong statements. This is stated already in the objectives of the study: “[...] to complement the existing legal evidence base and theoretical considerations about ATP in the EU Member States with economic substance.” See also the proposal for a Directive on global minimum tax of December 2021 and the European Commission communication on Business taxation. My view is that these views are interesting as they seem to be based on pre-BEPS facts without any post-BEPS review. European Commission objectives may be more on creating a taxing power for the EU rather than limiting freedom rights from any taxpayer. The BEPS-based development offers the Commission an opportunity to drive this development and a lower focus on BEPS topics would not be beneficial for the Commission. This appears to large MNEs however as mistrust and an attempt to see an increasing amount of operations as tax avoidance, as Penttilä put it in 2022 “are there any limits for applying tax avoidance rules”.

⁶⁸⁸ Urpilainen considers that local, i.e. stand-alone countries, do not have the capability to manage global financial movements and it is questionable how far it should be targeted. Urpilainen, p. 44. The statement referring to global financial movements and as a result of that pinpointing MNEs’ possibility to use mismatches or shift profits ignores all the compliance burden and the risk of double taxation that operations in multiple countries bring. Equally, it ignores the differences between operations labelling some types of setups aggressive. Meanwhile, the setup may be a crucial part of some operations but be artificial for another business. Likewise, it ignores the importance of fundamental legal protection that taxpayer has, such as ensuring that rules are proportional. At the same time, it is a fact that tax bases in different countries are changing due to globalisation and digitalisation of operations, but these phenomena are changes in the financial and operative environment, not tax avoidance. The response should rather be to adjust the substantive tax regulation than focusing on GAARs.

⁶⁸⁹ See for example PerVL 97/2022 vp HE 320/2022 vp.

⁶⁹⁰ De Broe 2007 refers to a number of ECJ cases when concluding that incorporation of a subsidiary does not justify a general presumption of tax avoidance as long as the subsidiary is subject to tax in another Member State, pp. 803–804.

⁶⁹¹ In this respect, ECJ case law has in multiple cases denied the misuse of EU law and principles by wholly artificial arrangements, see De Broe 2007, p. 806. See also Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg 1 (C-115/16)*, X

do not have absolute freedom to transfer profits freely between countries⁶⁹². Operations in multiple countries are generally a result of operative needs with local compliance obligations⁶⁹³. Small and medium-sized operations, that are located in a few limited countries, have commonly exemptions and reliefs of taxes and compliance obligations. Small and large enterprises are not incomparable situations and are therefore treated differently⁶⁹⁴. However, the difference in compliance obligations should be proportional and not based on the assumption that size creates tax avoidance. In other words, this means that compliance obligations and risks should be compared to eliminate extensive burden for anyone⁶⁹⁵.

Comparisons purely between large corporations and smaller businesses are complex. If we consider the vertical equality between taxpayers, the comparison is

Denmark A/S (C-118/16), C Danmark I (C-119/16), Z Danmark ApS, para. 96, where the ECJ stated that “there is, in EU law, a general legal principle that EU law cannot be relied on for abusive or fraudulent ends”. See also for example ECJ 212/97 *Centros*, para. 24: “Member State is entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law”. When analysing the joined cases (Danish) cases it is important to note that it was a case where a non-EU company was entering EU markets in a way to get EU internal market benefits, not an intra-market situation to start with.

⁶⁹² Active use of treaty benefits purely to seek tax advantages without a real substance or business purpose has not been the purpose of tax treaties or EU law. Abuse of tax treaties as well as tax avoidance have been tackled by tax treaties, ECJ case law, and local legislations already for decades. This view has been confirmed already long before any BEPS, see De Broe 2007, p. 808. This is an aspect that responsible tax management is highlighting. In this respect, it is making an attempt to illustrate the justification of utilising freedom rights. De Broe 2007 (p. 803) reminds that incorporation of a subsidiary in another Member State does not create an assumption of tax avoidance.

⁶⁹³ In the case of a responsible taxpayer, the principles of how, when, and where incorporation of a company is acceptable and how committed the taxpayer is to comply with the existing rules.

⁶⁹⁴ Prechall considers equality and prohibition of discrimination to create a positive obligation. Further, Prechal considers that “both the principle of equality and the prohibition of discrimination require that, save where there is an objective justification, comparable situations must not be treated differently and that different situations must not be treated in the same way, there may be situations which are so different that treating them equally may amount to discrimination.” Trying to make small operations and large operations treatment equal may be such a situation. See also statements of the Finnish Constitutional Law Committee, *ibid*.

⁶⁹⁵ In the current legislative environment such analysis is not done. BEPS 1 and 2 have increased the compliance burden of MNEs with a minimum € 750 million turnover materially while SME compliance burden has been reduced or their increase is more focused.

rather clear when done within one country: if tax rules are the same for all taxpayers that are comparable⁶⁹⁶, taxpayers are equally treated. The fact that small operations get reliefs and exemptions that large operations do not have does not necessarily create a violation of equality⁶⁹⁷ as small operations have limited capability to carry risk and compliance obligations whereas large operations can have better capability to manage compliance at least to a certain extent and their risk is spread to multiple locations. Companies are not vertically in a comparable position.

When considering the horizontal equality among taxpayers, the question can be different. One taxpayer should not be treated better than another based on the form or size of the operation⁶⁹⁸, at least based on the EU general principles and the Treaties⁶⁹⁹. The OECD and the EU have set a turnover limit for some BEPS-related rules⁷⁰⁰ for businesses that have a turnover of more than € 750 million. This kind of monetary limit may be artificial as the limit is not based on real factors⁷⁰¹. This kind of limit may set a limitation for growth opportunities⁷⁰².

Even more complex than the additional compliance burden is the additional tax burden, such as the global minimum tax. This additional tax burden may in some cases create a competitive advantage and even a subsidy⁷⁰³.

⁶⁹⁶ Comparing small operations to small operations, for example. See Tikka, pp. 83–84.

⁶⁹⁷ State aid rules may be applicable depending on how the differences are created.

⁶⁹⁸ Equality is a complex topic. For example, when considering if a taxpayer can trust tax authorities' decisions in a stand-alone case may be overruled by equality factors: one taxpayer cannot benefit from tax authorities' misunderstanding when all other taxpayers are taxed equally or at least this may happen only in very few cases. See also Tikka 1972, pp. 83–84.

⁶⁹⁹ Equal treatment, or discrimination from another angle, is prohibited though only in case of citizen of another Member State is treated worse than in the domestic situation.

⁷⁰⁰ For example, DAC 6 reporting obligations, public and tax authority country-by-country reporting, and global minimum tax rules are set for MNEs with a turnover over € 750 million. These few examples may look like a simple task to execute in the digital environment, but actually, each of these obligations creates a material compliance obligation with no actual purpose. This is obvious in the case of DAC 6 reporting obligation as they cover normal transactions as someone could use them for tax avoidance purposes. An MNE cannot rely on the fact that the transaction is purely business-oriented if it needs to be reported under a GAAR section, not to mention that this kind of out-of-objective reporting creates unclarity also for tax authorities.

⁷⁰¹ Businesses having a turnover of € 740 million do not differ that much from operations having € 760 million or € 500 million turnover. In fact, the nature of the business may create entirely different kinds of capabilities as some operations create turnover more than others. This is a challenge of these kinds of limits: they easily create discrimination unless the proportionality is considered properly.

⁷⁰² This view has not been tested yet in any court or other instance.

⁷⁰³ See case *Boiron* C 526/04, which was a case about increased tax creating a subsidy in comparison to companies paying the normal, standard tax.

Each Member State can define tax burden for their taxpayers based on their objectives as long as the tax is not in conflict with EU law⁷⁰⁴. If the issue is in the scope of EU law, discrimination and equality become relevant⁷⁰⁵. They are relevant to the cornerstone of the EU: a functioning internal market⁷⁰⁶. The assumption that taxpayers would be executing aggressive tax planning based on the assumption of having operations in multiple countries, is in contradiction to the internal market objective and therefore in conflict with equality⁷⁰⁷.

EU Treaties and general principles will have a role when judging the taxpayers' economic freedom and legal protection. My conclusion is that constitutional rights protect taxpayers independently of the legal form, how taxpayers have organised their business, or who owns the business. This is the case especially within the constitutional interpretation of the law even on the Finnish national level. Even though taxation does not have to be strictly equal for all business operations in one country, the differences have to be justified and proportional in light of national and EU law⁷⁰⁸. EU law, when applicable, creates protection that has better enforcement than national constitutions. Finally, freedom rights, as constitutional rules as such, are objective rights. Taxpayers have the right to claim their constitutional rights (subjective rights), and authorities have the obligation to respect and follow freedom rights⁷⁰⁹.

⁷⁰⁴ Setting global minimum levels for effective taxation is a complex topic. It involves other factors of the freedom rights creating obstacles as taxpayers cannot rely on the local regulation. Instead of ensuring free movement, the EU has through directives set indirect limitations. At the same time, EU law becomes applicable to a wider area of taxation bringing cases to the ECJ.

⁷⁰⁵ This is the case even for global minimum tax. As Vanistendael 2014 considers, equality and the rule of law are good examples of the EU's foundations. Further, this illustrates the complexity of the EU's role as a regulator: does the EU actually have the power to rule over taxes to the extent that the EU is currently doing or is there a broader agenda behind different proposals, see Penttilä 2022.

⁷⁰⁶ See for example Urpilainen 2012, pp. 42–45, and Vanistendael 2014.

⁷⁰⁷ This true even if the taxpayers were to use their rights to reach a lower tax burden. See EU cases C-446/03 *Marks & Spencer*, C-110/99 *Emsland Stärke*, see *constrario* conclusions in C 255/02 *Halifax* and C-484/19 *Lexel* (especially para. 55).

⁷⁰⁸ Mäenpää, 2013.

⁷⁰⁹ Karapuu 2011.

6.5.2 Abuse of freedom rights – Justified limitation of freedom

Certain fundamental rights, defined by constitutions in different EU Member States aligned and confirmed by EU law⁷¹⁰, especially in relation to economic values⁷¹¹, offer fundamental protection to taxpayers in the form of non-discrimination and protection against arbitrary taxation. Equally, all taxpayers do not enjoy necessarily all the freedom rights depending on the legal form in which they are organised, and the protection is not unconditional⁷¹². This is crucial to understand as constitutional rights do not create total freedom, they ensure only freedom in relation to freedoms that others equally have⁷¹³. Freedoms are

⁷¹⁰ The EU Treaty and the Charter confirm constitutional principles included in the majority of EU Member States's constitutions. While the Charter may not always be legally binding it may act as an inspiration for general principles, Lennaerts & Gutierrez-Fons p. 1655, reference to ECJ Parliament v Council C-540/03, para. 38: “to reaffirm ‘rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court [...] and of the European Court of Human Rights’”. Further, EU law does not cover all the areas of life and also by purposes respects the local constitutions. Even though the ECJ has a task to unify the interpretation of EU law, it does not result in unifying all the constitutional systems and rules in the EU. This constitutional pluralism means that the ECJ cannot unconditionally rely on EU law and fundamental rights without destroying constitutional diversity. In line with this, the ECJ has respected the terms set in Member State constitutions as a restriction to “constitution shopping”, finding the lowest level of protection to fundamental rights. See Lennaerts-Gutierrez-Fons, p. 1663, and ECJ case C-36/02 *Omega* (para 30). On the other hand, Snell has considered that financial rights have a lower threshold to get EU law protection.

⁷¹¹ EU is strongly an economic union, which seems to result in a somewhat lower threshold for economic issues to be “in the scope of EU law” than in non-economic issues. See Snell, pp. 16–17. The wide scope of EU law in economic issues has been criticised as being overly far-reaching taking out the national powers. This can be seen also in the area of taxation. BEPS 1 and 2 directives are far-reaching dictating sometimes in detail how Member States should use their sovereignty in taxation on a national level.

⁷¹² This is the case, especially within the national constitutions. As considered already earlier, the Finnish Constitution offers limited protection for taxpayers on the level of freedom rights. As EU law has, as Snell (i has considered, more of an economic focus, EU law protects taxpayers independent of the size of the taxpayer.

⁷¹³ Freedom rights do not mean absolute freedom to make arrangements without limitations. This is necessary as total freedom would easily infringe the freedom of another taxpayer. Freedom rights are a system ensuring all proportionally the same freedoms.

connected with obligations and responsibilities arising from constitutions and laws to protect a freedom⁷¹⁴.

Taxpayers may misuse constitutional rights as well as EU law-based freedom rights to reach tax benefits that are not in line with the purpose and objective of the freedom rights⁷¹⁵. Financial freedom rights are in place to gain economic growth and well-being by equally well-functioning internal market, not only to minimise tax⁷¹⁶.

⁷¹⁴ Freedom rights are horizontal, which means that in order to enjoy them everyone needs to respect freedom rights that fellow citizens have. This connects freedoms to respect and obligations.

⁷¹⁵ See for example ECJ C-110/99 *Emsland Stärke*, para. 39. The European Commission argued that abuse of rights contains “a subjective element, namely the fact that the commercial operation was carried out essentially to obtain a financial advantage incompatible with the objective of the community rule”. The same view was taken by AG in case C-255/02 *Halifax*, para. 69, and C-196/04 *Cadbury Schweppes*, by considering that abuse of law was a principle governing the interpretation of EU law. See also Vanistendael 2019. In the joined cases C-116/16 and C-117/16 *Danish cases*, the ECJ confirms this approach by stating in para. 70 that “[...] a general legal principle that EU law cannot be relied on for abusive or fraudulent ends” and in para. 71 “the application of EU legislation cannot be extended to cover transactions carried out for the purpose of fraudulently or wrongfully obtaining advantages provided for by EU law”. The ECJ confirms that (para. 97) “proof of an abusive practice requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it” and that (para. 98) “Examination of a set of facts is therefore needed to establish whether the constituent elements of an abusive practice are present, and in particular whether economic operators have carried out purely formal or artificial transactions devoid of any economic and commercial justification, with the essential aim of benefiting from an improper advantage”. In relation to the Danish cases, it has to be taken into account that the case was about a taxpayer from a third country entering the EU, not a pure EU internal transaction where the ultimate owner would in any case be in the EU.

⁷¹⁶ When considering purely taxation we should remember that the question of EU law applicability to tax issues is not direct and straightforward, but rather an indirect impact. Tax is a consequence of business and sometimes the consequence may impact the functioning of the internal market, *ibid.* Taxpayers need to illustrate the connection to EU law. Likewise, the internal market is not only a tax internal market, but on totality internal market where there are tax consequences within the internal market. Steering tax rules, even harmonisation, does not mean automatically that they would promote the functioning of the internal market unless that is analysed separately. If the aim of tax rules is to encourage certain types of behaviour, it may be difficult to meet, especially if the target is very narrow. In this respect eliminating tax avoidance is a difficult target by setting the same measure unless the applicability of the measure is not considered with special care. The same is applicable for misuse of freedom rights equally, though it may be easier to identify. With respect to misusing freedom rights, the question becomes easily whether the behaviour is typical for a taxpayer, i.e. is it a

If the fundamental rights are used purely to avoid taxpayers' obligation to contribute to society⁷¹⁷, then the rights are misused. Misuse of the freedom rights has to be prohibited efficiently to ensure that legitimate use of the freedom rights is efficient. However, legislative and administrative rules should respect freedom rights as taxpayers' operations have to respect the liability to pay the fair share of taxes⁷¹⁸.

Abuse of financial freedom rights is tackled primarily by constitutional interpretation of tax law⁷¹⁹ and finally by tax avoidance rules, as a last resource⁷²⁰. We can find two approaches from ECJ case law on how to tackle the issue of tax avoidance in EU law. Firstly, tax avoidance is seen as a justification for measures restricting taxpayers from exercising their rights due to the need for fiscal supervision, or later tax avoidance⁷²¹. Secondly, tax avoidance has been seen as a

normal or justified standard for the type of taxpayer to behave as the taxpayer has behaved. As an example, a wholesaler relying on specific IP-related royalties even though in reality IP does not exist for that kind of taxpayers.

⁷¹⁷ Hemels states that each taxpayer is born in a certain state and is therefore liable to pay taxes to that state. Similarly, each state has the right to protect its taxpayers from free riders who are trying to escape their obligations. Hemels, pp. 420–422. The same aspect is raised in the principles for responsible tax management, such as B Team principles.

⁷¹⁸ Paying taxes is linked to the ability to pay. While the ability to pay refers to the actual capacity to pay based on wealth, it should also prohibit arbitrary taxation. Arbitrary taxation impacts negatively the ability to pay and sets therefore not only a lower but an upper limit to taxation, see Englisch 2014, pp. 444–446. Knuutinen (2009) considers on pages 45–46 that a benefit principle would suit better when considering corporate taxpayers by referring to Bird's statement about how naïve a reference to the ability to pay taxes is in relation to corporations and their separate legal personality and the amount of money. In this respect, the argument seems to be naïve. Further, Knuutinen refers to Rosen's statement that a corporate cannot bear taxes. There is a contradictory aspect in these statements with the Finnish Parliament Constitutional Committee's view where the Constitutional Law Committee considers that large taxpayers' protection is weaker (para. 13 in 97/2022). This would mean that large taxpayers are considered separately. The size of the taxpayer is finally a proportional topic as also the tax amounts are large in question of large taxpayers.

⁷¹⁹ See for example Finnish SAC 2016:180. The Supreme Administrative Court is not taking the legislator's role nor was the SAC willing to judge the legislative processes' compliance with constitution whereas the court can interpret the tax law in light of the constitution.

⁷²⁰ To be proportional, tax avoidance rules should focus only on eliminating abuse, not the economic freedoms.

⁷²¹ Assessing tax avoidance subjectively is difficult and cannot be the sole source for assessment. Again, tax governance and measures in relation to responsible tax governance may play a role. Weckström defines tax avoidance to include an artificial objective, hiding real objectives and set up to reach mainly a tax benefit that in total picture is artificial, Weckström I p. 395. Tax avoidance in an international arrangement is more complex as the relation between tax treaties and tax treaties has two levels, see Weckström II pp 508–509.

specific case of abuse of EU law justifying not to apply the fundamental freedoms for the benefit of the taxpayer⁷²². The ECJ has set a threshold to be met objectively measuring characteristics of the transaction or series of transactions illustrating the misuse of freedom rights⁷²³. These characteristics concentrate to measure if the transactions are artificial⁷²⁴.

There has to be a balance between rights and restrictions. Misuse of rights will erode the benefits offered as "free riders" avoid the obligations, i.e. the "cost" of these rights. Anti-avoidance rules target ensuring sufficient tax collection, while freedom rights ensure businesses are organised efficiently. This is why it is crucial to analyse more methods, principles, and rules created to tackle tax avoidance. They create a risk for financial freedom rights as they may abuse the right to collect tax.

As the EU has now implemented new minimum tax rules, the EU regulative system seems to eliminate low taxation, i.e. unjustified tax benefits, at least for those taxpayers subject to the new rules. This means that as an assumption the threshold of having an unjustified tax benefit has increased.

I will in the following consider this aspect by analysing and comparing more closely the EU's and the OECD's actions against base erosion and profit shifting from a taxpayers' rights perspective in relation to the existing ECJ case law.

⁷²² Vanistendael 2019 considered that elimination of abuse, even though it has existed already a long time, has been established finally in ECJ praxis for example in C-110/99 *Emstal Stärke*.

⁷²³ In the joined cases C-116/16 and C-117/16 (*Danish cases*) the ECJ confirms again, perhaps a bit more in detail, how the abuse should be measured by stating in paragraph 97 that "proof of an abusive practice requires, first, a combination of objective circumstances in which, ..., the purpose of those rules has not been achieved and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it" and in paragraph 98 that "[e]xamination of a set of facts is therefore needed to establish whether the constituent elements of an abusive practice are present, and in particular whether economic operators have carried out purely formal or artificial transactions devoid of any economic and commercial justification, with the essential aim of benefiting from an improper advantage". See further C-585/22 X BV, paras. 50 and 57.

⁷²⁴ De Broe 2007, pp. 757–759, considers, that abuse was determined as early as in 1988 in the ECJ case C-39-/86 *Lair*. The objective and purpose of the Community provision are decisive in concluding abuse. De Broe concludes that the ECJ applies some kind of substance over form measure when analysing abuse. The key term is artificiality. See also Vanistendael 2014 and 2019.

6.5.2.1 Tax avoidance and freedom rights

Taxing powers in the EU belong to Member States leaving Member States with fiscal sovereignty. The EU as such has no taxing power at all⁷²⁵. This results in a position where tax-related issues have been in the focus of the EU by separate “justification” only if the impact of tax laws have a connection to EU law principles and the basic freedoms based on the EU treaties⁷²⁶.

The fundamental freedoms in EU law can be understood in three ways: anti-protectionist rules, individual rights, and allocation principles⁷²⁷. Taxpayers’ legal protection dimension is concerned mainly with individual rights and an anti-protectionist approach focusing on the objective of this study better than the allocation principle⁷²⁸.

⁷²⁵ The only area where the EU has taxing powers is customs. EU’s budget is built on membership fees, not taxing power. Vanistendael, 2019 and Traversa and Pirlot 2014, p. 125–127. The Council of the EU has launched a few directives in the area of income taxes, one of the latest them the OECD’s Inclusive Framework-based global minimum tax. The Council argues that the EU has the right based on Article 115 on ensuring the functioning of the EU internal market. This is a question of interpretation of the EU Treaty, not automatic meaning of the EU’s legislative powers to direct taxation. This can be seen for example when the EU launched its Covid-19 Recover Plan in 2020. The recovery plan was to be financed by debt that will be repaid by Member State contributions. In addition to that the European Commission proposed three new sources of financing, of which one was the reallocation of MNE profits, i.e. an EU tax. The validity of this interpretation will most likely be tested in the ECJ. This is a question of when there will be a case where facts and circumstances are in place for this kind of question. The view has even other consequences, such as dispute resolutions, that are interesting and important for the focus of this study.

⁷²⁶ Each Member State has tax sovereignty (Member State has the competence to define domestic rules and aspects of their tax system though respecting international treaties) from substantive (right to tax all income within its territory) and formal dimensions (restriction to impose their laws abroad). This sovereignty is restricted by the principle of consistent exercise of Union law i.e. if tax restricts the implementation of Union law. EU law will override the restriction promoting the internal market. Traversa and Pirlot, pp. 127–129, and Hettne, p. 24.

⁷²⁷ Anti-protectionist rules consider freedoms of movement to aim at liberalizing trade between Member States. Individual rights regard freedoms of movement as economic fundamental rights allowing citizens specific rights that should not be infringed by Member States. Allocation principles finally regard freedoms of movement as provisions designed to distribute powers between Member States and the European Union having more weight on the political character of free movement than the economic character. Traversa and Pirlot, pp. 133–139.

⁷²⁸ Political development in the 2020s has resulted more in the area of allocation principle, even in the area of anti-protectionist approach. Especially, rules aimed at MNEs with more than € 750 million in net sales can be seen as anti-protectionist action: to create a more level playing field for SMEs by imposing more compliance and tax burden to MNEs. OECD’s Pillar 1 and Pillar 2 initiatives reflect more on the allocation of income.

Sovereignty in taxation, i.e. national tax, leads to differences, even mismatches within a single market.⁷²⁹ As a consequence, taxation may become an issue for the functioning of the EU internal market. This may give the EU some powers concerning taxation⁷³⁰, but only in case taxation interferes with the internal market⁷³¹. In other words, EU secondary law concerning taxation should respect Member State sovereignty. This could mean that secondary law should therefore be concentrating more on policy statements⁷³² or then take over taxing powers from Member States to eliminate national differences.

Business operations gain from the functioning of the internal market. If EU focuses more on tax planning, i.e. national measures, EU is focusing more on limiting economic freedoms than ensuring the functioning of the internal market. There has to be a balance between the right to tax and freedom rights⁷³³.

⁷²⁹ This seems to be the case even when implementing the same rules. For example, ATAD-based interest deduction limitations may result in mismatches within the single market due to differences between national regulations. Similarly, the OECD Inclusive Framework on global minimum tax will result in mismatches. These mismatches will be new and they may occur accidentally or as an agreed consequence. Another factor that may interfere with the functioning of the internal market is the poor alignment of the anti-avoidance measure. It reacts more in the case of interest deduction to interest and profitability levels than actually aggressive tax planning. This will lead to challenges within the internal market as some actors will suffer from these rules in cases where there is no tax planning involved. This may interfere with the functioning of the internal market.

⁷³⁰ See the proposal for a EU directive on Pillar 2, global minimum tax, November 2021.

⁷³¹ This means that proportionality has to be considered carefully. EU-level rules can easily interfere not only with national tax sovereignty but even equality. For example, the Pillar 2 proposal sets an obligation to create a national tax burden and on the other hand sets a higher tax burden based on the size of a company.

⁷³² EU law is in place concerning direct taxation on the basis of the general provisions in TFEU in connection to the approximation of laws, regulations, administrative provisions, and even application of those that “directly affect establishment or functioning of the internal market”. This has allowed the EU to implement directives concerning the distribution of intra-group profits, cross-border payments in the form of interests and royalties again within a group of companies or associated companies, cross-border reorganisations, and within administrative co-operation, Traversa & Pirlot, pp. 126–127. Typical for these rules is that they set limits for tax sovereignty by simply equalising tax treatment for taxpayers from other Member States and co-operation of authorities to ensure this target. The directives impact the level of tax therefore only indirectly. Any further-reaching actions could be questionable, especially if there is no sufficient mandate from national parliaments or change in the EU Treaty. Self-mandating (see Urpilainen 2014) brings clear challenges to taxpayers' legal protection as it is commonly not considered at all or at least sufficiently.

⁷³³ See Bentley 2007. Bentley talks about the balance between taxpayers' rights and taxing powers. If either interest has too much weight, there is a risk of conflict escalation. For

6.5.2.2 The ECJ's approach to taxpayers' constitutional protection and abuse

Preventing abuse of both fundamental rights and legislation is not a new invention. As Advocate General Maduro states, referring to Advocate General Tesouro, every legal system that aspires to achieve unity needs to have a self-defence mechanism against abuse⁷³⁴. I take it for granted that this protection against abuse is needed. The question is how far can this protection of taxing powers go without conflicting with taxpayers' economic freedoms rights, in other words comparing interests in order to find proportionality and balance.

Advocate General Maduro confirms that, it is a well-established and stable principle, confirmed by the ECJ, that taxpayers have the right to arrange their business in a tax-efficient manner. There are no legal grounds to expect taxpayers to arrange their operations maximising their tax burden⁷³⁵.

The ECJ has taken two separate lines in tackling tax avoidance and the abuse of EU law. The first one concentrates on tax avoidance as a justification to restrict taxpayers from exercising fundamental freedoms to ensure balanced taxing powers or in other words, the need for fiscal supervision. The breakthrough of tax avoidance as a justification was in the case *Marks & Spencer*⁷³⁶. *Marks & Spencer* was about loss compensation between EU Member States.

taxpayers, this means often use of all possible legal options to get remedies. To my opinion, this conflict escalation is happening already as tax authorities seem to have an attitude or assumption that MNEs are making efforts to avoid paying taxes in spite of all the efforts of responsible tax management and transparency.

⁷³⁴ Advocate General Poiares Maduro's proposal in cases C-255/02 *Halifax plc*, C-419/02 *BUPA Hospitals Ltd*, and C-223/03 *University of Huddersfield Higher Education Corporation*, para. 73.

⁷³⁵ Advocate General Poiares Maduro's proposal in cases C-255/02 *Halifax plc*, C-419/02 *BUPA Hospitals Ltd*, and C-223/03 *University of Huddersfield Higher Education Corporation*, para. 85. Further, Maduro notes that while this freedom is entirely legal, some persons may consider it not to be moral. I think that morality is a difficult base rule for taxation as it is very subjective. I think also that fair judgment protects what normally is meant by morality: if a taxpayer is using his right to organise his business purely in a tax-minimising manner, he will ignore other business-related risks. This will create an obstacle for the business. Fair and balanced valuation of different factors, including tax, ensures that no issue gets an extreme weight in business structures. The same principle applies to states: if tax rules are built only for maximising tax collection, it will, sooner or later, create an obstacle for business and reduce finally tax revenue. See Maduro, para. 86.

⁷³⁶ Vanistendael 2019. See ECJ C-446/03 *Marks & Spencer*.

The ECJ had made the *AAOy*⁷³⁷ decision where the outcome was slightly different. In the *AA Oy*, case the ECJ considered that the Finnish tax consolidation system, group contribution, was violating freedom of establishment, but it was justified as it safeguarded the balanced taxing powers between the Member States⁷³⁸. The ECJ considered group contribution to be in this respect a wholly artificial accounting entry only⁷³⁹.

In the *Marks & Spencer* case, the ECJ stated: “it must be accepted that the possibility of transferring losses incurred by a non-resident company to a resident company entails the risk that within a group of companies losses will be transferred to companies established in MS which apply the highest rates of taxation”. In other words, the risk of tax avoidance was seen as a justification to limit the EU rights at least to a certain extent.

In the *AA Oy* case, the ECJ regarded the rules to be proportional if transactions “do not reflect economic reality” or are “devoid from economic reality”⁷⁴⁰, whereas in the *Marks & Spencer* case, loss consolidation was allowed in certain circumstances. I see this as a reflection of a different approach to loss consolidation. The Finnish group contribution allows taxpayers to transfer profits freely without any counter remuneration or actual loss coverage while the UK system is bound to real loss compensation⁷⁴¹. Therefore, UK law was seen as not being proportional to

⁷³⁷ ECJ C-231/05 *AA Oy*. In this case, the ECJ confirms in paragraph 40 that the first paragraph of Article 43 EC expressly leaves traders free to choose the appropriate legal form in which to pursue their activities in another Member State and that freedom of choice must not be limited by discriminatory tax provisions.

⁷³⁸ ECJ C-231/05 *AA Oy* paragraph 30 confirms freedom of establishment, and paragraphs 32 and 39 consider group contribution rules to be discriminatory. Paragraphs 56 to 58 conclude that artificially transferred losses between countries to use losses twice is actually an abuse of freedom of establishment.

⁷³⁹ De Broe 2007, pp. 818–819. De Broe disagrees with the ECJ regarding the wholly artificial nature aspect and considers that group contribution may also be a justified business transaction. The European Commission has in 2019 sent a formal notice to Finland that the Finnish group contribution system is not in line with freedom of establishment. The Commission seems to agree with De Broe. While this may be to a certain extent true, group contribution is a pure transfer of profits from one company to another without requiring anything else than a joined ownership of more than 90%, if the tax residency is ignored. This offers actually an open route to transfer profits without any counter transaction at all.

⁷⁴⁰ ECJ C-231/05 *AA Oy* Para. 62 and 63. This could be also arm’s length test: payment is not remuneration for goods or services.

⁷⁴¹ Loss consolidation and group contribution systems are the two opposite ends of a tax consolidation system. When transferring profits between entities without necessarily a counter transaction group contribution had components of artificiality while loss compensation is shifting losses, not profits.

the target of eliminating tax avoidance⁷⁴². De Broe disagrees with the ECJ's approach and considers that it would have been possible for the ECJ to apply the earlier case law stating the UK rule to be disproportionate to its purpose⁷⁴³. Independently of the approach, the ECJ accepted tax avoidance to be a justification to restrict the use of fundamental freedoms to a certain extent, though not automatically⁷⁴⁴, but setting terms such as proportionality and transaction or arrangement to be wholly artificial.

The second line is specifically abuse of EU law allowing justification to restrict the use of fundamental freedoms. Already in the case of *Emsland Stärke*⁷⁴⁵, the European Commission claimed that abuse of rights contains "a subjective element, namely the fact that the commercial operation was carried out essentially to obtain a financial advantage incompatible with the objective of the community rule." Additionally, the Commission stated that abuse is illustrated by the fact that benefits are reached by creating conditions subject to getting the advantage artificially. Abuse of Union law was finally confirmed by the ECJ in the case *Halifax*⁷⁴⁶. The ECJ set two requirements to illustrate the abuse of Union law, firstly, to grant the advantage would be contrary to the purpose of Union law and secondly, the essential aim was to receive the advantage.

The ECJ has published in 2019, i.e. post BEPS, new cases concerning abuse of Union law⁷⁴⁷. These cases are important, although I see them rather confirming principles from earlier cases, and as such they do not eliminate taxpayers' fundamental rights or their protection. These decisions rather clarify the ECJ's understanding of how to measure artificiality and abuse in relation to constitutional rights.

When considering the ECJ decisions in the Danish cases from a taxpayers' protection point of view, the main question is whether the ECJ has diluted in any way the importance of the fundamental rights and legal principles. I think that Advocate General Kokott's statement gives a good perspective on this issue: "[...]

⁷⁴² I consider the ECJ's point in *Marks & Spencer* as an effort to identify a proportionality test, i.e. allow loss consolidation in real cases with economical substance. This would mean that the ECJ refers to its earlier case law, but indirectly. See De Broe 2007.

⁷⁴³ De Broe 2007 refers to and agrees with Michael Lang's view on this, De Broe p. 820. I can see De Broe's point, but would lean more towards the ECJ's approach as it offers good and thorough couple guidance together with the *AA Oy* case.

⁷⁴⁴ *Marks & Spencer* sets requirements when loss compensation across borders is acceptable. The Finnish group contribution is not strictly speaking about loss compensation, but fiscal consolidation by moving profits between Finnish entities.

⁷⁴⁵ ECJ case C-110/99 *Emsland Stärke*, see para. 39.

⁷⁴⁶ ECJ case C-255/02 *Halifax*.

⁷⁴⁷ C-115/16 *Danish cases*. None of these cases were purely related to the internal market, but had a non-EU transaction angle in them.

questions ultimately apply to the fundamental conflict between the taxable person's freedom to arrange his affairs under civil law and the need to prevent arrangements that are valid under civil law but nonetheless abusive under certain circumstances.⁷⁴⁸ Further Advocate General Kokott considers that “in light of the angry political mood concerning the tax practices of certain multinational groups, drawing that dividing line is no easy task for the Court of Justice and not every action by an individual to reduce their tax should be open to a verdict of abuse.”⁷⁴⁹

In the decisions for the Danish cases, the ECJ clarifies how to consider whether an arrangement that a taxpayer has entered within his fundamental right to organise his business is abusive from a tax point of view. The flavour of the Danish cases was that the transactions were in relation to an EU and a non-EU country. This is an important factor as it may bring abuse closer to the cases. If a non-EU operator has arranged its operation purely to receive a tax advantage, which has been targeted to improve the functioning of the internal market, the threshold for abuse is lower⁷⁵⁰. This point is changing analysis of abuse of EU law.

When comparing ECJ practice, including the Danish cases, it is remarkable that the analysis done and arguments presented to support the BEPS-related tax directives are thin and do not include the considerations that the ECJ has made. *The EU* is focusing only *on tax* but *the ECJ* focuses on *the internal market as a whole*. This creates a shadow over the tax-related EU directives⁷⁵¹. This can be crucial for the mandate the EU has in the area of tax.

The ECJ confirms that a taxpayer has the right to arrange a business under civil law even so that the tax burden is minimised. Equally, the ECJ states that EU law may not be used abusively. In the Danish cases, the access to benefits granted by EU law was created through the artificial entrance by a non-EU taxpayer reaching out for EU benefits through abusive methods⁷⁵². This means that abuse is, as recognised already

⁷⁴⁸ Advocate General Kokott's opinion in case C-115/16, para. 3. This point illustrates well that tax cannot be the only objective when assessing proportionality.

⁷⁴⁹ Advocate General Kokott's opinion in case C-115/16 *Danish cases*, para. 4. See also C-585/22 *X BV*, para. 57, where ECJ confirms that the wholly artificial approach is still valid referring to several old cases such as Cadbury Schweppes and Cadbury Schweppes Overseas and Test Claimants in the Thin Cap Group Litigation.

⁷⁵⁰ See for example para. 107 in the cases C 115/16 *Danish cases*.

⁷⁵¹ The new directives represent a new era of EU tax regulation as the EU has shifted towards positive harmonisation. The spirit of the new regulation is leaning more towards the direction of the EU as one market area where the EU has a strong federal position. This development has been systematic and proceeding step by step, as Penttilä pointed out in 2022. The EU seems to have a target that it is trying to attain piece by piece without raising a decent discussion about the development.

⁷⁵² In this aspect the third country approach is important: was the arrangement executed purely to get access to EU internal market benefits that the taxpayer would not have

in the past⁷⁵³, a principle that sets borders for using the fundamental rights to balance taxing powers. With these principles, the ECJ is carefully developing its earlier case law by clarifying factors to be considered to identify abuse⁷⁵⁴. Further, the new minimum tax rules may mean that claiming abuse has a higher threshold than earlier⁷⁵⁵.

As the ECJ is developing its principles on abuse, it could be seen also as tightening the interpretation of wholly artificial arrangements, not just granting EU law benefits in relation to transactions having an EU cross-border element⁷⁵⁶. The ECJ is carefully seeking balance between fundamental rights and their restriction. This becomes evident as the ECJ confirms clearly two, already existing principles. First, reaching for a benefit that is formally in line with EU law, but which is

had at all without the entities. I consider that this factor creates an extra layer of requirements as even the access to the EU internal market needs to be real, i.e. not artificial. The case will have an impact on the interpretation of beneficial ownership clarifying it, such as *Danon*. Even though the Danish cases are applied by multiple countries and may get different angles, taxpayers' right to arrange their operations in an optimal way in domestic or already in intra-Union setups was confirmed by the Belgian Court of Cassation in the so-called ICL case from 25 November 2021.

⁷⁵³ Vanistendael 2019.

⁷⁵⁴ I see that the ECJ is aligning its decisions with each other by purpose rather than by accident. For example, in case C-526/04 *Boiron*, the ECJ took view on negative state aid and remedy. My view is that the ECJ created a framework to illustrate when government has an obligation to repay the negative state aid and when not.

⁷⁵⁵ The EU's minimum tax aims to ensure minimum level of taxation, which means that the new rule should eliminate inappropriately low-taxed arrangements. This creates a fundamental assumption of non-tax benefit for the arrangement and moves the bar of illustrating tax benefit for an arrangement higher even in cases where no minimum tax is levied. The reason for this would be that the Pillar 2 rules creating a framework of minimum tax eliminating inappropriately low taxation will ensure an agreed level of taxation. This kind of agreed taxation level is sufficient and no tax benefits would exist. As this was the intention of the regulator, cases which earlier have been referred to abuse of EU freedoms are eliminated being most likely considered when drafting the rules.

⁷⁵⁶ For example, the Belgian tax authorities appealed to the Court of Appeal of Ghent making a reference to ECJ C-115/16 Danish cases. Tax authorities made arguments in a purely EU intra-market transaction referring to abusive use of EU law, unlike in the Danish cases where the taxpayer was trying to enter EU freedoms by abusive arrangement. Tax authorities didn't point out artificiality nor abusive use of EU law principles in the case, rather a lower tax burden than what the Belgian tax authorities were willing to accept. Court of Appeal of Ghent made a decision in the case on the 16 June 2020 decision number 2019/AR/1487. The decision was confirmed by Supreme Court in June 2024.

contradictory to the purpose of EU law by artificial arrangements can be regarded as abusive and therefore, based on an EU law principle, not acceptable⁷⁵⁷.

To treat an arrangement as abusive a threshold should be reached. This threshold consists of “a combination of objective circumstances in which, despite formal observance of the conditions laid down by EU rules, the purpose of those rules has not been achieved and second a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it”⁷⁵⁸. When setting the threshold, the ECJ is not measuring the proportionality of rules, but setting concrete requirements to respect fundamental economic freedoms. In a real business case, the ECJ is comparing this right to the obligation to pay tax. If the fundamental freedoms are used artificially and not in line with the purpose of EU law, the fundamental rights have been used abusively and no EU law benefit should be granted⁷⁵⁹. Obligation to pay taxes overrides the freedom to arrange business in that sense.

The new minimum tax means that tax authorities will have to demonstrate a two-step test to illustrate abuse. Firstly, tax authorities need to illustrate abuse as the ECJ has defined abuse and measuring of abuse. Secondly, tax authorities need to illustrate that a taxpayer has managed to abuse even the minimum tax rules.

My view is that the ECJ is making an effort to clarify even how the proof should be evaluated by stating some factors that “may be reinforced”⁷⁶⁰ when considering abuse. Whether the ECJ has succeeded in this guidance is not clear. Assessing facts is complex. What is an artificial setup for one may be a basic setup for another business⁷⁶¹. Notably, the EU has not considered these factors in its BEPS 1 and 2

⁷⁵⁷ In C-585/22 *X BV* case in paragraph 57 the ECJ confirms the traditional approach. Paragraphs 87 and 88 confirm further the traditional approach fitted to the Dutch regulated background to be consistent with the proportionality principle.

⁷⁵⁸ ECJ in C-116/16 *Danish case II* para. 114.

⁷⁵⁹ The objective of EU law is not to grant tax benefit, but to promote the functioning of the EU internal market. The responsible tax principles combining business and tax are in the core of this approach.

⁷⁶⁰ ECJ in C-116/16 *Danish case II*. 106.

⁷⁶¹ For example, debt to equity ratio is claimed to be aggressive tax planning and not acceptable as profits are shifted between countries. This may be the case if normal “industrial” circumstances require a certain equity level and this industry standard is not followed. On the other hand, for example, private equity industry typically uses different debt-to-equity ratios than the industrial operators. This in itself cannot be abusive nor artificial if the private equity standards are used properly. In case a legislator does not approve of private equity standards, the legislator may create rules, the minimum commonly agreed morality, as Fuller states it, to be followed. The legislator may not however state that using debt in financing is not acceptable to reach out for higher taxes, at least not without a sufficient majority in the legislative process.

approach. The rules tackling abuse are rather formal without measuring the circumstances, as the ECJ is doing.

Advocate General Kokott is even more precise in her opinion in case C-115/16. She states clearly the importance of fundamental rights such as the freedom of establishment. A taxpayer has the freedom to look for minimal tax burden within the frame of the law and the purpose of the law. Kokott states that “the mere fact that a business structure was chosen in the present case that did not generate the maximum tax burden cannot in itself qualify as abuse”⁷⁶². Kokott makes an effort to clarify the criteria even further: abuse has to be evidenced by the subjective and objective tests. Further to illustrate how to measure subjective and objective tests, she states that lack of transparency may be one evidence of a purpose to abuse EU rules⁷⁶³.

My conclusion is that abuse has been prohibited in well-established case law and confirmed by the Danish ECJ cases. However, the threshold for abuse is still high and cannot be an assumption for tax assessment. These factors have not been built into the new BEPS directives, which may create interesting new cases for the ECJ to decide: are the directives proportional to their objectives. The principles of EU law as well as ECJ case law protect taxpayers’ rights by setting limits for the tax authorities’ assessment possibilities⁷⁶⁴. On the other hand, new minimum tax rules

⁷⁶² ECJ case C-115/16 *Danish case*, para. 71. Kokott states later in paragraph 84 the reason for the right to look for the lowest tax burden – it is the structure of EU Member States and their sovereignty in tax issues. In paragraph 84 Kokott states that “any such actual minimal taxation or non-taxation is a consequence of the tax autonomy of each State. If fiscal competition between Member States is admissible under EU law due to the lack of harmonisation of income taxes, a taxable person cannot be blamed for availing himself in reality of the tax advantages offered by certain Member State.” This kind of tax maximisation argument is often sued by tax authorities, see for example *Kammarrätten i Stockholm 4572-17*.

⁷⁶³ Advocate General Kokott’s opinion in the case C-115/16 *Danish case*, para. 88. Lack of transparency, which used on purpose resulting in not being taxed in any of the countries involved in the arrangement due to lack of information illustrates abusive purpose. Transparency in this context means tax authorities possibility to receive information from counterparty countries. Interesting to notice is how responsible tax management principles set also transparency as a requirement for acting responsibly. For example, B Team principles set a requirement of taxpayer transparency and avoidance of using so-called low-tax countries, which typically do not have the tax authority transparency or the exchange of information clauses.

⁷⁶⁴ ECJ considers taxpayers’ rights in relation to the economic freedoms and the functioning of the internal market, where again SAC (Sweden) in decision 90/2011 is focusing more on taxable income-based reasons or any for tax purposes restricted reasons. SAC Sweden created a new definition on top of “artificial arrangement” through “internal convenience” concept. Arguing misuse of constitutional freedoms goes far beyond simple tax analysis and may therefore be challenging for tax authorities who are used to arguing taxable income aspects, i.e. pure tax law approach, while the

should ensure an agreed minimum level of tax eliminating tax benefits. Pillar 2 might have an indirect impact on the functioning of the internal market, but *inadvertently*.

6.5.2.3 EU Harmonisation and legal protection of taxpayers' economic freedoms

Legal culture and system vary from one EU Member State to another. Any harmonisation of rules will take a long time and should take into account special features of different Member States and also businesses⁷⁶⁵. Harmonisation of tax regulation is touching closely Member States' right to tax, tax sovereignty, and, as considered earlier, only in some cases, the functioning of the EU internal market⁷⁶⁶. Therefore, the EU's initiatives in the area of Member State financing, i.e. taxation, should be considered carefully. Not only proportionality but also clarity and predictability of regulation are crucial from the points of view of taxpayers' fundamental rights and the functioning of the internal market.

Taxpayers' legal protection cannot be ignored in a harmonisation process, for example, by referring to existing dispute resolution rules. The approaches of national courts are different due to their backgrounds and cultures⁷⁶⁷. This means that for instance governance rules for tax authorities and dispute resolution should be developed equally on the EU level to ensure EU-wide harmonised process and taxation⁷⁶⁸.

approach should be more about the whole "setup" rather than about tax consequences alone.

⁷⁶⁵ Member states may support the key industries that are crucial for the country not for tax purposes but as these industries are important for the country.

⁷⁶⁶ Tax sovereignty may however impact competition between Member States as Member States are offering different kinds of reliefs, credits or beneficial tax rules to attract businesses. This, however, is one phenomenon and a natural part of a well-functioning internal market. Competition between Member States improves competitiveness of the EU when attracting businesses being part of the functioning of the internal market. Tax in that respect is not anything else from other public policies, though perhaps not the best and most efficient one. Another aspect is that this competition has to be fair. Having fair tax competition does not necessarily justify minimum rules.

⁷⁶⁷ Some countries are reluctant to send cases to the while ECJ some are not, see Bernitz 2016, p. 47.

⁷⁶⁸ This could lead to cherry picking. Cherry-picking in this respect means that the EU is developing substance rules for taxation, but does not take any initiative in developing legal certainty and legal protection at all. Development of these kinds of rules may be complex as they touch fundamentally areas where governments see national interests which they do not allow to be solved by anything else than their own tax authorities and courts. The complexity of national interests has not been raised to political discussions as they would slow down the implementation of substance rules. Secondly,

Harmonising tax rules in itself can be reached through negative or positive harmonisation. ECJ case law has, due to its nature, been more focused on negative harmonisation⁷⁶⁹ while the EU's latest directives, contradicting with the old principle in the area of tax, have concentrated on positive harmonisation of taxation, especially tax avoidance⁷⁷⁰. Further, the EU's new tax-related regulation has overlapping parts that with some likelihood create conflicts when implemented nationally. The question is how well these approaches reach the EU's target of a well-functioning internal market⁷⁷¹.

Based on the existing constitutional principles government does not automatically have authority to unlimited taxation. Taxation should be proportional to its target, i.e. financing society⁷⁷². One method of measuring the proportionality could be the principle of ability to pay⁷⁷³. As tax is a consequence of financial

taxpayers in countries where the courts are reluctant to refer the cases to ECJ are set in a worse position than in countries where the courts have a lower threshold when asking for a ruling from ECJ.

⁷⁶⁹ The ECJ is judging cases based on existing EU law including the EU treaties and fundamental legal principles rather than creating new rules as legislators can do. This leads to ECJ judgments within the existing EU law of what is not allowed based on EU law or what is regarded as discrimination. As the EU has no actual legislative power as regards tax, this has been more or less a natural outcome. On the other hand, it could be argued that the ECJ could state what is acceptable and what is not. This could, however, lead to difficult situations as the ECJ is dealing with stand-alone cases resulting in an even heavier case law approach with political statements.

⁷⁷⁰ To some extent the focus of the new EU-based tax rules is built to be minimum rules.

⁷⁷¹ The functioning of the EU's internal market is at the core of economic freedoms, such as the freedom of establishment. If this is not respected and taxpayers' economic freedoms are not considered, the functioning of the internal market is not improved and taxpayers need to make additional efforts to enforce them.

⁷⁷² Proportionality is a complex measure in this sense. The financing need is defined by political decision-makers when they decide on what the government will be spending on. The proportionality will step in through constitutional protection against arbitrary taxation.

⁷⁷³ Englisch 2014 considers that ability to pay could be regarded "to imply a prohibition of confiscatory or excessive taxation, [...] would constitute a disproportionate interference with the pursuit of the respective income generating activity [...]", Englisch 2014, p. 445. Even though there are opposing views especially when considering large businesses, I would state that the ability to pay is applicable to those businesses also purely as if the large businesses have more assets, their taxes are larger.

activity⁷⁷⁴ taxation has a clear dynamic impact on financial activities⁷⁷⁵. This comparison is ordinarily done by the Member States as they have the taxing powers and they consider what is optimal for the Member State as a whole.

As taxpayers' capability to enforce justified economic freedoms varies between Member States and the EU has not developed enforceable dispute resolution, the proposed tax harmonisation will not actually create harmonisation, it is only changing the indirect impacts taxation has on EU law. In spite of EU's efforts in harmonising corporate tax, there are still 27 Member States with national tax systems in the EU.

The EU's legislative initiatives concerning, directly or indirectly⁷⁷⁶, tax avoidance is interesting. The interest arises from a few factors. Firstly, EU law appears to create the basis of enforceable fundamental freedom rights for all taxpayers. Secondly, the EU itself has no taxing power, leaving fundamentally some space for competition between the Member States within the internal market⁷⁷⁷. Thirdly, I would raise the process of drafting new regulation. The EU seems to have no consolidation of tax rules with each other or with business⁷⁷⁸. This leaves limited capability for national legislators to align tax legislation. Finally, the mitigation of

⁷⁷⁴ Financial activities, such as business operations as well as employment, are not done to pay taxes, but initially to generate financial benefits, such as shareholder value for shareholders or earnings for the employee. Tax is therefore not the primary objective, but a secondary issue. Even though the tax is a secondary objective of financial activity, it is a crucial consequence as funding society is necessary for financial activities. Therefore, paying taxes is an important plan B (see B Team principles).

⁷⁷⁵ Barrett, McGuirk & Steinberg (1997) consider for example that taxes determine both the long-term level and timing of donations, illustrating that taxes have a clear dynamic impact, p. 333.

⁷⁷⁶ All the initiatives do not directly target tax avoidance, even though eliminating certain tax behaviours is one of the key objectives. Their objective seems to be tackling MNEs' tax behaviour. I have a picture that this is related to mistrust towards MNEs as the objective stays the same independently of the amount of regulation tackling aggressive tax planning or efforts done by MNEs to behave responsibly. This may relate to high expectations of tax revenue. The initiatives are interesting as they recognise the freedom rights, but at the same time are constructed to limit them.

⁷⁷⁷ See for example ECJ decisions in cases C-115/16 *Danish case*.

⁷⁷⁸ The EU has drafted especially multiple different kinds of anti-avoidance rules including and not including actual tax avoidance measures. The focus has been more on the national level, not on the functioning of the EU's internal market, which is the ECJ's approach, see Knuutinen 2012, p. 50. This results in situations where the same issue is impacted by multiple anti-avoidance rules, such as financing (for example EBITDA limitations, hybrid instruments, and Pillar 2 rules).

tax avoidance is sensitive when considering the balance between fundamental rights and taxing powers⁷⁷⁹. This takes us to consider the legislative process.

⁷⁷⁹ Tax avoidance is often connected to artificial behaviour or setups, as identified by the ECJ, see Vanistendael 2014 and 2019, DeBroe 2007 and Urpilainen 2012. The challenge is that some behaviours are at the core of the business and its requirements due to the nature of the business while it is extremely artificial for another business. This leads easily to situations where tax avoidance rules create an obstacle for some businesses.

7 Legislative work and taxpayers' rights

It is important to consider, on top of national legislative process, if the EU's regulations objectives are legitimate, are the rules reaching the target and finally are they going beyond what is needed to reach the target⁷⁸⁰. In other words, I compare fiscal interests to freedom rights. ATAD-based limitation on interest deduction, DAC 6-based rule on mandatory disclosure rules, and Pillar 2 rules are good examples⁷⁸¹.

Legislation defines the taxation rules that both tax authorities and taxpayers have to respect. Therefore, the quality of legislation is the basis of protecting taxpayers' rights⁷⁸². In case tax legislation is poorly prepared and drafted, it results in unclear rules with no predictability⁷⁸³ and a balance between taxing powers and taxpayers' legal rights. If clarity is a challenge already in the national legislative process, it is so even more on the EU level⁷⁸⁴. EU directives are giving binding rules for Member States to draft legislation of a national measure, i.e. taxation. Drafting BEPS related EU directives define how each of the 27 Member States should tax their tax resident taxpayers for domestic and cross border business on national level. Even though the

⁷⁸⁰ The components are based on the rule of law principle including a proportionality test, see Urpilainen 2012, p. 80, and Äimä, p. 56. The rule of law principle creates a good comparison to measure whether the design of the rule fits into the legitimation that taxation has when infringing on taxpayers' fundamental rights.

⁷⁸¹ Council Directive (EU) 2016/1164 of 12 July 2016 and Council Directive (EU) 2018/822 of 25 May 2018. I've selected to compare these topics as examples as they specifically are focused in the BEPS project. As these business functions are often cross border, they are also dependent on the functioning of the internal market.

⁷⁸² As Fuller states, the law defines the lowest level of morality that can be agreed upon by a majority. Further, the legality principle is one of the cornerstones for taxing powers as stated by multiple constitutions, see also for example Vanistendael 2014, Hultqvist 1995 and Äimä, and Article 51 of the EU Treaty.

⁷⁸³ See Hultqvist 2014, p. 30. Hultqvist (2015) considers also the importance of tax legislation clarity. How can complex and not precise legislation fulfil the requirements set by the legality principle, see for example, Hultqvist 2015 pp. 20–21.

⁷⁸⁴ The EU is not a legislator nor does the EU have legislative processes or experience in the area of tax legislation.

objective of the directive was in the heart of indirect impact to the functioning of the internal market it did not include a sufficient impact assessment on Member State nor business level and not necessarily proper public hearing or consultation⁷⁸⁵. EU tax directives seem to be rather political statements with technical details than a rule allowing at least some room for national measures⁷⁸⁶. I will first analyse the EU as a tax legislator before focusing on the national legislation process.

7.1 The EU as a tax legislator and the national legislative process

As said, the EU has no taxing power, taxation falls outside its direct legislative powers⁷⁸⁷. Even if that is the case EU law has an impact on national tax legislation

⁷⁸⁵ For example, for Pillar 2 implementation purposes the EU ignored impact assessment in its final process for Pillar 2 directive (with a reference that OECD has already had impact assessment). Even in the case of a public hearing, the EU's role is different from a Member State legislators. Where Member State legislators can hear multiple stakeholders in relation to certain legislation and take into account the local circumstances, the EU needs to consult even the Member States in addition to all the other stakeholders. Taking into account local circumstances will be only on an average level which is only a theoretical level. An average does not represent anything real. Further it is important to note that the impact assessments the EU tax legislative process has included is merely the impact on the EU, not the Member State, which collects the tax revenue.

⁷⁸⁶ International law is a complex area when considering when it actually is binding. Ward analyses OECD recommendations and considers that they are not part of international law as they do not create obligations under international law (pp. 80–81). On the other hand, the EU interacts with the OECD. Wouters & Vida p. 1981 consider that representation of the European Communities shall be determined in accordance with the institutional provisions of the (EC) Treaties (Article 1) and that the Commission shall take part in the work of the Organisation (Article 2),. This demonstrates that the EU has a role in legislative work in relation to the objectives of the EU Treaty, that is the functioning of the EU internal market, but the EU's role is complex and not straightforward when considering tax legislation on a Member State level.

⁷⁸⁷ I see this as a direct link to the Council reference to Article 115 when proposing EU law on taxation. This statement is normally short in the form of an assumption but it is not in reality considered whether the proposal fulfils the objectives of Article 115. On the other hand, Englisch 2021 states that for example Pillar 2 can “be well defended that the proposed minimum tax legislation would facilitate the “establishment or functioning of the internal market””. However, I cannot see that Englisch would have considered Pillar 2 rules in full scope to understand the impacts of the complex regulation. The complexity of taxation can be found in these arguments from the Council of the EU and also Englisch. The functioning of the internal market is seen as a moral issue – all taxpayers within the EU, or at least MNEs, should have the same efficient effective tax burden, which is high enough. This view is, however, more a

even without the EU's initiatives in the post-BEPS era⁷⁸⁸. The joint application of the substantive EU law and general principles confirmed by the ECJ may force the national legislator to adjust and accommodate its policy choices⁷⁸⁹. The EU has more legislative power through different enforcement methods than for example the OECD or other international policymakers⁷⁹⁰.

Sovereignty of states is a challenge for taxpayer's legal protection, perhaps even rights as more cross-border assessments⁷⁹¹ are implemented. The concept of sovereignty is based on far-reaching independence⁷⁹² securing national funding needs. This means that states, as a starting point, are focused primarily on their own tax base and subject only to rules created by themselves or rules that states have

question of one approach to morality or fairness in a simplified form. Harmonising tax rates within the EU will not eliminate the tensions between national tax systems nor will it improve the functioning of internal market. The functioning of the internal market is measured on the level of business, not taxation only. The functioning of the internal market is about free movement and freedom of establishment of businesses. As taxation is one factor among many others, tax may in some cases impact the functioning of the internal market. General principles of EU law may equally be applicable to taxation, but not always. My view here is that the European Commission has not understood the complexity of taxation and business when involving the EU in substance law on tax matters.

⁷⁸⁸ For example, the Merger directive has had a key role in improving the functioning of the EU's internal market.

⁷⁸⁹ Lennaerts and Gutierrez-Fons p 1692 consider that EU law and especially EU law general principles have a gap-filling function as both EU law and national law fall within the scope of EU law. See also Prechal, p. 11, referring to case C-302/06 Kowalsky with two potential connections to EU law: national legislation falls within the scope of EU law or the subject matter of the case is otherwise connected to EU law. This could be the case for EU law principles.

⁷⁹⁰ This is based on the nature of the OECD and the EU. Where the OECD's rules are subject to a procedure of building up treaties, recommendations, and guidelines, of which some are binding if a country agrees to commit to them, part of them are only recommendations and guidelines that can assist in the legal decision-making, but which are by no means binding, see for example Ward and SAC (Finland) decisions 2013:36, 2014:119, 2017:146, 2018:173, 2020:43, 2020:34, and 2020:35 where the SAC considered the OECD transfer pricing guidelines to create a source for interpretation for arm's length principle with a narrow approach. The government proposed a change to laws regulating transfer pricing in Finland to include the OECD transfer pricing principles into law (proposal 188/2021). I find this somewhat problematic as it brings unclarity to law, as noted by Hultqvist 2014 in relation to Swedish legislative procedure.

⁷⁹¹ It is important to note that I do not mean only cross-border transactions, the traditional area of international taxation, but specifically cross-border assessments in addition to the traditional approach. In the global minimum tax headquarters country is assessing the level of taxation in other countries in case there are MNEs subject to global minimum tax domiciled in that country.

⁷⁹² Independency in this respect means, that governments are primarily ensuring their own interest and sovereignty rather than EU-wide interest.

specifically accepted in interaction with other states⁷⁹³. This international law is never the less soft as joining different treaties in some cases may be merely a policy statement than binding law in a state⁷⁹⁴. The soft nature is reflected also in the wording of the treaties. In this respect, the new EU directives shadow these kinds of treaties as they also look like political statements⁷⁹⁵.

The EU has a different role in this sense as it has enforcement methods to make Member States transpose EU directives into national law. Directives are approved differently on a national level than treaties creating at the same time a clear obligation for Member States to act⁷⁹⁶. This is somewhat problematic from a taxpayers' legal protection point of view, as the EU sets a strict framework for specific tax rules to be implemented on the national level without ensuring compliance with the legality and proportionality principals on the national level. When legislating directives, the EU's goal is, or at least should be, seeking the functioning of the internal market by harmonisation⁷⁹⁷, not to interfere with Member State fiscal interests⁷⁹⁸. To ensure

⁷⁹³ Pijl, p. 100. According to Pijn in the modern view treaties, creating international law, treaties pivoting around individuals primarily confer rights on individuals, and any damage done is primarily individual damage. Tax treaties in this respect are more kind of hybrids, where both the interests of individuals and states are taken into account. Taxpayers have currently even procedural rules to enforce their rights.

⁷⁹⁴ Pijl lists several reasons why and how a state may commit to a treaty without a purpose to be legally committed to the treaty. Signing or joining a treaty represents in this case a political statement. Pijl, pp. 102–106. To have a legal effect, the treaty needs to have a legal status.

⁷⁹⁵ The new BEPS-based tax directives include a political statement to illustrate the objective. Additionally, directives include substance regulation, which is by wording unclear and not precise in the manner that is required by tax law from the legality principle point of view.

⁷⁹⁶ When a Member State has an obligation to act, or not to act, a reference from tax law to EU law self-evidently exists.

⁷⁹⁷ Earlier this has been reached by so-called negative harmonisation, i.e. more in line non-discrimination of nationals of another Member State. The new approach seems to be a positive harmonisation, or at least partial positive harmonisation. This means that there should be more same rules in each EU Member State.

⁷⁹⁸ The objectives are different when considering the functioning of the internal market and national fiscal regulation. The internal market is impacted by wider aspects than purely taxation, the consequence of business activity. Taxes impact in broad terms the functioning of the internal market only if they discriminate against taxpayers from another Member State. This means that taxation as such, not even different levels of taxation prohibit the functioning of the internal market. The EU's target in BEPS could be seen also as an anti-internal market approach: the EU is not aiming to eliminate obstacles to the internal market, but rather stating how Member States would define their tax basis. The current model will not work as taxing powers still belong to Member States and even the new EU-based rules will create obstacles. This "no difference between Member States" approach can be reached only by giving the EU the sole taxing power on business activities.

this, the EU should create rules and processes that guarantee unified tax practice on direct taxation instead of multiple national approaches. The EU should also consolidate its regulation to eliminate harmful overlapping legislation.

The starting point for the EU's legislative actions is therefore different than the ones that the actual national tax legislator has. When a national legislator considers the impacts on the actual Member State in question creating tax legislation, the EU considers the interests of the EU from an internal market point of view, not from a government funding point of view⁷⁹⁹. Tax interferes with economic freedoms; therefore, internal market cannot be improved by pure fiscal substance regulation unless the rules are not carefully measured against economic freedoms.

This new approach creates also a need to review whether taxpayers have a legal possibility for enforcement of their rights. When creating EU-wide rules, tax authority governance and taxpayer rights to challenge tax authority decisions should be ensured equally in all EU Member States in relation to the new rules. This is crucial as national courts are referring cases to the ECJ totally differently⁸⁰⁰.

Economic freedoms are not the sole core of taxpayers' rights. Fair trial and respect for the right to property are part of taxpayers' rights and protection. The challenge the EU has is ensuring the functioning of the internal market does not interfere with the right to property or eliminate excessive taxation. Drafting tax rules is new for the EU. The EU has experience with rules that impact the business and promote directly the functioning of the internal market. Taxes instead normally may have indirect impacts on the functioning of the internal market. Currently the EU's tax legislative process fails to draft rules fit for the EU's core purposes as internal market measures are ignored.

The complexity of the EU's role as a legislature in tax issues is obvious. Each Member State has the right to collect taxes in line with its own needs and political agenda⁸⁰¹. The EU and Member States may have conflicting interests as the needs of

⁷⁹⁹ Sometimes the focus of the EU may be purely on the EU powers. The EU's initiatives around tax could be seen, as Penttilä considered, also as an effort to create taxing powers for the EU. By creating a range of initiatives, the EU could consider that they have covered most of the tax areas, or at least taxing power areas, so it would be easier to give the EU the taxing powers.

⁸⁰⁰ See for example Bernitz 2010. For some reason, some countries, as Bernitz explains about Sweden, are very reluctant to refer cases to the ECJ. When the EU takes steps through directives to involve the substantive tax rules within the scope of EU law, the availability of the ECJ should be improved. This part of regulation has been ignored. Further, independent national interpretations do not promote the functioning of the internal market.

⁸⁰¹ Based on tax sovereignty each country is developing its physical and mental infrastructure as well as paying "membership fees" to the EU. The EU is financed

Member States differ materially and the EU has no power to state which of the Member State tax systems is the reference for all other Member States⁸⁰². Any attempt to regulate tax matters will impact directly and indirectly each Member State's financials creating a need to adjust tax collection. The EU's attempt at harmonisation seems to be only partial as Member States still regulate national taxes. This creates some sort of double standard⁸⁰³, which impacts the predictability of tax legislation.

When considering the EU as a tax legislator from the taxpayers' legal protection point of view I would define it as problematic and even chaotic. First of all, the EU's objective is to change taxpayer behaviour by setting limitations, but the EU's legislative process does not include a proper constitutional assessment of freedom rights⁸⁰⁴. Secondly, the conflict and difference between who in reality is collecting taxes (Member States) and the legislator (the EU) is a source for challenges. As the impact assessments are done late, first at the level of Member States, the EU tax regulation is vague resulting in impacts that were not the purpose of the law⁸⁰⁵.

mainly through fees collected from Member States even though the EU has proposed multiple times its own taxing powers, for example when funding the Covid-19 support package.

⁸⁰² Considering tax systems from the functioning of the internal market point of view is complex. Harmonised-looking tax systems do not yet mean that the internal market will be well-functioning. The EU should assess how the new rules would impact the internal market and first after that consider how to promote the functioning of the internal market through tax rules. Currently, the impact assessments are lacking, refer to the EU's own financing impacts (which are zero as Member States collect tax, not the EU), or they refer to the OECD's assessments.

⁸⁰³ Taxpayers need to comply with all the existing and new directive-based national rules and equally with a new global minimum tax system implemented by the EU. The two systems are not aligned, which means that a taxpayer has two standards to follow. On the other hand, the EU has stated what would be the minimum level taxation, in other words, a minimum level of the harmonised tax burden, and at the same time proposing new BEFIT rules that again leave national taxation, a new EU level of taxation regulation and finally still also global minimum tax system.

⁸⁰⁴ Constitutional assessments are done on the Member State level, i.e. on the level where there is only limited room to adjust the rules. The EU is not taking them into account on a wide scale other than policy statements: "the rules are considered to be proportional".

⁸⁰⁵ My view is that this is possible as EU legislation is purely political – political ambitions override easily the actual circumstances. As an example, holding companies are assumed to be tax avoidance tools and therefore they should be the focus of tax avoidance rules meanwhile holding companies are a typical tool to mitigate risk, group operations for strategic review, arrange ownership, or bankruptcy protection. The operating profits are not taxed, and should not be, in the hands of the holding companies, but in the operative companies. Holding companies may be used abusively for withholding tax purposes, but when behaving responsibly the use of holding entities has another purpose than tax benefit.

My conclusion is that unless the EU's role and processes are developed and clarified, the EU's tax legislative initiatives negatively influence taxpayers' legal protection. This becomes obvious when looking at MNEs' increased compliance burden resulting in lowered predictability, poor clarity, and uncertainty⁸⁰⁶. Solving this challenge would require fundamental considerations: moving taxing powers from Member States to the EU or creating⁸⁰⁷ an EU-level tax legislative process and governance, including a court system with strong enforcement powers. To demonstrate the challenge, I will next illustrate it with an example.

7.1.1 Case study: Limitation of interest deduction in ATAD, and the rule of law

On 28 January 2016, the European Commission presented its proposal for an Anti-Tax Avoidance Directive (ATAD). This proposal was part of the so-called Anti-Tax Avoidance Package. On 20 June 2016, the Council of the European Union adopted the Commission's proposal into Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning⁸⁰⁸ of the internal market⁸⁰⁹. The OECD-originated ATAD contains five legally binding anti-abuse

⁸⁰⁶ Finland did not allow a possibility for advanced rulings to its implementation of global minimum tax due to the complexity of the rules and the fact that taxpayers' obligation to file first returns is not near in time. At the same time, Sweden implemented a possibility for a ruling with a reference to the same facts. Especially in the question of global minimum tax, MNEs need to take a position on their GloBE obligations a lot earlier than filing the tax returns. This obligation is based on IFRS rules.

⁸⁰⁷ If the EU had taxing powers, its legislative process should include real components of the basic legislative process as the objective (collecting taxes) should be balanced directly with constitutional rights (can constitutional rights be restricted in favour of collecting taxes). The EU would have a direct link to stand-alone taxpayer's position that the EU should respect in its legislative process compared with the way the EU is currently legislating Member States, not taxpayers directly. As Hettne p. 20 states, "the general principles of EU law not only impose limits on national law, but also on the effective application of EU law in the Member States". This may be also a stress point for the EU's reference to Article 115 as taxpayers face the challenge of the internal market sooner than Member States.

⁸⁰⁸ This is a strong conclusion based on the statement that the BEPS actions, being the underlying framework, refer to the behaviour of some taxpayers only.

⁸⁰⁹ This same reference is repeated in later directives as justification of the EU directive. The EU has not described clearly how the directive would improve the functioning of the internal market other than with high-level assumptions and references. At least Englisch seems to agree with this argumentation. As the rules do not set one clear rule for all taxpayers across the EU I find that this argument is not a convincing one. Even though proportionality is an objective measure for national legislation it should be applied even to the EU directive as the directive sets limits for national legislator

measures to be implemented by the Member States, the restriction of interest deduction being one of them. The directive creates a minimum level of protection against corporate tax avoidance throughout the EU, “while ensuring a fairer and more stable environment for businesses”⁸¹⁰.

The background for ATAD is stated in brief in the EU’s Anti Tax Avoidance Package: “The Anti Tax Avoidance Package is part of the Commission’s ambitious agenda for fairer, simpler and more effective corporate taxation in the EU⁸¹¹. The Package contains concrete measures to prevent aggressive tax planning, boost tax transparency, and create a level playing field for all businesses in the EU⁸¹². It will help Member States take strong and coordinated action against tax avoidance and ensure that companies pay tax wherever they make their profits in the EU”⁸¹³.

Out of these objectives, only a simpler corporate tax system promotes the functioning of the internal market whereas fair and more effective corporate taxes

(Article 51). For the purposes of this study, it is crucial to understand the objective of the directive. As the objective is fighting against tax avoidance, it should also be measured whether the directive fulfils its objectives, that is whether it is not proportional to taxpayers’ constitutional freedoms. EU Tax Observatory 2021 p. 7 considers the EU’s capabilities to be limited by stating “However, direct taxation remains the sole prerogative of individual member states, subject to the fundamental freedoms fixed in the Treaty on the Functioning of the European Union”

⁸¹⁰ See https://ec.europa.eu/taxation_customs/business/company-tax/anti-tax-avoidance-package/anti-tax-avoidance-directive_en. I would classify this statement as ambitious, but also as highly political. The directive, its preparatory works, and even the OECD BEPS analysis do not really contain any reference to how it supports fairer, simpler and more effective corporate taxation in the EU. Pålsson p. 152–153 considers that the EU Charter, especially Articles 20 and 21, provides for equal treatment and non-discrimination. However, the specific provisions on freedom of movement serve as the most important basis for equality. Article 49 (freedom of establishment), Article 56 (free movement of services), and Article 63 (free movement of capital) are designed to prohibit restriction on freedoms. As the directive is targeting to limit these freedoms, it has a negative impact on equality rather than a positive impact. This would mean that the EU’s statement would require more analysis to clarify how the limitation of equality promotes fairer, simpler, and more effective corporate taxation in the EU. A reference to multinational companies’ possibility to be established in more countries as an argument is thin as it brings more compliance obligations and complexity for business.

⁸¹¹ This as such does not improve the functioning of the EU internal market. It sounds like an attempt to make a reference, at least to a certain extent, to define the aimed tax system. This becomes obvious when considering closely the measures that EU rules have created in the era of BEPS.

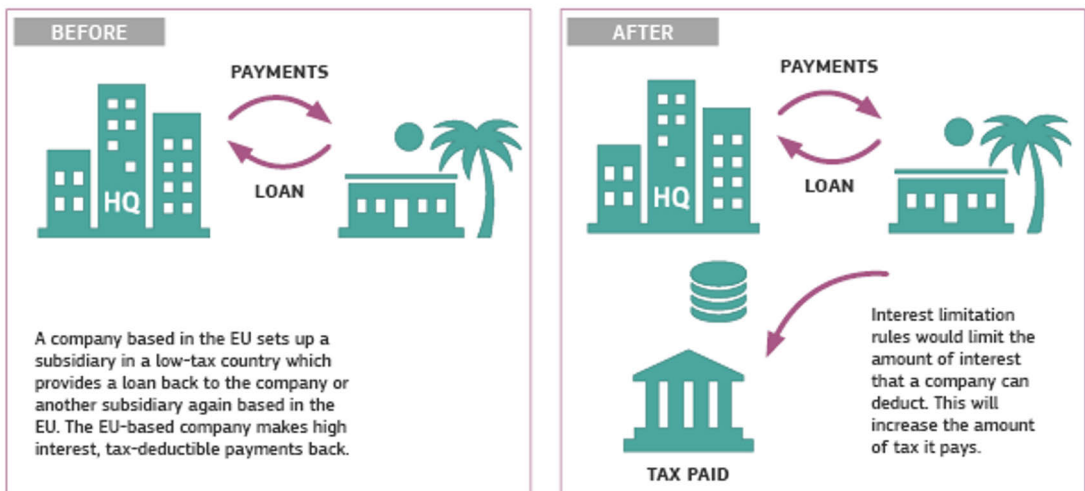
⁸¹² The interest deduction limitations are valid only for operations that actually have financing needs and to the extent the financing costs are above a threshold. This means that the impacts of the rule are focusing on the businesses that need financing to be able to invest and operate. This as such is not aggressive tax planning but merely in line with economic freedoms to arrange business in an optimal way.

⁸¹³ European Commission Press release Jan 28, 2016.

are not strictly speaking internal market measures. Harmonisation, however may to some extent be a positive development to the functioning of the internal market. As financing is crucial part of business operations, and is also recognised as sensitive area from aggressive tax planning view, it is an interesting issue for the purposes of this study.

As Knuutinen states, limitation to interest deduction is not expressed as an anti-avoidance rule in the directive as such although this is the objective for the rule⁸¹⁴. The logic of interest deduction limitations was presented in brief as a picture⁸¹⁵:

THE LOW TAX LOANS: Interest Limitation Rules



https://ec.europa.eu/taxation_customs/business/company-tax/anti-tax-avoidance-package/anti-tax-avoidance-directive_en

Directive (EU) 2016/1164 makes some common as well as specific remarks about the purpose and content of the directive when considering limitation on interest deductions:

⁸¹⁴ Knuutinen 2020, p. 54. The interest deduction limitation is based on selected financial indicators that have no relation to the intention of avoiding taxation.

⁸¹⁵ https://ec.europa.eu/taxation_customs/business/company-tax/anti-tax-avoidance-package/anti-tax-avoidance-directive_en. The picture is marketing interest deduction rules with a simplified picture painting out different levels of taxation, but not illustrating fundamentally an abuse of EU or national regulation, compare with for example Kokott's statement in the Danish cases.

1. Political priorities in international taxation highlight the need for ensuring that tax is paid where profits and value are generated⁸¹⁶.
2. It is imperative to restore trust in the fairness of tax systems and allow governments to effectively exercise their tax sovereignty⁸¹⁷.
3. There is a need to find common, yet flexible, solutions at the EU level consistent with the OECD BEPS conclusion⁸¹⁸.
4. It is essential for the good functioning of the internal market that, as a minimum, Member States implement their commitments under BEPS and more broadly, take action to discourage tax avoidance practices and ensure fair and effective taxation in the Union in a sufficiently coherent and coordinated fashion⁸¹⁹.

⁸¹⁶ This statement is crucial as it has been the basis of transfer pricing rules already for decades. The challenge in this true and valuable statement is, in line with Fuller's findings, that it is difficult to give an objective statement on where the value is created and where profits are earned. This is dependent on views on what is driving value creation. This can be seen in the points made by different countries. Countries seem to give weight to those value drivers that are typical for the country in question. Likewise, this can be seen in the points made internally in an MNE – every function is considered to contribute differently to value creation.

⁸¹⁷ Equally, it is easy to agree with this view. There is, however, a slight challenge in this statement. As governments are exercising their tax sovereignty the EU seems to offer its view on tax sovereignty, which is not in line with all Member States' views. This is to a certain extent the problem when considering whether the EU can reach the objectives proportionally, especially by giving weight to the efficiency of tax sovereignty by limiting it.

⁸¹⁸ The OECD's action 4. The OECD stated that "the recommended approach will mainly impact entities with both a high level of net interest expense and a high net interest / EBITDA ratio, in particular where the entity's ratio is higher than that of its worldwide group" and that "the rule does not restrict the ability of multinational groups to raise third party debt centrally in the country and entity which is most efficient taking into account non-tax factors [...]". OECD / C20 2015 Final report, p. 16. The statement is challenging from a taxpayers' fundamental rights point of view as a taxpayer has the right to choose even how to finance the operations in the way that is best for the taxpayer's business. This statement does not consider at all this fact, merely focusing on the option that a taxpayer can choose in which country to take the central funding and that the consolidated debt equity is the reference ratio. Financing is far more complex than a reference to an average indicator.

⁸¹⁹ My view is that this point is made to justify legislative power based on Article 115. This argument is crucial and interesting. The argument is well justified, but the mechanism that was chosen does not tackle tax avoidance but rather measures the relation between interest cost and taxable profitability. The capability to carry debt relates not only to profitability but especially to balance sheet strength. As the market interest rates have increased, multiple challenges are appearing with capital-intensive

5. National implementing measures that follow a common line across the Union would provide taxpayers with legal certainty compatible with Union law⁸²⁰.
6. It is necessary to lay down rules in order to strengthen the average level of protection against aggressive tax planning in the internal market creating protection for national corporate tax systems.
7. In an effort to reduce their global tax liability, groups of companies have increasingly engaged in BEPS, through excessive interest payments. It is therefore necessary to fix a ratio for deductibility which refers to a taxpayer's taxable earnings before interest, tax, depreciation, and amortization (EBITDA)⁸²¹.

These background points illustrate political pressure within the European Commission and the Council resulting in high-level political statements⁸²². They might oversimplify the reality of financing operations by concentrating too much on

taxpayers in cases where tax avoidance is not in focus. Additionally, when considering the EU, the application of interest deduction varies despite the EU directive. The EU directive proposal 2016 states p 5 that "The envisaged measures do not go beyond ensuring the minimum necessary level of protection for the internal market. The Directive does not therefore prescribe full harmonisation but only a minimum protection for Member States' corporate tax systems." The legal basis for the directive proposal is the functioning of the internal market, but the directive aims only to partial harmonization and instead protect Member States' corporate tax system.

⁸²⁰ To support this statement, the EU should have analysed more deeply the rules and their impacts to measure the proportionality of the proposed rules in relation to the objectives of the rule, as normally is done at least in the Nordic countries' legislative process. Here, urgency has replaced caution belonging into the tax legislative process according to for example the Finnish Constitution.

⁸²¹ This ratio is sensible for far more factors than just aggressive tax planning measures. Interest rates are impacted by market interests more than aggressive tax planning, the profitability is equally dependent on other factors than the tax department's efforts. The rule treats different kinds of operations differently, it refers to the size of interest payments while it does not measure artificiality or any other objectives of interest payments at all. Aggressive tax planning should naturally refer to solutions where a high need for funding is not a natural resource for business.

⁸²² Fuller p 33 considers these kinds of statements to be beyond the morality of law. Even though the statement is easy to agree with they may be impossible to comply with due to several reasons. Fuller refers to eight ways to fail to make law. I consider that Fuller's view is true in this case. The rules seem to be drafted and assessed by tax authorities, who surely understand how to assess taxes but have finally very thin understanding of business requirements. This leads to situations that Fuller is writing about.

abusive practices⁸²³. The EU's key objective is the elimination of abuse, but has EU executed the rule of law test steps in its regulative process? Limitation of all interest deductions seems to be going beyond what actually would be needed to improve the functioning of the internal market. We can see if we shortly analyse the impacts of interest deduction rules.

The EU has set, in line with the OECD's BEPS action plan, a relation between taxable EBITDA and financial net as a limitation measure for financing costs. This taxable-income-related measure combined with financial net impacts different taxpayers, such as capital-intensive businesses. When considering the rules from the functioning of the internal market point of view the taxpayers can be classified by impact (from most beneficial to least beneficial):

1. Non-EU investors have better capability to invest in the EU as the target entity can deduct interest cost based on its taxable profitability meanwhile the equity investor receiving (tax exempt) dividends as return on investment is not limited by the taxable profit dependent interest deductions.
2. Investments done within one and same Member State and one fiscal unit have better capability to deduct interest costs due to broader taxable EBITDA than an investment within the EU cross-border investment.
3. The least beneficial situation is a case where an EU-based taxpayer invests in another EU country, where the taxpayer has no other operations. Capability to deduct interest cost is limited as the new investment is the only source of taxable EBITDA in the country. The investor's return is tax-exempt dividend not included in the basis of taxable EBITDA, i.e. not creating the basis for interest deduction. The post-tax financing cost of this investment is higher.

The EU's legislative process failed to consider these situations even though the same kind of impacts have been analysed when regulating state aid rules (TFEU Article 107). State aid rules measure carefully when state aid is acceptable from the

⁸²³ For example, in 2022, when Russia started its war against Ukraine and the EU reacted with strong and justified sanctions towards the Russian economy, this changed dramatically the financing net of those companies that were funding Russian operations by debt financing. Hedging costs went up to 45% of the nominal value resulting automatically in a negative finance net. Further, the gas curtailment impacted the German Uniper SE dramatically creating extensive losses every day and resulting in multibillion debt with hardly any financial net. These issues can hardly be seen as aggressive tax planning but the ATAD rules were still applicable. The reference to extensive interest payments is a simplification that should not be used as a basic assumption for tax avoidance or aggressive tax planning.

internal market point of view, but interest deduction limitations having the same financial impact are not considered from this aspect at all⁸²⁴. Instead, the rules may create a difference of financing cost due to tax depending on the way financing is organised. This illustrates well that the EU's tax legislative process is not efficient.

7.1.2 Case study on interest deduction: Discrimination of investments and the operative model

In this section, I will illustrate that the EU's approach may include the idea that Member States should adapt their whole tax system to ATAD.

The national tax consolidation rules create different basis for interest deduction. If tax consolidation is organised, for example, through group contribution, taxable profits can be transferred easily. The use of depreciations is instead limited as depreciations are allocated to companies where the assets are⁸²⁵ meanwhile debt can be in another entity, such as parent company⁸²⁶. The structure of the interest deduction rule creates differences between taxpayers depending on how they have organised their operations: central financing is treated differently than decentralised financing and holding-based split structure operations are treated differently than all operations in one entity setups. This means that taxation is limiting taxpayers' right to choose the best non-tax-related operational model. For example, the Dutch Supreme Court has found this kind of rule too narrow in the light of the system of law⁸²⁷.

⁸²⁴ Limitation of interest cost may create equally an advantage to certain taxpayers and a disadvantage in the same way as state aid. Tax rules create a negative state aid, see for example-526/04 Boiron.

⁸²⁵ Unless the national tax rules allow also to transfer the tax depreciations for interest deduction purposes within the fiscal group, depreciations can't be optimised even within a national fiscal consolidation-

⁸²⁶ Allocation of debt is usually strongly business-driven even though financing in BEPS is regarded to be one of the areas of aggressive tax planning as some taxpayers have used artificial financing setups. This does not mean that all financing would be artificial or done for tax purposes. To avoid structural subordination, some MNEs organise their funding centrally by the parent company and an efficient group internal financing from there onwards. This means that interest costs are centralised in a company that does not necessarily have any operative assets subject to depreciation. Changing the operative model to get an interest deduction may result in increased interest cost as the operative change could lead to structural subordination and the price of funding depends on the creditworthiness of each company in the group. Typically, structural subordination means lowered credit rating which means higher interest cost.

⁸²⁷ See the Dutch Supreme court decisions BNB 2014/79, BNB 2015/165 and BNB 2017/156. Even though the question was about the interpretation of existing law, the system of law, in other words, the right to organise business is a fundamental freedom,

The reason for the interest deduction rule to conflict with the fundamental rights is, contrary to the objectives set in the BEPS project and the ATAD initiative, that the prohibition of abuse has greater weight in comparison to the functioning of the internal market, i.e. fundamental economic rights⁸²⁸. They are not anymore considered in the constitutional context as the focus is merely on tax avoidance. The legislator, in this case the EU, has failed to balance the different interests, nor has the legislator considered the third measure, proportionality at all⁸²⁹.

The third measure in the rule of law test is whether the rule reaches its target and does not go beyond what is needed. The EU's objective has been the promotion of the internal market by ensuring that all income would be equally taxed in the Member States⁸³⁰. Further directive statements look more like a policy or political statement⁸³¹. However, the OECD, who drafted the recommendation, did not aim for

that should be respected. It can be limited by taxation, but only if the limitation is legitimate and proportional.

⁸²⁸ The legitimate, true group internal financing setups are the vast majority of set ups even though they are not discussed publicly at all. In fact, these legitimate setups may formally look almost like artificial setups with the difference that financing in the legitimate cases is based on actual business reasons and these business needs are common for all the businesses in the branch. In artificial cases there normally is no need for such kind of financing. Additionally, there can be setups that aim purely to avoid taxes, but they include artificial characters, such as round-tripping.

⁸²⁹ The fact that the EU has not considered the proportionality of the rules is due to what kind of a legislator the EU is. If the EU is granted taxing rights or power to legislate over taxes, the legislative process in the EU should be adjusted accordingly. See for example the EU directive proposal 2016 p 5.

⁸³⁰ The EU directive proposal 2016 states that "The Directive does not therefore prescribe full harmonisation but only a minimum protection for Member States' corporate tax systems. Thus, the Directive ensures the essential degree of coordination within the Union for the purpose of materialising its aims. In this light, the proposal does not go beyond what is necessary to achieve its objectives and is therefore compliant with the principle of proportionality." This illustrates well that BEPS objectives were more urgent than considering the EU economic freedoms and the functioning of the internal market.

⁸³¹ This kind of statement is politically-oriented creating a black-or-white outcome. It ignores whether financing, even group internal financing, is real and exists for proper business reasons or whether it has been set up artificially. The statement seems to focus only on shifting profits from one place to another instead of considering when financing would create profit shifting. Taxing powers have not been compared against the economic fundamental rights. I see that we can read the EU's initial objective from this statement: ideally to seek a fair level of taxation, aiming only to partial harmonisation of the rules and making competition even between Member States, not necessarily taxpayers. There were however no attempts to measure what would be fair nor how far-reaching the rules would be. One could think of multiple reasons for this approach, one that comes to my mind is that neither the OECD nor the EU understood what they were

improved functioning of the internal market as the OECD has no internal market in the sense that the EU does.

The interest deduction limitation rule has no internal market measurement⁸³². The ECJ has taken some positions on national measures that can be used also for this purpose. In this respect I would like to refer to case Marks & Spencer⁸³³ where the ECJ stated that a cross-border consolidation of tax losses in EU should be possible under certain circumstances. Cross-border consolidation, even limited to final losses, improves the functioning of the internal market by supporting the free movement of capital.

In the case AA Oy⁸³⁴, a non-arm's length group contribution was not acceptable as this would open a real possibility for eroding tax basis in one Member State. Group contribution is, even though being legally justified, an artificial transfer of profits as there is no requirement for any real transaction of goods nor services or business reasons⁸³⁵. Further, the European Commission has reminded at least Finland and Sweden of the fact that final losses should be deductible in Finland respective in Sweden though the operations would be abroad⁸³⁶.

The difference between interest deduction and tax consolidation is fundamental: interest on loans should be set at arm's length and is a remuneration for services meanwhile group contribution does not have these features at all. Financing and interest due to it is by nature not eroding tax base⁸³⁷ meanwhile tax consolidation, especially group-contribution-based tax consolidation, is not an arm's length

legislating about. This could be concluded from the fact that the OECD and the EU finally sought a global minimum tax, so-called Pillar 2, to ensure the elimination of aggressive tax planning, see for example Mason, pp. 972–973. Examples of statements are for example that “[i]t is necessary to lay down rules against the erosion of tax bases in the internal market and the shifting of profits out of the internal market” as “in an effort to reduce their global tax liability, groups of companies have increasingly engaged in BEPS, through excessive interest payments”.

⁸³² This same approach seems to be applicable to other directives also. The impact assessments are limited to considering if there are financial or operative impacts to the EU itself, not the impacts to the taxpayers or Member States.

⁸³³ ECJ C-446/03 Marks & Spencer.

⁸³⁴ ECJ C-231/05 Oy AA.

⁸³⁵ Loss consolidation consolidates business-related losses, resulting in a closer relationship with the business.

⁸³⁶ See for example the Finnish Government proposal 185/2020. The proposal does not however open a true cross-border loss consolidation, merely a form-over-substance approach for EU requirements.

⁸³⁷ Arm's length financing is not eroding tax base: the service provider gets a remuneration covering its risks and functions it performs meanwhile receiver of service receives the service, can use it for his/her benefit collecting profits from the financed target, and pays a fee for this service.

transaction at all⁸³⁸. Restrictions in interest deduction relate directly to business operations. This means that a mechanical rule limiting interest deduction not only eliminates some artificial debt structures but limits also normal, legitimate business operations. This illustrates that considering taxpayers' rights is important, as it has wider impacts than just fiscal interest.

The limitation rule is based on taxable EBITDA. The rule does not have any purpose test measuring why the debt is in place⁸³⁹. In other words, all debt is included in the limitation considerations, arm's length or artificial, business oriented or tax evasion oriented⁸⁴⁰. The limitation measure, taxable EBITDA, does not measure tax avoidance, not even erosion of a tax base. It measures level of taxable income. This means that the limitation goes far beyond what would be needed for the purposes of the rule in the light of rule of law analysis and treats different set ups differently⁸⁴¹. This means, that EU's legislative process has failed and is in conflict with Fuller's principles⁸⁴².

⁸³⁸ Group contribution is not a remuneration of any service or goods, it is based on a tax consolidation system. This kind of system works within one tax sovereignty, but not between two countries without eroding tax basis in one.

⁸³⁹ Knuutinen 2021 considers that the interest limitation rule is in place for the same purpose as other anti-avoidance rules even though there is no anti-avoidance measurement connected to the rule.

⁸⁴⁰ New tax-related directives will put a challenge to the ECJ's traditional approach to the "incidental" effects of directives, see Ross, pp. 487–489. The ECJ has been reluctant on the idea of horizontal direct effect allowing one individual to invoke rights against another individual. In the case of the new tax-related directives the same kind of challenge may be seen, but from a different angle. National legislation implements a directive setting out only minimum rules while the directive itself may include challenges as regards proportionality. These challenges are reflected in national laws, which Member States may not be able to solve. An individual has to challenge the proportionality of the directive to assess his/her legal protection. In this respect, EU law might offer protection against directives. Ross considers based on case C-201/02 Wells the interface between direct effect and incidental effect case law that "the principle of legal certainty prevents directives from creating obligations for individuals. For them, the provisions of a directive can only create rights" (para. 56). One conclusion of this could be that a directive may set rules to limit the interest deduction, but a taxpayer can successfully claim interference with EU Treaty irrespectively.

⁸⁴¹ As Ross states (p. 496), "a multi-faceted and open approach to the interaction of different legal orders is actually well within the spirit of subsidiarity more generally. On this view instructions from the (judicial) centre should be as "soft" as" possible in order to maintain and guarantee those principles and values essential to the core activities of the Union.

⁸⁴² Fuller describes how King Rex is making efforts to create good legislation. Fuller has classified requirements for good legislation through King Rex's failures. In this respect, the EU has acted like King Rex.

The question remains whether it is the directive itself that violates the EU Treaty or whether the national laws violate the EU treaty depending on how the directive is implemented. Each EU Member State has sovereignty over taxation within their own jurisdiction. Tax legislation should nevertheless respect EU Treaties and EU law by treating equally domestic and EU intra-market operations, or it should not create unjustified limitations, to put in other words. The EU aimed the rule for cross-border transactions rather than national operations – the target was to limit multinational entities' operations, not national operations⁸⁴³. Tax treatment of interest cost becomes dependent of the legal form of the investment as the measure to allow interest deduction is always bound to tax treatment of corresponding return on the investment irrespectively of the purpose of the legal form of investment⁸⁴⁴. Therefore, I think that the EU's solution to implement the OECD's recommendation without proper preparatory process fails from the beginning from a taxpayers' legal protection point of view. The OECD did not plan the rule to promote the functioning of the internal market, the angle that the EU is using as justification. This is the reason for the structural challenge in the directive, which can be eliminated only by extreme measures in the national law⁸⁴⁵.

7.1.3 Rule of law and EU directives

EU directives set limitations for national legislation⁸⁴⁶. By setting limitations on the national legislator, the EU is effectively restricting the national legislator. When legislating on tax the EU is legislating on a national measure, not the internal market

⁸⁴³ The directive mentions especially structures that multinational entities use, there are thresholds for applying the rules. Financing is seen merely as a tax planning tool, not a consequence of financing needs.

⁸⁴⁴ Interest deductibility depends on whether the return is taxable. This means that investments in the form of acquiring shares are treated differently from greenfield investments. Interest deduction may also be dependent on where the investment is done as permanent establishment income may be treated differently. Even though profitability, especially taxable profitability, is a measure, I do not see it as a problematic measure in itself. Profitability is merely a business risk that depends on various measures, not a discriminative factor unless it is created by other, non-tax-related national measures. The challenge is created by connecting the measure to the (national) tax treatment of the limitation measure without any purpose test. Further, the measure is connected to tax treatment of related income.

⁸⁴⁵ National legislator's hands are actually tied due to the directive, meaning that Member States would be in breach of the directive. Even though the EU Commission proposal refers to Member States need to adjust the rules for national purposes, the room for different kind of solutions is very limited. The challenge is created by the directive itself as the proportionality on the actual legislative level was never assessed.

⁸⁴⁶ See for example Hettne.

directly. This is a challenge from the taxpayers' legal protection point of view. Taxpayers' legal protection relies on primarily national measures that are restricted by the EU Treaties and EU directives and these national measures may be indirectly in conflict with the EU Treaties and directives⁸⁴⁷.

When approaching the rule of law itself, the first consideration is whether the law has legitimate targets. Interest limitation rules, as a whole ATAD, aim to tackle tax avoidance and aggressive tax planning⁸⁴⁸. As the target is actually to limit the taxpayers' possibility to choose between legal alternatives on national level, the legislative process should ensure that the rules do not go beyond what is needed.

Rule of law has in this case a double impact. Firstly, the EU should consider that its directives are drafted so that Member States can comply with them in line with EU law. This means that the directives should reflect the functioning of the internal market, nothing more⁸⁴⁹. On the second level, Member States should implement the rules complying with EU law, but with clarity, on the national level to ensure the rule of law.

This kind of rule of law approach is supported, as the ECJ has considered justification of legislative conflicts with the EU's principles through a rather narrow approach at least compared with the arguments presented by EU Member States. The ECJ's approach has been described as dogmatic⁸⁵⁰ where only tax avoidance and ensuring balanced taxing rights⁸⁵¹ have been approved as justification for taxation

⁸⁴⁷ A good example of this is the EU's objective for the directive to "help Member States take strong and coordinated action against tax avoidance and ensure that companies pay tax wherever they make their profits in the EU". While it is easy to agree with the statement, it ignores the conflicting interests that Member States have in order to recognise profits generated under each Member State's jurisdiction. The directive does not even attempt to define how allocation of profits should be done nor does it improve sufficiently the dispute resolution between Member States. For example, the global minimum tax is not an improvement as it creates an entirely new level of taxation to the EU with totally new standards.

⁸⁴⁸ Directive (EU) 2016/1164 recital points 1, 3 and 6.

⁸⁴⁹ Such as level of taxation.

⁸⁵⁰ Urpilainen 2012, p. 81. Urpilainen considers that ECJ has dismissed arguments on reduced tax revenue (with reference to C-35/98 Verkooijen) and accepted arguments on tax avoidance and fair allocation of taxing powers. See also Vanistendael.

⁸⁵¹ Urpilainen 2012, p. 81, Helminen 2013 pp 22–23 points out that EU law in itself does not include any rules for allocating taxing rights between Member States. Member States may have parallel rights for exercising their taxing powers, which is not regarded to create restrictions prohibited by TFEU (see for example Case C-436/08, Haribo Lakritzen Hans Riegel BetriebsgmbH) as long as this is not discriminatory. Member States should eliminate international double taxation through international tax practice, such as tax treaties and the OECD Model Tax Convention, Helminen 2014, pp. 392–393. This means that EU law objectives have been partly outside the scope of ATAD.

interfering with EU law, i.e. EU treaties. On the other hand, purely government financial reasons have not been regarded as a justification for conflicting with EU law⁸⁵² nor different tax rates⁸⁵³.

Directive (EU) 2016/1164⁸⁵⁴ as such states multiple targets, which are on a high level in line with ECJ praxis concerning ensuring balanced taxing rights. Unlike the ECJ, the European Commission's approach to the topic is not narrow, nor protecting the private sector rights, but rather the opposite. The directive is not making efforts to be limited only to tax avoidance, nor even aggressive tax planning⁸⁵⁵. Efforts relating to balanced taxing powers are also rather humble⁸⁵⁶. The measure used, net financial cost in relation to taxable EBITDA, does not reflect tax avoidance nor aggressive tax planning in any manner. Nor it is impacting the artificiality of

Van Thiel 2002 states that the ECJ considers for example economic rights enjoyed in a constitutional context. For this purpose, the ECJ has developed "judicial protection" principles. These principles include the idea of the EU as a new legal order which is based on the rule of law and in which private sector rights are of a constitutional character and that these rights may be invoked in national courts. The courts are obliged then to ignore contrary provisions of any national laws, Van Thiel 2002 pp. 177–178.

⁸⁵² C-35/98 Verkooijen, para. 48, and C-292/04 Meilicke, para. 30.

⁸⁵³ Urpilainen 2012 considers (pp. 80–81) that ECJ has accepted tax avoidance as a justification for interfering with rights based on EU law, but only when the interference is as little as possible.

⁸⁵⁴ This directive is a new type of tax-related directive. It may reflect the same challenges as other, non-tax directives, such as that the content is difficult to align with national legislation.

⁸⁵⁵ The approach the European Commission has chosen is challenging from a taxpayers' legal protection point of view. As the EU is making an effort to tackle aggressive tax planning which in the limits of economic freedom rights are cases where the rights are misused by artificial arrangements, the EU's approach becomes somewhat difficult. As any true, business-minded, and legitimate setup can be misused and is artificial for those businesses that do not have a natural need for the setup, the EU should in fact consider most of business transactions as aggressive tax planning. As this cannot be the case, the EU's approach has an improper approach to tackling tax planning.

⁸⁵⁶ Point 6 in the directive recital. This point states not exactly that taxable borrowing costs can be deductible though it does not state how much of it is deductible. Point 5 instead states clearly the target of avoiding double taxation. This raises the question of whether the directive improves the functioning of the internal market at all. This would mean that the EU had no justification to legislate over the issue.

financing⁸⁵⁷. It measures funding cost and profitability that vary independently of any tax reasons⁸⁵⁸.

The target to harmonise taxes that impact the functioning of the internal market only indirectly⁸⁵⁹, if at all, creates a complexity when considering taxpayers' rights. According to Helminen⁸⁶⁰, EU law has not regulated by any means the allocation of taxing rights between Member States as long as they are not discriminatory. ATAD rules go deeper in the area of tax sovereignty. It defines as a concept when a business cost is deductible and when not. This most likely is the challenge created for the legislative process. The rules impact the allocation of income and tax revenue between Member States, which should not be an aim of EU regulation. It appears that the rules are going beyond what would be allowed for purposes of Article 115⁸⁶¹. As Van Thiel considers, "economic rights are enjoyed in a constitutional context and must be protected both in the EU and in the Member States"⁸⁶². This casts a shadow on the ATAD drafting process⁸⁶³.

The complexity and sensitivity of this topic in relation to taxpayers' legal protection is evident in the case of ATAD as the objective is to limit taxpayers' economic rights. The OECD's BEPS project, which is not aimed at improving the

⁸⁵⁷ Financing, as any other legally and operatively justified business model may be used artificially or aggressively when used in a situation where it is a natural part of. Instead, the measure may create an obstacle for cross-border business restructurings within the EU as a consequence of far-reaching steering of tax impacts on business. This is not in line with the EU's objectives or mandates. A relief based on a group-wide debt-equity ratio is not a real effort to respond to proportionality. Consolidated debt-equity is only an average, not a reflection of business needs in a country. This illustrates well the conflict between the national and EU approaches. On a national level the debt level might be high due to an investment and the higher debt deviates from the average. The investment requires a well-functioning internal market while a consolidated debt-equity is shifting costs to Member States that would not have any income on the investment.

⁸⁵⁸ Interest rates vary due to movements in financial markets, credit rating, and regulation, not due to tax planning. Manipulation of credit rating on the other hand is artificial and can be approached from an arm's length point of view.

⁸⁵⁹ See S. Prechal, pp. 8–10. See also Lennaerts & Gutierrez-Fons, p. 1639.

⁸⁶⁰ Helminen 2014, pp. 392–393.

⁸⁶¹ For example, the interest deduction limitations vary a lot between EU Member States. As the markets where the investments are used are acting in one internal market, the differences between the EU Member States may create discrimination and therefore they are not promoting the functioning of the internal market.

⁸⁶² Van Thiel pp. 177–178. According to this approach measures in ATAD should have been carefully measured against the economic rights protecting taxpayers.

⁸⁶³ ATAD rules, as well as Pillar 2 rules, are drafted originally by the OECD. The OECD has no internal market and has no need to consider how the rules actually work within the EU's internal market. The OECD's approach legitimately is national. As the EU has not considered the functioning of the internal market in this respect either, proportionality may have been ignored totally.

functioning of the EU's internal market, but rather tackling global challenges, produced 15 action plans that included recommendations, policy statements, and alternatives⁸⁶⁴ to tackle inappropriate misuse of economic freedoms⁸⁶⁵. The rules copied to ATAD have not been measured to ensure the objectives of EU law and the proportionality of the rules against the functioning of the EU internal market.

I see two complexities in the EU's approach. First, the actual impact changes the allocation of income between Member States and therefore is touching economic freedoms by setting a minimum level for national tax rules, that each Member State will implement. This does not in itself eliminate mismatches between Member States, it only changes the nature of the mismatches. "National implementing measures which follow a common line across the Union would provide taxpayers with legal certainty in that those measures would be compatible with Union law" becomes only a political statement. Each Member State can choose freely the level of national restrictions, as long as they reach the minimum restrictions⁸⁶⁶.

Secondly, the directive takes no measures to unified measures nor dispute resolution which would be crucial for the functioning of the internal market. This approach is crucial as the existing dispute resolution is based on national court procedures and solving tax treaty disputes. The effectiveness of the EU legal system and national rules is not considered⁸⁶⁷. This leaves the right to a fair trial merely a national matter⁸⁶⁸. This accelerates poor proportionality as different countries'

⁸⁶⁴ See for example Ruitter 2018. This reflects normal policy statements that are actually not intended to be binding rules themselves, but to be the building blocks for future rules, see for example Pijl, p 100.

⁸⁶⁵ In the case of tax avoidance and possibly even in the case of aggressive tax planning, economic freedoms are misused. The EU sets minimum rules for each Member State "to strengthen the average level of protection against aggressive tax planning in the internal market" as "only a common framework could prevent a fragmentation of the market and put an end to currently existing mismatches and market distortions", points 1–3 in recital of ATAD. This statement is a high-level political statement but even as such it includes a far-reaching assumption of some economic rights to be abusive purely by existing. Funding seems to be one of them.

⁸⁶⁶ It appears that the attempt to eliminate mismatches is mumbled: the key definitions are not agreed on the EU level either, see also Urpilainen 2021, p. 1317. Further, the statement on alignment on EU law is interesting as the EU in itself does not include taxing powers. Clarity, which is one of the cornerstones in legislation, becomes questionable due to the political nature of this directive.

⁸⁶⁷ Ross (pp. 479–480) refers to ECJ case C-201/02 Wells as an example of maintaining an uneasy hierarchy between substance and procedural rules where substance rules are represented by EU law and procedural rules national rules.

⁸⁶⁸ Legislating tax issues through directive connects the topic directly to EU law, but leaves dispute resolution to "old generation" regulation.

approaches to EU law vary a lot⁸⁶⁹, a factor not improving the functioning of the internal market.

Pillar 2, the minimum tax, creates additional complexity. Meanwhile, the measures of deducting interest costs do not reflect anti-avoidance, Pillar 2 may create double taxation of the same income where there is no tax deduction. Interest deduction limitation is a measure in corporate income tax meanwhile Pillar 2 is a separate tax system and framework based on however also on profit (but defined differently). This fundamental situation creates surely an interesting item based on EU law varying depending on the factors. It illustrates well missing legislative process on the EU level in consideration of national taxation.

The second test regarding the rule of law is whether the rules are non-discriminatory. With respect to EU law, discrimination refers to the functioning of the internal market⁸⁷⁰. Urpilainen considers that BEPS recommendations have been implemented to a certain extent in a harmonised manner⁸⁷¹. This does not guarantee non-discrimination as taxes are assessed separately on national level in each Member State. Non-discrimination was not tested on the EU level, nor on a national level. It is likely that at least in some cases the different tax treatment could be seen as discrimination in line with the ECJ's principles. This is due to the BEPS objectives not being internal market or equal treatment measures, they are more connected to

⁸⁶⁹ See for example Bernitz 2010 and 2016. Ross is approaching this angle through the effectiveness of European legal orders. Where Ross considers effectiveness being openly invoked by national courts, particularly in relation to burden of proof, time limit, (non)availability of remedy, or procedural power of a court, Bernitz has analysed how reluctant the Swedish courts are to refer cases to the ECJ partly due to the procedural power of a court. See also ECJ C-173/03 *Traghetti del Mediterraneo v. Italy*, Advocate General Léger's opinion, para. 56: "First, the breach in question may result from a national law being interpreted in a way that conflicts with the Community law applicable. According to settled case-law that is contrary to the duty of interpretation in conformity with Community law incumbent on all national courts, the importance of which was recently reiterated in *Joined Cases C-397/01 to C-403/01 Pfeiffer and Others*, a dispute between individuals concerning the application of provisions of national law which were adopted in order to transpose a directive conferring rights on individuals." *Joined Cases C-397/01 to C-403/01 Pfeiffer and Others*, para. 111, states: "It is the responsibility of the national courts in particular to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective."

⁸⁷⁰ See Englisch 2021.

⁸⁷¹ See Urpilainen 2021. Urpilainen considers however that the minimum rule approach is not supportive of harmonisation. While this is true, this approach ignores the fact that traditionally national courts define national interpretation (based on tax authority assessment and challenged by a taxpayer) without EU consolidation.

abuse⁸⁷². The BEPS project did not create a sufficient preparatory process for tax legislation⁸⁷³.

7.2 Conclusions of considering EU economic freedoms in the legislative process

National constitutions protect many of fundamental freedoms through constitutional interpretation⁸⁷⁴ as well as set limits for legislators to interfere with these rights through normal tax legislation⁸⁷⁵. Fundamental freedoms in EU law, in other words, freedoms promoting the functioning of the EU's internal market, are based on the EU Treaties and confirmed by ECJ praxis⁸⁷⁶. The ECJ in its turn seeks support from Member States' constitutions when interpreting the EU Treaties⁸⁷⁷. Supreme Courts confirm the importance of fundamental freedoms⁸⁷⁸ and their priority to fiscal interests. Constitutional regulation defining freedoms, equality, etc. is crucial for taxpayers' legal protection. Constitutions, even though being "softer" law⁸⁷⁹, in the

⁸⁷² See for example Urpilainen 2021, p. 1316.

⁸⁷³ The OECD gives only a recommendation, not an actual law proposal. Nor does the OECD consider impacts on any national level.

⁸⁷⁴ For example, the Finnish SAC has considered that it has no power to step into the role of a legislator nor consider if the legislative process has been appropriate, but can use constitutional interpretation to solve the questions raised in the appeal.

⁸⁷⁵ In this respect especially the proportionality principle is crucial to ensure that the legislation is not going beyond what is needed to reach the objectives.

⁸⁷⁶ The EU treaties' objective is to promote the functioning of the internal market and eliminate obstacles to the free movement of capital and persons. This is clearly a non-tax measure, where tax may impact negatively the functioning of the internal market and make business less attractive for a taxpayer from another Member State.

⁸⁷⁷ Vanistendael 2014 notes (pp. 35–36) that the EU is founded on the common "values" such as freedom, equality, and the rule of law. The same values are used in Member State constitutions. Lenaerts and Gutierrez-Fons consider (p. 421) that "looking at the function of general principles, we attempt to determine how general principles affect the vertical and horizontal allocation of powers." This leaves the ECJ with a gap-filling function, as the ECJ is engaged in creating new principles, that contribute to completing the new legal order established by the EU Treaty. This was done by aligning Union legal order with the basic constitutional principles common in the majority of Member States.

⁸⁷⁸ For example, the Dutch Supreme Court has ruled that based on the system of the legislation taxpayer has freedom of choice in the form of financing of a company it owns. This freedom cannot be restricted by too narrow interpretation of the Dutch interest deduction limitations. NB 2014/79, BNB 2015/165 and, BNB 2017/156.

⁸⁷⁹ Constitutions create guidance and principles that are rather soft and flexible unlike tax law, which is hard and mechanical, see Vanistendael 2014, p. 29.

legislative process challenge political pressure concerning fiscal interests or urgency⁸⁸⁰.

It seems obvious to me that constitutional rules are fundamentally important for taxpayers' legal rights especially in the legislative process, both on the national level and the EU level. Directives and tax law⁸⁸¹ should be drafted so that tax, as a consequence of business, is at a minimum neutral from the economic freedom and internal market points of view⁸⁸². Secondly, for those who execute and apply tax law, constitutions present a soft law guidance and constitutional interpretation, in other words, no clear problem solving-directly, but guidance. The protection constitutions offer is abstract and soft with enforcement⁸⁸³.

The other side of the coin is that these fundamental freedoms create also fundamental obligations⁸⁸⁴. Fulfilling these obligations is important as constitutional protection is financed by taxes paid. The governments' obligation, when using their right to tax, is the obligation to respect the freedom rights. This illustrates well the

⁸⁸⁰ See for example Bentley 2007, pp. 236–237, and Lehtonen 2012, pp. 32–33. Lehtonen raises the question of how efficient pre-control is to ensure constitutional aspects of tax legislation. The EU has repeatedly stressed the fundamental importance of a well-functioning internal market, such as in the global minimum tax initiative. Despite the European Commission stressing this point, it announced on 14 September 2022 the need to cut power prices and levy windfall taxes on utilities that charge more than 180 euros / MWh without really considering whether this would impact consumer prices, what is the actual ability to pay tax or how it impacts the functioning of the internal market. Urgency seemed to be the driving force. This gives some evidence that the European Commission is moving from one urgency to another without having to consider the balancing powers set by constitutions.

⁸⁸¹ Lehtonen 2012 considers that constitutional pre-control is not sufficient. At least in Finland, politicians consider pre-control to be well-functioning and are reluctant to initiate constitutional post-control.

⁸⁸² Tax in itself is not neutral for business, but it should be neutral for economic freedoms and functioning of the functioning of the internal market point of view.

⁸⁸³ Enforcement may not look obvious, but the ECJ has ensured enforcement in post-legislative aspects on the freedom right level, and for example, the Finnish SAC is committed to constitutional interpretation. For example, in the Supreme Administrative Court (Finland) case 2021:179 the SAC was considered the purpose of the law against economic rights. The SAC sought guidance from the constitution for the decision. In the Finnish SAC case 2008:6, the SAC considered that “based on the current state of tax law” income was taxed as dividend income. The SAC gave a hint in this case for the legislator to fix tax law but did not see based on the legality principle it was possible to change the interpretation of the law. In the Supreme Administrative Court (Finland) case 2016:115 the court considered that a taxpayer had valid business reasons and therefore the right to organise its transactions in the best possible way without being taxed based on tax avoidance.

⁸⁸⁴ The obligations refer to the latest trend identified in tax management. Shareholder value has been joined with stakeholder value. This means that the duty to contribute to society or avoid misuse of freedom rights is identified as a target even in business society.

balance between private interest and public interest⁸⁸⁵. Neither should have supremacy over the other.

The EU's new tax directives are challenging from a taxpayers' legal protection point of view. The EU justifies the directives by referring to Article 115 of the Treaty of the Functioning of the European Union on (functioning of the internal market). The OECD, which in real terms stands for the design of many of these rules, has not designed them for this purpose as such⁸⁸⁶. Additionally, the EU has not aligned different, overlapping directives with each other properly. Member States and the ECJ have a challenge in implementing and assessing these rules created by the EU, but not measured against Article 115.

This takes me to analyse the legislative national process slightly closer before considering legal principles.

7.3 National legislative work and taxpayers' legal rights after BEPS and ATAD

Economic freedom rights, as part of the constitutional level of legislation, restrict even the legislative powers of a government or any other legislative body⁸⁸⁷. This is due to the superiority of constitutions or the EU Treaty. Restriction of taxing power creates an obligation for legislators to take taxpayers' rights into consideration⁸⁸⁸.

⁸⁸⁵ Balancing interest is one of the key criteria when considering legitimate legal expectations. Douma, pp. 227–228, further ECJ case Mulder 120/86, that Douma refers to.

⁸⁸⁶ Harmonised rules target to prohibit locating financing in low tax countries, but this is not in line with the freedom of establishment.

⁸⁸⁷ As discussed earlier, the Council's role as a legislator in the area of taxation should be rather clear, see for example Äimä, p. 55), but perhaps confused somewhat with the latest proposals, such as ATAD or Council Regulation on an emergency intervention to address high energy prices. The objective of EU tax policy is complex as a policy differs from tax regulation. The Council does not have any taxing powers. The Council is arguing its tax proposals based on Article 115 (functioning of the internal market) or 122 (difficulties in the supply of energy). The use of these Articles as an argument in itself is a political statement that reflects most likely political objectives, in line with the Roles statement. From a legal point of view the use of these articles is not discussed properly. For example, Englisch 2021 seems to agree with the use of Article 115 and the European Commission's legal department with the use of Article 122. I see that these views do not however take into account the proposed rules at all. A minimum rule does not support necessarily at all the functioning of the internal market. Nor is a revenue cap type of windfall tax supporting the energy supply or solidarity within the EU.

⁸⁸⁸ Sasi (2018) considered that constitutions do not limit legislators' powers. It appears that the Council of the EU would have the same consideration as Sasi. As I have stated

Taxpayers, on the other hand, have an obligation to pay taxes, which is based on legislation respecting fundamental rights⁸⁸⁹. This first level of taxpayers' protection is based on the construction of legislation and a constitutional state: it will work only if the second level of taxpayer protection is in place. Taxpayers' enforcement powers on the first level are soft and complex. Taxpayers' protection is improved if the quality of the legislative process is secured. The quality of the legislative process and the tax legislation creates the second level of taxpayers' protection.

I will review the importance of taxpayers' rights by considering the three components of the rule of law as well as reviewing shortly Fuller's principles in light of taxpayers' rights and the national legislative process. These aspects are the purpose of the law⁸⁹⁰, impact assessment⁸⁹¹ as well as clarity of the law itself⁸⁹².

I aim to test whether Fuller's principles still are valid or if there is perhaps a new paradigm changing morality. The question is if the constitutional principles create then actual protection for a new paradigm and if that protection is taken into account in the current processes with a twist from new EU directives. Finally, I will try to estimate the strength of the possible new, post-BEPS and post-ATAD, paradigm and the constitutions for the second level of protection.

earlier, I agree with this view with a remark that a legislator or regulator has to consider the mandate the legislator or regulator has. Regarding the area of constitutional principles or the EU Treaty, the mandate depends on the required decision-making majority and process around approving the new rules. A purely simple majority decision is not sufficient for all regulative decisions.

⁸⁸⁹ This is in line with "no tax without representation" and the legality principle, see for example Äimä, pp. 103–104, Tax has to be ruled by law in a way that taxpayer can conclude tax consequence. The rule of law / legality principle puts a higher standard for the tax legislative process. In this respect, a requirement of interpreting the law in the spirit of the law may illustrate a poor preparatory process conflicting with the rule of law.

⁸⁹⁰ Purpose of the law is crucial especially when considering the proportionality of the rule. The proportionality principle will be supported also by the preparatory works if the purpose of the law is well documented.

⁸⁹¹ Also impact assessment refers to proportionality test. Additionally, an impact assessment should allow consideration of how the protection of property is taken into account and that the rule of law actually can be reached.

⁸⁹² Clarity seems to be a basic requirement set by the constitution for tax laws ensuring that taxpayers can comply and that the rule of law is followed.

7.3.1 A new paradigm guiding legislation –The purpose of the law

As I have considered earlier, there is on the EU and the OECD levels⁸⁹³ a strong political will and pressure to change tax rules, at least for some taxpayers⁸⁹⁴. One of the main drivers for this change seems to be the ongoing discussion of multinational entities' thin tax footprint and tax avoidance, i.e. mistrust⁸⁹⁵. This mistrust results

⁸⁹³ The OECD got the task of reviewing tax rules from the G8 and G20 countries. It is important to note that the OECD's work does not necessarily reflect all the aspects of all OECD countries. OECD and also EU implementation has been steered by the US reactions and conditions on the new rules and the progress of the new rules. African and South American countries are not satisfied with the new set of rules as they see these rules aiding more developed countries. This can be seen as mistrust towards the OECD and promoting the UN to produce a new tax policy.

⁸⁹⁴ Especially the multinational entities seem to be in the focus. The OECD stated that the low or no taxation per se is not a concern, but the practices creating artificial segregation of tax base is a concern. The OECD's BEPS project promoted a co-ordinated and comprehensive action plan to address this kind of base erosion and profit shifting to secure sovereign taxing powers and allocation of income fairly, OECD 2013 pp. 9–11. The OECD was aiming for co-ordinated actions and improved treaty network. This gives each country the possibility to adapt its tax sovereignty to the new system. The EU's justification relates more to the functioning of the internal market. The EU has based its directive proposals and also directives on the OECD's BEPS recommendations. These new proposals and executed directives create new compliance rules as well as new additional taxes. The new paradigm seems to have reflections on behavioural tax. Adam Smith considered that a neutral tax system is the most efficient. For example, Äimä (p. 1010) has considered that administrative efficiency, simplicity, and predictability are key drivers for a good tax system. Taxation can have behavioural targets without fiscal interests, i.e. not contributing to government funding. This however is not necessarily supporting economic efficiency nor a very exact way of steering behaviour. The steering impact becomes even more challenging if not impossible if it is combined with fiscal interests. The steering objective is somewhat contradictory to fiscal interest as if the steering objective is reached, the fiscal objective disappears. A good example of this challenge is the green transition: while taxpayers should promote green transition by their choices, the fiscal interests will mitigate green transition as the revenue of "green taxes" disappears.

⁸⁹⁵ As the OECD states "some taxpayers deem reported low corporate tax rates to be unfair" and later "their effective tax rate is viewed as being too low", OECD 2013, p. 8. This illustrates well the mistrust although the OECD makes a correct statement by referring to "some taxpayers". The challenge is that low corporate income tax may be a natural consequence of low profits despite high net sales. Equally, effective tax rate is an extremely complex measure without any actual reference to statutory tax rate or current tax contribution. When considering for example EBTF's studies the consequence would be that multinational entities, at least those who reported their tax contribution to EBTF, seem to pay a large portion of the taxes, see for example EBTF total tax 2022 report, p. 43.

more from public discussion on a few taxpayers than facts on a wider basis⁸⁹⁶. Another reason may be the EU's political agenda to shift taxing power from Member States to the EU or to create taxing power for the EU in addition to Member States.

Reasons for mistrust are analysed in several studies though the basic assumption seems to be taxpayer behaviour to erode tax basis⁸⁹⁷. Often these studies focus on tax only fail to understand the impacts of financial turns in the economy, the changing nature of business, differences in local and international operations, or impacts that tax has on the source of tax revenue, i.e. business. Tax is a complex topic to be discussed. Simplified conclusions do not do justice to the complexity of taxation. Simple political statements may seem justified, but the impacts are in reality unexpected⁸⁹⁸. Decision-making should be more balanced taking better into consideration the factual background.

⁸⁹⁶ Conclusions are often made isolated on amount of income taxes in relation to net sales or reported profits simplifying the circumstances, not reflecting the complexities of tax. This, on the other hand, does not mean that there would not be artificial setups, but surely not as an assumption.

⁸⁹⁷ For example, the European Parliament study by the Directorate General for Internal policies, policy department A “Nominal vs. Effective Corporate Tax Rates Applied by MNEs and Overview of Aggressive Tax Planning Tools, Instruments and Methods” states about BEPS: “The project was launched following unprecedented public and political anger at the aggressive tax planning activities of multinational enterprises (MNE).” The study tries to explain how MNEs are eroding tax basis rather than trying to understand the difference between statutory tax rate, effective tax rate, and tax planning opportunities between MNEs and SMEs. Trust is crucial, for example in a webinar arranged by *ACCA, IFAC and PAFA, in collaboration with the OECD and the World Bank* in September 2022 was considered the importance of trust that: “It’s a vicious circle: the lack of trust threatens the key resource enabling any government across the world to meet today’s challenges – i.e. tax revenues - but without effective tax systems, governments cannot fund the initiatives to build that trust. And yet without that revenue, governments cannot deliver on the UN’s Sustainable Development Goals (SDGs).” Likewise, in EU Tax Observatory working paper 18 the assumption seems to be that “[...] when they (MNEs) choose to move taxable profits away from countries, the corporate tax revenue is likely to be affected”. The study compares corporate income taxes to German local trade tax. The study considers “the resulting effective trade tax rate varies between 7% and 21%”. This seems to relate more to statutory trade tax rates than effective tax rates. We can see by these examples that mistrust is created by examples and that a few taxpayers behaving artificially affects a larger group of taxpayers independently whether their solutions are legitimate or not. Income tax is a consequence of profits in the business, not the revenues.

⁸⁹⁸ We have seen speedy proposals for new tax rules or even new taxes, that are driven partly due to high political pressure or urgency or a combination of both. These proposals are not properly considered from a totality point of view. The OECD Pillar 2 as well as Council Regulation on an emergency intervention to address high energy prices (2022) are good examples of this. Pillar 2 is intended to finalise the OECD’s

The OECD's BEPS policies followed by EU regulation can be defined as narrow by its scoped target. The paradigm seems to be tax behavioural change: the unwanted tax behaviour is aggressive tax avoidance⁸⁹⁹ to be eliminated without any reflection as to why and when businesses have legitimate needs for the focused items. The means of tackling specific artificial situations⁹⁰⁰ are narrow and opposite to the purpose of the regulation⁹⁰¹. The need to update tax rules was impacted by assumed tax avoidance tension touching deeply taxpayers' right to choose between different options. The tax management behaviour was considered to be changed by broad rules for specific business objectives, i.e. a whole area within business was labelled as "most likely tax avoidance"⁹⁰². Later the same narratives have been used but the

BEPS work, to bring the extra revenue to countries. The further analysis is done, the smaller the actual increase in tax revenue seems to be. Tax revenue expected in Finland is only € 5–30 million per year, see HE 77/2023, p. 27. This finding is not in line with the expectation. The proposal for a Council Directive due to high energy prices states the curtailment on gas deliveries and shortage of energy combined with high prices are the main challenges for Member States and the EU. However, the revenue cap and solidarity approaches do not solve the challenge of energy supply, nor the high prices. It seems to be that the impacts might instead, at least in the short term, reduce the capacity in use as some production would become loss-making. This illustrates well how complex tax as a steering tool is as different topics are connected to each other in a way that requires proper analysis and discussion to be taxed sustainably.

⁸⁹⁹ In this case the behavioural change is not a traditional target. Often tax policies target to change investment behaviour to promote something that is important for society or to prohibit certain behaviour, such as smoking or the use of fossil fuels. BEPS-related targets refer to tax management behaviour, which is fundamentally a different topic. Instead of giving an advantage to certain behaviour policymakers are trying to impact certain taxpayers' behaviour of how they manage their taxes by assessing the tax treatment of all businesses, see for example Council Directive (EU) 2016/1164, recital para. 2.

⁹⁰⁰ The OECD considered that **some** taxpayers have reported low taxes (OECD 2013, p. 8) which has given rise to BEPS action plans. If the aim is to tackle the behaviour of these few taxpayers, the method seems to be impacting many more than perhaps intended.

⁹⁰¹ Compare for example with the ECJ C-115/16 Danish cases where ECJ specifically considered that the taxpayer was entering the EU internal market artificially to benefit from the internal market in a way that was not the intention of the legal system.

⁹⁰² Changing behaviour is complex and difficult as steering business based on tax consequences most likely has some unintended impacts. The same challenge is connected to BEPS –changing the tax treatment of business objectives to impact tax management behaviour most likely has impacts that were not intended, not at least in the policy statements. Such impacts could be looking for alternative solutions to reach the business objectives or transfer of business activities. Only transparency targets aim to a certain extent change tax management objectives to make sure that data and information are truly provided to tax authorities. The downside of this target is that it offers a lot of details to tax authorities instead of a big picture. This means that transparency, as now executed, may offer some support for the tax authorities together

political agenda seems to shift more to the reallocation of taxing powers⁹⁰³. As the underlying business objectives, even on a high level, were not known, the drafted rules impact taxpayers' legitimate economic freedoms and may not be proportional to the objectives.

The objective is to restore trust in the fairness of taxation. This objective as such is not in itself justifying the EU's actions as the fairness of taxation is not improving the functioning of the internal market. Fairness should be ensured by the Member States⁹⁰⁴. Perhaps the new paradigm is seeking morality in defending the tax base⁹⁰⁵. Fuller, and many before and after him, have been considering morality. Fuller talks about the moral of aspiration starting from the top of human achievements and the moral of duty starting from the bottom⁹⁰⁶.

The wording of the new rules is built in the spirit or morality of aspiration⁹⁰⁷. The urgency of both the BEPS project and the following actual legislative work left no time nor an opportunity to consider the total impacts of the proposals or whether the proposed rules truly are in line with the purpose of the rules⁹⁰⁸. As legislation

with the transfer pricing documentation meanwhile using the same format for public country-by-country reporting is most likely only confusing.

⁹⁰³ While the EU has no taxing powers it is drafting multiple tax rules in order to finally tackle tax avoidance. These policies are covered by Article 115 concerning the functioning of the internal market, later even including behavioural aspects, such as health. On the other hand, tax avoidance topics have been tackled already by BEPS and ATAD rules. It looks more like a policy to shift taxing power from Member States to the EU, see for example Penttilä 2022.

⁹⁰⁴ Member States have tax sovereignty, i.e. they have the right to tax and they should follow OECD targets of systematic changes and aligned tax treaties.

⁹⁰⁵ Especially for multinational enterprises it is not regarded to be sufficient to pay tax in line with the law, rather in the spirit of the law or based on morality. It appears that the behavioural change is dressed as morality. The OECD considered in 2019 that the original BEPS project target was: "Project consisted of 15 separate action areas targeting the gaps and mismatches in the international tax system that facilitated the shifting of profits by multinational enterprises (MNEs) away from where the underlying economic activity and value creation took place." (OECD/G20 Base Erosion and Profit Shifting Project Report Tax Challenges Arising from Digitalisation – Interim Report 2018).

⁹⁰⁶ Fuller, pp. 4–5.

⁹⁰⁷ This is obvious: for example, DAC 6 wording covers a wide range of normal business transactions that need to be reported as "aggressive tax planning" to catch all possible angles. This illustrates seeking higher moral behaviour than perhaps was targeted resulting in automatic shortcomings. There are other approaches to this topic: the need to cover as wide a range of topics as possible or a poor understanding of the facts behind different setups. The most likely reason is perhaps a combination of all these approaches.

⁹⁰⁸ This kind of impact assessment is crucial when considering the proportionality of the rule. Is it going beyond what was the purpose or is it tackling the objective at all?

starts normally from the moral of duty⁹⁰⁹, the newly drafted regulation faces the problem of impossible implementation. Taxpayers wishing to comply with the complex, often overlapping rules may require extreme solutions⁹¹⁰. This illustrates that when drafting new rules, no true impact assessment from the taxpayers' economic freedom point of view was done, nor assessment on how to ensure a fair assessment process and trial.

The purpose of the national law is to ensure that a Member State complies with the ATA-directive. Indirectly the ATA-directive purpose should be therefore copied to be also the purpose for the national law. As EU's legitimisation for the directive is the functioning of the internal market, a stand-alone Member State may have challenges in connecting this to national proposal for the rule. Member State interest nationally may be in conflict with EU's target

The later development, an attempt to shift tax regulation powers to the EU piece by piece has the same challenges⁹¹¹. As the EU has no actual legislative process⁹¹² for concrete tax legislative work, rules are easily unclear, looking like a policy. Even proportionality may be questionable. The EU's political agenda seems to ignore Member States' constitutions and even the EU Treaty⁹¹³.

⁹⁰⁹ Moral of duty sets down the basic rules without which an ordered society is impossible, Fuller, p. 5.

⁹¹⁰ Tax authorities will have challenges to make responsible and trustworthy assessments based on all the data and information. The possibility for clarity through rulings may be denied by legislation as the legislation is so complex that tax authorities have challenges in giving the advanced rulings, see for example HE 97/2022

⁹¹¹ This attempt may illustrate more the approach the large Member States, especially France, have on tax legislation and the EU. While the Nordic Member States are more focused on the rule of law approach and tax sovereignty, France may be approaching the same issue from a federal-state point of view – even tax rate differences are creating unfair taxation.

⁹¹² The EU may not have a proper legislative process in other sectors of legislation either, but as tax and criminal law are centered around the rule of law, the issue is even more crucial for tax legislation.

⁹¹³ References to the EU's mandate are often thin and not analysed extensively. They refer to Article 115 (functioning of the EU internal market) or Article 122 (emergency rule in relation to energy supply) of the EU Treaty, but the actual analysis of whether the rules actually have a positive impact in the spirit of the referred EU Treaty Article is not considered properly. For example, the Council Regulation (EU) 2022/1854 on an emergency intervention to address high energy prices states as its background and objective "Regulation establishes an emergency intervention to mitigate the effects of high energy prices through exceptional, targeted and time-limited measures. Those measures aim to reduce electricity consumption, to introduce a cap on market revenues that certain producers receive from the generation of electricity and redistribute to final electricity customers in a targeted manner, to enable Member States to apply measures of public intervention in the price setting for the supply of electricity for household

My conclusion is that the new approach depends on the combination of the complexity of the issue including global business, national and international regulation, setting higher moral targets for legislation than normal, high financial expectations, ignoring constitutional aspects, and conflicting interests. National legislators' hands are fundamentally tied: purpose of the law is defined by the EU, not by the Member State. A national legislator has a theoretical freedom to align with constitutional aspects and an actual obligation to comply with directives. The new approach conflicts with the legality principle, in other words, the formal application of rules. Vanistendael describes the situation from growing tax burden to tension between form and substance⁹¹⁴:

“As tax burdens of all sorts have been increasing worldwide and as transactions have become more complicated and globalized, connecting many different tax systems, the temptation has been increasing to look for forms and constructions leading to a lower tax liability. Because in many jurisdictions taxing is an act requiring a specific legal basis, tension between “form” and “substance” has sometimes been exacerbated and pushed to extremes.”

Proportionality may be challenged also later in the assessment process due to failures in the legislative process. The new rules push tax authorities to assess tax more based on fiscal interest opposite to the actual circumstances of the underlying businesses and considerations resulting in arbitrary taxation and escalation of mistrust⁹¹⁵.

Constitutions' one function is to protect taxpayers from extraordinary, even arbitrary, tax liabilities. A constitution, as well as EU law, is a hedge instrument for

customers and SMEs, and to establish rules for a mandatory temporary solidarity contribution from EU companies and permanent establishments with activities in the crude petroleum, natural gas, coal and refinery sectors to contribute to the affordability of energy for households and companies.” Some of these objectives are easier to pursue but some of them may be contradictory to each other. For example, compensation of high energy prices may be contradictory to energy saving targets while high windfall tax on extreme profits may reduce power production resulting in higher prices. Quite minor consideration was paid to the prices: what actually would be an extreme price to be taxed? All this means that taxpayers' legal protection should be taken into account to ensure that objectives are reached.

⁹¹⁴ Vanistendael 2011, pp. 189–190.

⁹¹⁵ See Vanistendael 2011, p. 191. The high volume of data and information, that is transparency, is not improving trust for the assessments. It is actually more difficult to identify what data and information is material and crucial among the high volume of information. There is obviously an attempt to use information that is actually not applicable for taxation purposes or should be used with caution.

taxpayers' rights⁹¹⁶. Constitutional rights should be evaluated in the legislative process and, the functioning of the internal market from an EU law point of view⁹¹⁷, and both of these aspects considered in an assessment process⁹¹⁸. From taxpayers' legal protection point of view the impact assessment should be focused on the relation of national tax treatment, the functioning of the internal market and measuring that purpose is met. This obligation is excluded on the EU level and left for later formal national compliance. Seeking aspiration through aspiration-based law will most likely be realised in a number of shortcomings⁹¹⁹.

7.3.2 Legislative process protecting taxpayer

A legislator has strong powers to change legislation⁹²⁰. Each time the political power shifts laws may be adjusted to reflect the political agenda of the selected majority. This power, however, is limited, as earlier considered, by the constitutional rules

⁹¹⁶ Vanistendael 2014 considered that constitutional rules may affect in addition to procedural rules even the material rules of taxation. Further, Vanistenadael 2011 p. 185 considered that international rules are crucial "more than wars, conflicts between tax systems in the international arena are inevitable, resulting in double or even multiple taxation".

⁹¹⁷ EU directives force Member States to legislate on the issue even though a Member State having an obligation to ensure alignment with EU law has no space to change the rules to better comply with EU law. The base assumption of an EU directive being compliant with EU law is not justified as the EU has passed this criterion lightly, at least when it comes to the justification of tax legislation by the EU.

⁹¹⁸ As Bentley 2007 considered, the challenges legislative work is facing have increased due to the amount of new legislation and the increasing complexity of the regulative environment. To comply with the regulatory environment either more resources and time or less new regulation would need to be considered.

⁹¹⁹ As meant by Fuller.

⁹²⁰ For example, Sasi 2018 stated that the legislator has "no limits" (Helsinki 2018). The same can be concluded from the proposals for Council Directives, which illustrate the thinking of limitless legislators. In case of the EU, this angle has further implications, as noted earlier. For example, in 2022 the Council of the EU's so-called windfall tax proposal (30 September 2022) proposed Member States to tax energy companies on their windfall profits for a limited time. The Council argued its mandate on Article 112 of the EU Treaty, which mentions emergency actions especially in the area of energy. The situation was an emergency or at least close to an emergency. Despite the emergency, the proportionality of the EU regulation, which would be immediately applicable law in each Member State was not considered at all, nor whether tax as such was the correct measure at all to reach the objectives. This means equally that no parliament ever approved the tax prior to it being already fixed by the Council. In other words, the decision was made by political pressure, urgency, and public expenditure instead of considerations to improve the situation on a fundamental basis. Measures were truly needed for multiple purposes, but the question of emergency can be questioned. We could instead talk also about late political reactions.

creating a general framework⁹²¹. Far-reaching changes require a clear mandate in line with the constitutional rules⁹²² illustrating a changed understanding of new fairness or morality. This requires in a constitutional system a defined majority and a process⁹²³.

Taxpayers' constitutional protection sets more requirements on the legislative process than just generalization or fairness⁹²⁴. Fuller lists eight fundamental requirements that are required for a law not to fail⁹²⁵. This list is perhaps more important than any other criteria set for legislation as the ECJ seems to follow closely Fuller's principles⁹²⁶. It also illustrates that the legislative process is important when considering taxpayers' legal protection: almost independently of the substance rules⁹²⁷, if the law fails on any of the eight points listed by Fuller, taxpayers' position is weakened. Or if we express it a bit differently, there is a risk for conflict escalation due to contradictory interests⁹²⁸.

⁹²¹ Fuller considers generality to be the first qualitative criterion for legislation. Generality, which the constitutions offer is a principle of fairness and belongs according to Fuller in external morality of law, Fuller, p. 47.

⁹²² In case political decision-makers do not respect the constitutions and overrule them due to urgency, post-control legal protection with efficient legal enforcement becomes a valuable tool for taxpayers' legal protection.

⁹²³ These rules are planned to ensure a balanced view of fundamental changes in legislation. Urgency as a reason illustrates at least to me that this principle is bypassed in order to reach other objectives that might not be acceptable by the majority. Urgency is used to hide the true agenda of the new "king", whoever that is. See in this respect Fuller's conclusions on King Rex failing in his good intention and Vanistendael 2014.

⁹²⁴ See for example Ossa 2022 in his statement about the Finnish windfall tax. He lists several factors that equality sets limits to legislators. The mandate may be wide, but not without limits. Equally, he concluded that the new rule should be clear and precise, which is in this case a concrete point to the proposal at hand.

⁹²⁵ These eight criteria are 1. generality of law, i.e. that there exists a rule, 2. rule is published, 3. non-retroactivity of law, 4. clarity of law, in other words failing to make the law understandable, 5. rules fail if there are contradictory rules, 6. rules require conduct beyond the powers of affected parties, in other words compliance becomes impossible, 7. rules are changed frequently, and 8. failure of congruence between the rules as published and as they are assessed by authorities, Fuller, pp. 38–39. When discussing with persons involved in practical tax work, it surprises me how many points the OECD's Pillar 2 rules fail in this "test".

⁹²⁶ See Douma, pp. 220–228. In this case, at least when the tax legislation is touching on EU law aspects, Fuller's list becomes relevant when considering whether the law complies with EU law and freedom rights.

⁹²⁷ If the law fails Fuller's test, there will be difficulties in applying the law. Rules may work, as Fuller illustrates in the example of King Rex, but only for a short period of time.

⁹²⁸ When comparing public and private interests, both suffer from this kind of escalation. Public interest as a willingness to comply decreases, see Bentley 2007.

In a perfect world, laws would be clear meaning that both taxpayers and tax administration always had the same view throughout the years. As so many have considered before me⁹²⁹, this is unfortunately only a theoretical dream. The OECD's and the EU's role in the legislative process, as executed in the BEPS project, creates poor clarity as the actual legislative process takes place after the broad rules have been fixed.

Currently, the considerations between internal and external morality are back on the table⁹³⁰. Even though courts are, or at least should be, independent, the judges are impacted at least to a certain extent by the ongoing political discussions and obviously decisions resulting in laws⁹³¹.

7.3.3 Morality in legislative process – Proportionality and impact assessment

A requirement of fair tax represents well the challenge that is connected to the morality of aspiration. The highest level of morality is complex especially when more aspects are taken into account⁹³². This is illustrated well also by statements that

⁹²⁹ Knuutinen 2009 considers that laws need to have a certain flexibility, Fuller points out that legality can be complete as it needs some flexibility to be built in. There are books written about how to interpret law.

⁹³⁰ Not always for the morality reason, but morality and fairness are used to drive political objectives of taxing powers. See for example the European Commission press release of 13 December 2022 stating: "Once implemented, this agreement will bring fairness, transparency and stability to the international corporate tax framework". The EU's agenda with Pillar 2 rules can also be seen as an attempt to finally create taxing powers for the EU. The EU is considering EU-wide corporate taxation based on the Pillar 2 approach creating an income source for the EU. The EU's reference to fairness is a political statement as there is no evidence that Pillar 2 rules actually would change the tax burden in real terms.

⁹³¹ It seems that courts are impacted by the political trends more in some countries than others. For example, in the US, judgments have partly a policy nature. On the other hand, independent court decisions on unclear rules may finally create surprises to political decision-makers as rules are considered in a wider framework.

⁹³² For example, the measure of effective tax rate is complex. The way ETR is defined in IFRS is complex to understand as IFRS takes a future view on business, not a backward-looking approach as taxable income often does. Further, the tax system includes multiple factors of tax treatment to maintain the logic of the taxing system and to eliminate double taxation. When just considering a simple measure against another there is a risk that the measures are not based on the same standard and not comparable. Low ETR does not illustrate low current cash tax and low current cash tax does not mean high ETR.

tax payment should not only be based on law, but morality⁹³³. Who will then define what is morally sufficient? We can easily come to the same conclusion as Fuller did in 1964: there will be shortcomings in reaching the fair amount of tax, not because taxpayers would not want to, but because they will fail in some aspect due to different views of what is fair⁹³⁴. For example, if new rules, such as BEPS action plan on digital business, are targeted to a specific taxpayer, the rules apply always to all taxpayers⁹³⁵.

The morality of aspiration is a high-level statement or understanding of justice and fairness, basically a policy statement. As Fuller concluded, when reaching for it one will normally fail due to the unclarity of what it actually is. My view is that the morality of aspiration⁹³⁶ is defining high-level principles that are applicable in broad terms. In legislation, these principles are normally defined in constitutions – or equally in the EU treaty⁹³⁷. Constitutions confirm freedoms and equality, but they cannot be applied easily to a specific case. To clarify this understanding of justice and fairness – constitutional rules – we need laws. Laws represent the morality of duty.

The morality of duty defines the minimum rules that are clear and known for morally acceptable activity. As the understanding of minimum level will vary over time, laws need to be adjusted. This takes place in a democratic state through a parliamentary process. As Fuller considers, laws and regulations need to be

⁹³³ This statement somehow underestimates the legality principle: how should the law be read then? Is there a higher value that rules over the existing laws and what would be the justification for tax authorities to levy taxes based on the tax authority's understanding of morality. Or can taxpayers pay more than what is required by law? It becomes unclear who then has the power to judge how taxes are collected. Equally, this does not mean that the taxpayer has no obligation to respect the law and the purpose of the law.

⁹³⁴ In fact, stand-alone phenomena-based objectives, as NGOs often have, will easily result in failure as they fail to understand the big picture and consequences of change. I would see NGOs' points more as a starter for discussion of different views than an actual kick-off for a new policy.

⁹³⁵ If some taxpayers behave inappropriately, the changing rules will apply to all taxpayers on the branch as the law can hardly be applicable to specific taxpayers only. Further, there is a clear impact on business – the EU has implemented most of the BEPS action plans and has plans to implement also Pillar 1, allocation of profits aimed for large digital businesses. These businesses are US-based. As the US did not approve Pillar 1 rules, the most important BEPS action plan may not be in force at all while the EU has put a lot of new compliance on its taxpayers weakening the EU taxpayers' competitive power in comparison to the US.

⁹³⁶ Fuller came to the same conclusion concerning the morality of aspiration and constitutions.

⁹³⁷ This illustrates why the fairness aspect should always be reflected against constitutional rules instead of actual, stand-alone tax consequences. The views and discussion become unbalanced.

formalised so that it is possible to comply with these rules, otherwise even the morality of duty will fail. This takes us to the morality of legislative work and process⁹³⁸.

To fulfil their targets, laws should be formulated so clearly that can be complied with sufficiently, available for and applicable to everyone, and not retroactive⁹³⁹. When considering tax law, laws should take into account not only the fiscal interests but also the constitutional freedoms by considering not only the tax impacts of the proposed law but also the impacts on the underlying economic activity subject to the tax⁹⁴⁰. From a taxpayers' protection point of view, it is critical that tax laws are not restricting economic rights too extensively. For this purpose, the legislator needs to understand the impacts of the proposed law, i.e. to make an impact assessment.

Considering the morality of a taxpayer is only a sub-morality focusing on fiscal outcome⁹⁴¹. High-level fundamental principles set by constitutions create a larger scale of morality. Fiscal morality is an underlying morality, in other words, it needs to adapt to constitutional rules. Tensions in morality, both external and internal morality⁹⁴², become an issue when approaching the borders of moral rules. Are they already misused?

⁹³⁸ Bentley 2007 considers that urgency in the legislative process easily escalates disputes. Lehtonen 2012 notes that high volumes and urgency leave no sufficient time for constitutional review. This results in failure to reach the morality of law.

⁹³⁹ All these points are included in Fuller's list.

⁹⁴⁰ As Ossa 2022 considers in his statement to the Finnish windfall tax proposal the tax legislator has wide freedom to legislate tax but this freedom is not without limits. Even though tax legislation is almost always a highly political issue, alignment with the constitution is outmost a legal judgment.

⁹⁴¹ Morality of tax refers to the high-level morality: what and how to tax taxpayers. Taxpayers' behaviour on how to comply is a sub-morality. The whole BEPS project with most of the following projects has been focusing on this sub-morality. The OECD stated in 2013 that "no or low taxation is not per se a cause of concern, but it becomes so when it is associated with practices that artificially segregate taxable income from the activities that generate it" (p. 10). The BEPS project had originally a behavioural target of changing taxpayers' behaviour to eliminate artificial use of the fragmented tax landscape. Likewise, the BEPS project had a behavioural target towards tax legislators to create global standards for critical rules applied across the world to create fairness. Over time this target converted into a need to reach out for global minimum tax burden as the EU stated in its press release of 13 December 2022 "Once implemented, this agreement will bring fairness, transparency and stability to the international corporate tax framework". One could argue that the earlier BEPS or even EU regulation has failed in reaching these targets. One reason for this can be the lack of proper impact assessments. The question remains, whether it is the taxpayers' or different governments' morality that has failed in this objective, or perhaps both.

⁹⁴² Comparing whether something is acceptable on broad terms based on freedoms and if these freedoms are respected by tax morality as well as if tax law respects broader freedoms. See also OECD Principles of Corporate Governance 2015, first principle.

I will clarify the challenges of conflicts between external and internal morality as well as the importance of morality in legislative work.

For allocation of taxing powers, the OECD and the EU considered that “tax should be paid where the profit is generated”⁹⁴³. It represents the morality of aspiration. This is a widely accepted statement. However, as different countries or parties have an opposite understanding of where the profit is generated, it is obvious that it is almost impossible to comply with⁹⁴⁴. Therefore, transfer pricing rules are required to define the minimum rules to allocate taxing powers in this respect. They represent the morality of duty.

Transfer pricing rules will fail if they are changing frequently and the legislator does not understand how the changes impact taxpayers, tax contribution/collection, and how taxpayers will react to the new rules⁹⁴⁵. The rules will fail also if they are not general and clear enough as well as if there is no global enforcement for the interpretation of the rules. Taxpayers will have ongoing disputes with different countries and countries will have disputes with each other. On the other hand, when technology is developing and changing business, transfer pricing rules need to be adjusted to balance the interests between economic freedom, clarity, and fiscal interests⁹⁴⁶.

⁹⁴³ These statements are often seen as political statements or commitments resulting from a political discussion. Political discussion is naturally linked to external morality aspect, but it is not as such directly converted into law. See Pijl, pp. 100–106. The OECD and the EU abandoned this principle when creating the Pillar 2 rules.

⁹⁴⁴ This leads to a discussion of whether the income is allocated based on this rule. Unclarity is illustrated by competing wishes representing the same target but with opposite interests. Or as the OECD clarified this in 2013: “[...] what creates tax policy concerns is that, due to gaps in the interaction of different tax systems, and in some cases because of the application of bilateral tax treaties, income from cross-border activities may go untaxed anywhere, or be only unduly lowly taxed.” Tax policymakers are concerned about the independent local interests drive for gaps. The challenge that policy makers have is to state whose approach is to be used globally by everyone. Further, as tax authorities (as well as local policymakers) are trying to gain back trust in the public eye, reactive actions, i.e. limiting proactive certainty, the disagreement in stand-alone countries is more attractive for tax authorities.

⁹⁴⁵ Changing transfer pricing rules may lead to changes in the tax basis if taxpayers start to move operations due to tax reasons, see Andersson 2016. Pillar 1 rules are equally a challenge for the rules: taxes are shifted somewhere else than where the profit is generated.

⁹⁴⁶ This change justifies the BEPS work on profit allocation, but only to a certain extent. It should tackle the new aspects of profit allocation instead of creating challenges for the old type of operations. For example, digitalisation is less evolutionary for a number of traditional operations, perhaps more comparable to normal R&D while there are totally new businesses with no existing / working rules for TP purposes. Again, no actual impact assessment was done to understand the outcome of transfer pricing rules.

When talking about morality in the legislative process from a proportionality point of view we need to make a reflection on Pillar 2 rules. To justify its mandate the EU states “Article 115 of the Treaty on the Functioning of the European Union (TFEU) is the legal base of the legislative initiatives in the field of direct taxation. Although no direct reference to direct taxation is made, Article 115 refers to directives for approximation of national laws as those directly affect the establishment or functioning of internal market”⁹⁴⁷. If we review this statement it seems to be, as analysed earlier, in conflict with the ECJ’s understanding of whether direct taxation is a direct matter of EU law.

The proposal for a Council Directive considers also that the Pillar 2 proposal is proportional. The reasoning behind this view is that the rules apply only to taxpayers that have a combined turnover above € 750 million, i.e. a limited group of taxpayers. Further, the proposal states that “the envisaged measures do not go beyond ensuring minimum effective taxation of such entities operating in the internal market and they are consistent with the OECD Model Rules as well as with EU law requirements”⁹⁴⁸.

The proportionality analysis in the proposal for a Council Directive is short and concentrates on a limited number of affected taxpayers and being proportional to reach the objective of effective minimum taxation. Proportionality is perhaps considered from the EU’s point of view, but surely not from the taxpayers’ point of view nor the national point of view. Especially when talking about consolidated effective taxation the objective is exactly the same as with ATAD rules⁹⁴⁹. The proportionality of ATAD rules are not considered in this short analysis. To measure the proportionality in relation whether effective minimum tax is reached or whether the EU’s initiatives go beyond, is not clear at all, or if it is clear, most likely the opposite to the proposal conclusions.

Basically, economic freedoms need to be considered by the national legislator when executing tax sovereignty. EU-based rules are challenging in this respect. The proposal for a Council Directive fails to recognise its impacts on taxation, partly because they were not analysed, and partly because they were not part of the legislative process. Impact assessment is ignored by referring that all EU Member States are part of the OECD and have been participating in the project. This entirely ignores sovereignty and the fact that the impacts of a global initiative were never considered from the EU’s internal market point of view.

⁹⁴⁷ Proposal for EU council regulation 2021, p. 2.

⁹⁴⁸ Proposal for EU Council regulation 2021, p. 3.

⁹⁴⁹ Pillar 2 is approaching minimum taxation from a consolidated view allowing each Member State to levy the minimum tax on a local basis, not on the headquarters level. For example, ATAD-based interest deduction limitation is tackling exactly the same issue through non-deductibility. These are obviously double measures that can result in highly effective taxation. This was not the objective.

When the impacts were then considered on a national level, the issue was assessed by analysing interest levels on debt⁹⁵⁰. The relation between net financing cost and taxable EBITDA was not analysed. This means that national legislators did not have a proper understanding of what would cause non-deductibility of interest cost: would it be extensive debt in relation to equity or would it be lowered profitability. On the other hand, national legislators had very little choice – to comply with the directive or not.

For taxpayers' legal protection, a well-working legislative process including a trustworthy impact assessment is in a key position as the laws should ensure clearly enough the behavioural rules that taxpayers need to comply with as well as the availability of fundamental freedoms. Therefore, proper impact assessments, reflecting national taxation impacts on business as well EU Treaties, true public hearings as well as a dispute-resolution mechanism are an integral part of the legislative process. They should not be ignored. If the process fails in this respect, the law fails.

I have now analysed the impacts that the BEPS-related EU directives create on the national legislative process. I will briefly analyse different factors for national legislative work ensuring taxpayers' legal protection and rights.

7.3.4 Key criteria for legislative work

The legislative process aims to draft a law or regulation to be finally adopted by the parliament. The process includes preparatory work as well as parliamentary discussions, constitutional pre-control, and decisions⁹⁵¹. This legislative process should create a law that reflects sufficiently the existing standards of external morality and fulfils the criteria set by the constitution for a tax law clarity being one

⁹⁵⁰ HE 150/2018 vp.

⁹⁵¹ In countries such as Finland, where no post-control exists in form of a constitutional court, constitutional control becomes crucial. If the control is based on an assessment by the body that drafted the proposal, the constitutional control fails. It becomes a self-assessment rather than a control that justifies a high threshold for an administrative court's judgement on constitutional aspects. In parliament, the judgment should be based on the Constitutional Law Committee's view at least in cases that have extraordinary features. For example, the Constitutional Law Committee (97/2022) considered in its statement for the proposal for a tax on extraordinary profits in 2023 (320/2022) that most of the freedom rights are applicable mainly for persons, meanwhile threshold is higher for businesses. This, however, is a somewhat narrow approach as businesses are finally owned by persons and the impacts should be considered duly. A statement on the fact that tax is not applicable to small businesses is complex – why would a small owner in a large business be treated differently than a big owner of a small business?

of them⁹⁵². Binding policy statements, such as BEPS statements, are limiting basic legislative processes.

Political decision-making should bring in aspects of aspiration in the society in question. It should initiate the development of legislation to reflect changes in morality, how it is understood by the majority, simple majority, or qualified majority depending on how fundamental the change is⁹⁵³. The legislative process should then measure the fundamentality of the changes to define the level of majority⁹⁵⁴ and the form of legislation to ensure it can be considered legislation⁹⁵⁵.

In consideration of the legislative process, I consider the following three items⁹⁵⁶: 1. generality of law, i.e. that there exists a rule, 2. clarity of law (failing to make law understandable), and 3. rules require conduct beyond the powers of affected parties (compliance becomes impossible). I think these are the most crucial ones.

Fuller's requirement of non-contradictory laws can be regarded in a narrow sense or a broader sense including an analysis of whether the proposed rules comply with

⁹⁵² The legislative process should ensure that the proposal for a law clarifies the purpose of the rule, ensures by a sufficient impact assessment that the purpose is reached, not more (proportionality), and has sufficient clarity. 81 § of The Finnish Constitution states that tax law should be clear and precise. For example, Tikka 1972 has considered that taxpayers should be capable of concluding what the tax treatment is as well as the size of tax contribution.

⁹⁵³ This angle is a challenge from the taxpayers' legal protection point of view in EU-based tax regulation. The EU drafts different kind of tax regulation. The EU has drafted EU regulation on measures on energy crisis published on the 30 September 2022, representing directly binding regulation as well as directives with minimum requirements such as 2016 Anti-Tax Avoidance Directive. EU's legislative powers are not clear in either of the cases. Tax law is therefore "fixed" when it becomes subject to national preparation and parliamentary discussion on the actual "responsible" legislative level. This may lead to unbalanced tax legislation as the rules are not necessarily aligned with existing tax treaties or dispute resolution mechanisms, and taxing powers may be unclear to mention a few. For example, the Swedish proposal for Swedish regulation on the Council regulation (EU) 2022/1854 where Sweden is proposing the ultimate parent company of a group being liable for the Swedish revenue cap payments in spite of the entity being a foreign entity with no PE in Sweden. EU regulation is a challenge as it creates an assumption that preparatory steps have been already taken although the EU as such does not have an equal process in place.

⁹⁵⁴ In other words, whether the law infringes on fundamental rules or not. This has been discussed already earlier in this study.

⁹⁵⁵ As Fuller notes, not even this can always ensure that laws would fulfil standards of fundamental morality if political decision-makers do not respect the fundamental rules and the split between powers in a legal state. See for example Fuller, p. 40.

⁹⁵⁶ As non-retroactivity of law has been studied widely, I will not analyse that any further in this study.

constitutional rights⁹⁵⁷. As I have analysed this already earlier, I will not return to this topic. Further, other requirements in Fuller's list involve how authorities manage to comply with or apply the rules or frequency of new rules and are not connected directly to legislative work. I will not analyse these aspects in this study.

7.3.4.1 Generality and clarity of law

Generality and clarity of law are often related and need to be considered together, not failing in either. Laws and regulations that are dictated to specific cases and apply to small groups, will have the risk of failing⁹⁵⁸. Specific tax rules may result in

⁹⁵⁷ Rules may be contradictory to constitutional rules. The threshold confirming normal law, representing morality of duty, to be in conflict with constitutions or fundamental principles is high. Constitution represents rules closer to morality of aspiration. Contradictions or conflicts may occur also between laws. An example of this is DAC 6 reporting. DAC 6 requires intermediaries, i.e. advisors, to report certain arrangements when they are ready for implementation. As this does not require any actual legal commitment yet and can consist of a part of a larger arrangement, this reporting obligation may rise earlier than party or parties to a larger arrangement consider it ready for implementation. Stock exchange rules again require that if information is made available for one party, it should be made available for all stakeholders in the form of a press release, stock release, or other information. This leads to conflicting rules where the adviser and taxpayer are either violating DAC 6 or stock exchange rules. This aspect should by nature be taken into account when drafting the law. In other words, preparatory works should identify other rules that are or may be impacted. This has been discussed already earlier. Bentley 2007 on pages 155 to 157 considers based on a Australian Parliamentary Committee study the amount of regulation and new rules to create a serious challenge for taxpayers' legal protection. I think this is illustrated by this example, and it is included in Fuller's list also.

⁹⁵⁸ This risk is due as the rules are intended to apply only to limited number of taxpayers meanwhile the rules in reality are applicable to all taxpayers, at least within the same kind of business. Likewise, the generality of law is an opposite measure to the aim of impacting a limited group of taxpayers. Tax laws are applicable to every taxpayer and if they are aimed to eliminate the behaviour of some specific taxpayers, the generality of law does not support this objective as specific measures are complex to build in to respect the generality of law at the same time. For example, EU Tax Observatory report number 3 analyses tax competition and approaches it from a vertical equity point of view. The report highlights well different aspects of mobility, who in practical terms can benefit from it and what are the costs related to. However, it approaches the issue disconnected from the framework, financial activity, by focusing only on tax. Some taxpayers have a natural need for cross-border optimisation since they have operations in multiple countries. All countries are not equally attractive within the EU and need to attract businesses to invest. Equalising tax measures will not eliminate the competition, and it should not either to maintain the competitiveness of the EU internal market. Creating rules with generality of tax law will therefore impact taxpayers that it should not impact, tax law will have economic impacts that were not intended due to

limiting government taxing powers as the government fails to track each specific action that a taxpayer takes – the approach of the law is too narrow.

Where constitutions manage to stipulate general rules, they express external morality⁹⁵⁹. EU directives, such as ATAD, express a sub-external morality, as they have qualifications of policy statements, restricting drafting internal morality. However, ATAD is not considering broader morality, i.e. freedom rights, only tax-related sub-morality. National laws instead should give guidance to internal morality. Therefore, generality should be considered carefully and reached in the actual legislative process to create rules that taxpayers can comply with⁹⁶⁰ and which are aligned with external morality, i.e. constitutions⁹⁶¹. Early engagement of balanced generality of law supports taxpayers' legal protection.

The requirement “of clarity represents one of the most essential ingredients of legality”⁹⁶². If failing in clarity, power is shifted to tax authorities and judges interpreting rules confusing fidelity to law and infringing legality⁹⁶³. Further, it could

generality. Tax is a complex area to influence behaviour partly because tax laws should have the qualification of generality.

⁹⁵⁹ See Fuller, pp. 46–48. Constitutions are applicable to the vast majority of topics. They have to be based on the principles and give guidance. Principles behind constitutions have a long lifetime, as principle of legality originates from the Magna Carta.

⁹⁶⁰ Generality brings the correct focus on the issue and respects the big picture even though generality is a complex measure. Generality, like so many other factors, needs to be taken into account in balance with other factors.

⁹⁶¹ In case tax laws are driven by specific topics only, there is a risk that these rules are contradictory to constitutional rules, or in case of extremely narrow or focused rules, they are contradictory to other rules. To take constitutional rules into account even for businesses, in other words for all the owners of all businesses, the constitutional rules, and at the same time constitutional legal principles, tax laws would most likely have better quality. For example, the Finnish proposal on tax for extraordinary profits (320/2022) states that 6 § of the Finnish Constitution on equality applies only to persons (at point 10.5) as well the other constitutional arguments concentrate on stating why the law proposal should not be reviewed by the Constitutional Law Committee instead of ensuring that the constitutional assessment would actually be done by the only body that has the true mandate for this in the Finnish system. The outcome would not be necessarily that the tax is not possible, but rather a more balanced form of the tax. This is a paradox as the legislator is legislating a tax law without complying with constitutional rules meanwhile legislator expects taxpayers always to comply with rules even if they would not fulfil requirements set for the laws. Tax laws, as they are drafted, should support taxpayers' capability of complying with them.

⁹⁶² Fuller, p. 63. See also G20/OECD Principles on Corporate Governance. The OECD stresses the importance of the rule of law, authority duties to keep authority, integrity, and resources to fulfil their duties professionally and objectively, pp. 12–17. See further Hultqvist 2014, p. 15, and Hultqvist 2015, p. 7.

⁹⁶³ One illustration of the shift of attitude and power could be the development of Swedish interest deduction rules. The Swedish interest deduction rules in 2008 were regarded to

be considered that, in case the law fails with respect to clarity, the legislature may trespass against constitutional restrictions set to legislature⁹⁶⁴. Attaining legality may be confused or put in danger. This means that clarity is vital for taxpayers' legal protection.

I would make one remark to point out the importance of clarity for taxpayers. In spite of how broad or narrow the constitutional protection for businesses is seen, clarity of the tax law should always be considered as a priority⁹⁶⁵. As tax is a consequence of business or activity, the framework and origin, i.e. business, have to be considered when drafting a law⁹⁶⁶. If policymakers, such as the EU and the OECD, set a requirement on tax planning or stress that tax planning should be based on substance, also legislators should commit to the same principles: they should take into account business and freedom rights when regulating fiscal matters⁹⁶⁷. After all, the constitutional aspect seldom prohibits taxation, it only sets proportional limits.

be unclear, see for example Hultqvist 2014 and Andersson & Carneborn. Still in 2022, after the rules have been changed twice and the European Commission has reminded Sweden about Swedish non-compliance with EU rules, Swedish TA is referring as guidance to the 2011 Swedish SAC decisions (ref. 90) together with the Swedish SAC case 3660-22.

⁹⁶⁴ Fuller, pp. 63–64. Tax law would in this case be contradictory to constitutional rules. I have analysed this aspect above.

⁹⁶⁵ To assess clarity more than just a law technical analysis is done especially in the case of taxes. In case terms and definitions vary a lot between different regulations and standards, a more detailed analysis of the wording should be done to ensure clarity. For example, the Finnish Chamber of Commerce pointed out the importance of clarity in its statement (pp. 3–6) to national implementation of Pillar 2 rules: poor and unclear regulation challenges taxpayers' possibility to assess tax consequences. Pillar 2 rules are extremely complex and my prediction is that the rules will result in surprises. Partly this is due to the poor clarity of the rules. Poor clarity may be a result of the OECD's and the EU's undeveloped role as legislators.

⁹⁶⁶ This is an aspect where for example the EU Tax Observatory fails in its study on tax competition. Tax competition as well as tax avoidance are seen as specific, stand-alone issues. ETR is explained almost purely by tax regimes or tax planning exercises while taxes, independently of what kind of tax, are directly connected to business or activity and illustrate only a consequence of what has transpired. ETR should primarily be explained based on what has happened in the business, secondary if there are specific tax regimes, and finally whether tax evasion/avoidance has in reality resulted in tax impacts. Approaching ETR or tax contribution on stand alone makes the same mistake as aggressive tax planner; disconnects the tax consequence from business reality and creates artificial setups.

⁹⁶⁷ One of the objectives of the EU is to ensure a well-functioning internal market with no obstacles for freedom of establishment and for free movement. If free movement and freedom of establishment are seen as an origin of tax evasion or base erosion, then the consideration is not proportional to the objective of the EU. The internal market is not an equal market, the large Member States have a competitive advantage to a certain

Generality and clarity of law represent two angles that are on one hand contradictory to each other and the other hand dependent on each other. Concluding how to behave in a stand-alone single case could be easy to do if there is a clear detailed rule for that case. At the same time, this rule could confuse issues that have somewhat different fact patterns, although somehow related. In other words, generality is important. Similarly, clarity cannot be reached if rules are too general, reflecting perhaps more the external morality of aspiration⁹⁶⁸.

The principle of constitutional state includes an idea of accuracy requirement as well as the requirement of predictability⁹⁶⁹. Accuracy and predictability are closely related to clarity ensuring legal certainty⁹⁷⁰. In other words, accuracy and predictability combined mean clarity⁹⁷¹. Without proper accuracy and predictability, rules may be difficult to comply with.

Another way to express this is that taxpayers should have the possibility to assess future tax treatment and impact with sufficient certainty⁹⁷². Legal certainty in the area of tax law means that tax assessment is likely to be correct and the taxpayer has

extent, and the smaller Member States being on the outskirts of the EU need to compensate with other factors attracting people and businesses to them. A lower tax rate may be one of these measures and it does not eliminate equity in the big picture.

⁹⁶⁸ This balance between generality and clarity stresses even further the importance of quality impact assessments, public hearings, and consideration of totality, not just as tax.

⁹⁶⁹ Hultqvist 2015 “Många tolkningar or tillämpnings bekymmer skulle dock kunna sparas om vi istället agerade proaktivt och ägnade den lagstiftnings skapande verksamheten större uppmärksamhet”, p. 7.

⁹⁷⁰ Legal certainty has the same angle as internal morality: it commits a judge to follow the law sufficiently when interpreting it. Interpretation should result in a decision that is within the range of the purpose and also the wording of the law to comply with legality.

⁹⁷¹ Unclear definitions or definitions that look alike, but are used differently in multiple regulations are not accurate and predictable. For example, the “beneficial owner” is used in tax treaties, bank regulation, the EU’s so-called Unshell Directive, and the 2009 Swedish interest deduction rules. None of these rules have clearly defined this term and due to different objectives, it is understood differently when explained in connection to different rules. As an example, the Swedish tax authorities claim that the term “den som har rätt till inkomst” looks the same as “beneficial owner”, but is not exactly the same without stating what the difference is. This leads to poor predictability, taxpayers not being capable of complying with the rules, and even contradictory outcomes.

⁹⁷² See for example Tikka 1996 b, p. 469, Knuutinen 2009 p. 24–25. When reflecting on ATAD, as an example, the directive fails as it sets only minimum requirements. In other words, taxpayers cannot rely on equal tax treatment and the functioning of the internal market as different Member States legislate differently.

been able to predict this outcome⁹⁷³. Predictability means that taxpayers can assess the tax impacts of planned operations for multiple purposes, not just tax planning purposes⁹⁷⁴. By Fuller's terms, clarity of legislation ensures predictability and generality, i.e. legal certainty of the law⁹⁷⁵.

The impact assessment within the legislative process can contribute to clarity. Impact assessment will bring different angles and circumstances under consideration assisting in drafting the rule to ensure clarity.

7.3.4.1.1 *Formality as a part of clarity*

Knuutinen states that "justice is about form; it is always formal"⁹⁷⁶. The formality of law has a purpose, especially when considering the legality principle. I see formality in this sense as one component of generality, formality is a general quality of law, a framework forming a component of clarity to a certain extent⁹⁷⁷. Form offers a standardised way to express consequences, limits, and procedures offering a taxpayer certainty of what is required and how to act in case of unclear situations. In this sense clarity and generality of law is not only protecting economic freedom rights, but it is about protecting legitimate expectations⁹⁷⁸ from retroactive assessments⁹⁷⁹.

⁹⁷³ This is crucial not only for legal purposes but also for financial purposes. If the financial outcome cannot be seen from the beginning, taxation will create a risk for business that creates an obstacle. This is not the purpose of taxes in the constitutional context. For example, in the case of Pillar 2, the global minimum tax, the regulation is complex, first by nature with no real reference to an existing standard. Taxpayers are obliged to report financial impacts earlier than the first tax returns are filed and tax assessments are done. In Finland taxpayers have no possibility for an advanced ruling. The question of whether Pillar 2 rules or their legislative process comply with constitutional rules (81 §) and principles is questionable.

⁹⁷⁴ Tikka 1972, p. 81. Tax is a consequence of business and this consequence has to be understood when entering a new business or making investment decisions.

⁹⁷⁵ Generality of law will ensure that law is applicable to the majority of cases creating rules for all, not only for a few.

⁹⁷⁶ Knuutinen 2009, p. 26.

⁹⁷⁷ Generality guarantees that the law can be applied equally to all applicable cases without the risk of outdated details. Generality creates flexibility in tax legislation that can adapt to a certain extent to changed circumstances.

⁹⁷⁸ Douma, pp. 224-227, considers legitimate expectation to be closely connected to legal certainty, which is respected also by the ECJ. The legitimate expectation is not built only through the legislative process but also through judgments of law. In any case, the legislative work is crucial in this respect allowing judgments to stay within the internal morality of law.

⁹⁷⁹ A good example of unclear regulation and objectives is Council Regulation (EU) 2022/1854 on revenue cap and solidarity contribution as an emergency intervention to

Formality has multiple levels in jurisprudence and legality. One of these levels is content formality⁹⁸⁰. Knuutinen's view on content formality is⁹⁸¹ that too narrow a room for interpretation and application prohibits the tax legislation from covering all financial phenomena that were objectives of the legislation⁹⁸². On the other hand, too broad a room for interpretation and application of tax law will result in a higher tax burden or other unintended outcomes. Knuutinen seems to support Fuller's findings in generality in this respect⁹⁸³. Further, formality is a necessity for responsible tax behaviour as it needs to express the purpose of the law supporting the appropriate utilisation of the rule. Governance represents one angle of formality.

Knuutinen makes a conclusion based on content formality that the core question in tax law is how well the taxable income definition equals with financial income definition⁹⁸⁴. Fundamentally, the idea is correct, but it illustrates some kind of

address high energy prices. The Council regulation was part of the package to deal with high energy prices and shortage on energy after the Russian attack on Ukraine. The regulation was drafted urgently with the idea of a temporary windfall tax, even though the Council of the EU avoided the use of the word "tax". The Council Regulation is directly applicable law in EU Member States. As the Finnish Government proposal (320/2022) considers, multiple EU countries have adopted the regulation very differently. Further Exxon has sued the EU in the General Court of the EU. While the EU considers the regulation to be in line with EU rules, Exxon considers that: "The windfall tax will not remedy any shortage of energy supply and cannot realistically achieve a timely impact, so the European Commission and Council were wrong to use exceptional powers under Article 122(1) TFEU to speed its approval", see America Hernandez, Politico.

⁹⁸⁰ According to Atiyah-Summers p. 13, the levels of formality in consideration to formality are based on two factors: 1. is the content of the regulation only an arbitrary decision or is there even a content-based argument as well as 2. to what extent is the regulation too broad or too narrow in relation to the applicability of the rule in relation to the objective of the rule.

⁹⁸¹ Knuutinen 2009, p. 28.

⁹⁸² The Pillar 2 proposal illustrates well what happens if a regulator does not understand the content of the proposal. ETR as a measure is complex and deferred taxes are not used for taxable income purposes. Setting a minimum effective tax rate does not set a statutory minimum tax rate, but on the other hand, it sets a sort of maximum tax rate offering opportunities for selected countries to offer tax benefits for selected taxpayers.

⁹⁸³ Some authors seem to set a high value on the fiscal interests allowing then tax authorities to make far-reaching judgements and assessments. This view ignores to my view the basic requirement of justice as taxpayers need to be able to understand what the rules are so that they can follow them. Further, a far-reaching scope of either fiscal rights or freedom rights often ignores the balancing obligations and liabilities whereby a balance represents more of a justified approach.

⁹⁸⁴ The same question could be asked for Pillar 2. The pillar, taxable income, and IFRS all illustrate different measures. Similarly, the legal framework may treat groups of companies differently than stand-alone entities even though tax payments are based on

morality of aspiration⁹⁸⁵. It may be difficult, if not impossible, to reach the same content for both dimensions due to the complexity of business activities and differing objectives of accounting rules and tax law⁹⁸⁶.

A good example, perhaps a more illustrative income definition, is timing when income is recognised as income. Accounting standards identify income and cost often already before the income or cost is realised whereas taxable income considers more the fact that income is realised. Eliminating the identification of income from cash flow may result in taxation where the ability to pay is low or it does not exist at all unless the taxpayer divests the property to be able to pay the tax⁹⁸⁷. This cannot be the purpose of the law as it would violate constitutional protection of property⁹⁸⁸.

a separate company idea. For example, in some countries, the company law-based rule on a company financing the acquisition of its own shares is applicable if there is a cash pool arrangement in place even if this would be only theoretically applicable.

⁹⁸⁵ One approach could be unifying the IFRS income definition as a taxable income definition. As IFRS rules do not fulfil the rule of law requirement and are by form unclear, depending heavily on opinions and broad wording, IFRS rules cannot be regarded as clear and precise, nor decided by the legislator. They leave by nature a lot of room for interpretation. This flexibility may be required to have a standard for all kinds of business, but this is not sufficient nor acceptable for tax law as it does not offer predictability and stability. Standard is not the same as law. Further IFRS is a challenge from a rule of law point of view as the interpretation power is by an accounting board.

⁹⁸⁶ One example of this is what is regarded to be income; when a business is sold, the seller targets for capital gains. Capital gains often reflect the future cash flow that will be taxable as profits of the business in the future. The new owner targets to collect dividends from the business and finally perhaps capital gains again. So, if income is taxed at all events, it will result in multiple taxation of the same income. This may be avoided by credit and exemption rules creating though difference between taxable and financial income. Another example is the assessment of an investment proposal. These proposals consider one project, not a company, tax unit, or group of companies. The assessment is based on operative measures that include tax and financing aspects often only as an assumption. The actual outcome when put into a business is not reflected at all when considering a specific project. Here the financial circumstances do not and even cannot reflect taxable reality.

⁹⁸⁷ A good example, though not connected to timing difference of income recognition, is the Swedish real estate tax valuation. Real estate value for power plants is reviewed on six-year periods. If power price is high in the previous six-year period, the real estate values are increased for the next six-year period. If power prices are then low, ability to pay is low meanwhile tax burden is high.

⁹⁸⁸ Equally elimination of the connection between cash flow and income recognition could lead to unexpected outcomes in fiscal revenue: losses will be recognised earlier as for example IFRS is based on future expectations. If the profitability or value is regarded to diminish, this will be booked as a cost immediately reducing the income. If we take into account the conservative and careful approach to identifying income prior it is realised, this would result in poor predictability for government funding. This is either good for taxpayers as it lowers predictability. This illustrates the difference between

These examples illustrate that if generality and clarity requirements are not fulfilled taxpayers' legal protection is weaker due to poor legislative work. For taxpayers' legal protection purposes, Knuutinen's statement looks like an aspiration illustrating external morality. Even though it may be possible for the taxpayer to follow IFRS type of tax regulation, such as Pillar 2, there would be a new conflict of interest between auditors applying the rules for IFRS purposes and tax purposes as well as tax authorities only for tax purposes⁹⁸⁹.

7.3.4.1.2 *Compliance and governance as a part of clarity*

The current trend in the field of taxation seems to be going towards a combination of "command and control" and "risk" kind of regulation with increased detailed reporting obligations⁹⁹⁰. The regulation is driving first to identify a wide range of arrangements or transactions that may be connected to extreme minimisation of taxes. This is the risk identification approach.

The second step is to ensure control over recognised arrangements that may have been executed mainly or almost mainly⁹⁹¹ to reach a tax benefit. As this regulation targets to identify tax benefits out of financial benefits, it is taking taxable income recognition further from financial income recognition.

The list of hallmarks in DAC 6 reporting is for example broad and subject to interpretation. It seems to state, in line with Knuutinen's idea, a high level of moral

IFRS standards and tax law. If tax law were to allow the same flexibility as IFRS, equality of operations would be questioned. Compare with Pillar 2.

⁹⁸⁹ This might be a reality already in the OECD's global minimum tax proposal "Pillar 2". It is based on IFRS approach, but with exceptions. Similarly, it seems to take nuances from taxable income. As a result, we will most likely have a new standard that is not exactly IFRS-based nor a taxable income-based standard.

⁹⁹⁰ When considering the increasing amount of detailed compliance regulation, such as country-by-country reporting, and on the other hand conversion from the exchange of information to the availability of increasing volume of information, data and indicators it seems obvious that the current approach is a double-edged sword. It is based on detailed compliance combined with penalties and an overwhelming number of indicators that are considered to be necessary when assessing risk.

⁹⁹¹ With this I refer to the purpose test "main or one of the main purposes" and DAC 6 reporting obligation. Once again, it is important to notice that some of these hallmarks are based on findings of what setups have been misused. The DAC 6 regulation does not state that there would be anything wrong in the arrangements, but the reporting obligation for businesses where the setups are normal, legitimated solutions, is a burden and creates risk. Tax authority gets a notification of something that could be seen as a questionable topic.

target reaching out for aspiration⁹⁹². This leads to the conclusion that taxpayers' rights are unintendedly ignored in the wish to reach morality of aspiration resulting in taxpayers with a low likelihood of succeeding in complying with the rules.

The clarity and generality of tax legislation are not self-evident. The more there is surrounding regulation, the more there are behavioural objectives or the higher the aspiration or the external morality is, the more complex it will be to draft tax legislation that fulfils the requirements of generality and clarity⁹⁹³. The tax legislative process, including the EU's drafting of directives, should include a consolidation of tax and other regulation. This consolidation, i.e. impact assessment in a broader meaning, will promote clarity, such as the tension between anti-avoidance rules and Pillar 2⁹⁹⁴.

7.3.4.2 Conduct beyond the powers of the affected parties – Some reflections on legal principles

Fuller considers that no lawmaker wants to make rules that go beyond the powers of taxpayers⁹⁹⁵. Fuller's opinion is well-reasoned. The high moral approach seems to be, at least currently, set by short-sighted, narrow, and highly political objectives⁹⁹⁶.

⁹⁹² The challenge of succeeding in the definition is even greater as the outcome of a transaction is not necessarily the one that was the target. When reviewing the outcome after the arrangement was done, it may look like something else than what the purpose was. It is at the minimum difficult to conclude what would be a tax benefit and whether the purpose of the arrangement was to reach only tax benefit. This reminds me a bit of Fuller's considerations on clarity – in this case, extremely broad definitions will result in a large number of reports. Finding the real cases out of a large number of justified transactions may not be easy and the risk of justified transactions being subject to additional compliance is a failure of the regulation.

⁹⁹³ See Hultqvist 2014, pp. 14–15.

⁹⁹⁴ Where anti-avoidance rules are aimed at eliminating transactions or arrangements that have a pure tax minimisation purpose resulting in no or extremely low taxation, Pillar 2 is catching up on these same transactions within the scope of its rules.

⁹⁹⁵ Fuller, p. 70: "On the face of it a law commanding the impossible seems such an absurdity that one is tempted to suppose no sane lawmaker, not even the most evil dictator, would have any reason to enact such a law." The challenge may be the complexity of drafted rules. For example, the objectives for Pillar 2 are clear and simple, but the proposal itself is complex. It is difficult to identify the objective from the regulation itself. This makes also compliance difficult if not impossible.

⁹⁹⁶ A good example of this kind of short-sighted regulation is the Council Regulation (EU) 2022/1854 on revenue cap and solidarity contribution as an emergency intervention to address high energy prices and the even more extreme Finnish version of this Council Regulation as stated in the law proposal 322/2022. Neither of these regulations has considered the impacts: taxing high profits or setting a price cap does not necessarily affect the root cause of the high prices. Instead, it may even accelerate the problem on

These kinds of urgent objectives ignore a broader view of topics, allow no time for reviewing legal principles, and fail therefore to secure the quality of legislation. The legislator ends up executing something that is difficult, if not impossible to reach, like the teacher that Fuller uses as an example.

We could consider law and the rule of law as an instrument that does not, and cannot, necessarily reflect all aspects of the political objectives, i.e. external morality. The legislator has an obligation to adapt political objectives into the existing legal framework⁹⁹⁷. This is when external morality is converted into internal morality. Law is an instrument to set rules to be followed irrespectively of external morality⁹⁹⁸. Further, the rules should be such that they can be complied with.

The spirit of the law is difficult, if not impossible to define. Who defines what is the spirit of the law when the government proposes and parliament approves a law⁹⁹⁹, and can the spirit of the law be expressed? If laws were to be interpreted based on the spirit of the law, then law fails to be clear and made publicly available¹⁰⁰⁰. The spirit of the law may be difficult to comply with, but the purpose of the law may be possible to comply with¹⁰⁰¹. Spirit of the law becomes even more complex when tax law is based on EU minimum regulation.

For the purposes of this study, the conduct beyond the powers of the affected parties is a combination of Fuller's qualifications for a good law. As tax law is narrow by its conduct, it has to be within the powers of a taxpayer to comply with

a long-term basis as energy markets are not stabilised and high energy price continue to create turbulence for the economy both for consumers and producers.

⁹⁹⁷ Including constitutional considerations and the required majority for the decision.

⁹⁹⁸ Spirit of the law is often used as a reference to how taxpayers should behave. Law is seen not to reflect enough the moral understanding and therefore taxpayers should assess how they treat different topics based on the spirit of the law rather than based on the law itself.

⁹⁹⁹ Hultqvist 2018 questioned the spirit of the law as the spirit of the law should be documented. To do this all the members of parliament should be interviewed. Hultqvist's view is very close to Fuller's thinking.

¹⁰⁰⁰ If we consider the spirit of the law to represent moral value, the morality of aspiration, the purpose of the law does in that case represent the morality of duty, or perhaps even something more. The purpose of the law is often defined more clearly even though not necessarily expressed well. For example, the European Commission states in its final proposal for Council Directive amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries as the purpose: "Considering that a key objective of this Directive is to improve the resilience of the internal market against tax avoidance risks arising from the manipulation of hybrid mismatches [...]". The purpose is stated clearly, another question is whether the purpose is reflected in the directive.

¹⁰⁰¹ This is subject to the wording and transparency of the objectives in the preparatory documents.

the rules and pay the tax, even purely as an ability to pay tax issue¹⁰⁰². If tax burden and complexity, unclarity of tax rules itself, or compliance is high, it may be beyond the powers of taxpayers to comply with the law if they want to continue their business. This would not be in line with economic freedom rights¹⁰⁰³.

Tax is an evitable outcome of economic activities covered by a collection of other regulations. Tax interferes with the constitutional right to property and economic freedoms¹⁰⁰⁴ resulting in not only powers beyond the conduct of taxpayers to comply with tax laws but powers beyond the conduct of taxpayers in combination with other laws also¹⁰⁰⁵. As each requirement set by different laws may on a stand-

¹⁰⁰² Ability to pay relates traditionally to personal actual ability to pay tax based on net wealth (Englisch, p. 444). When considering the ability to pay from the taxpayer's legal protection point of view with the addition of the fair trial principle, I think we should consider also the compliance cost together with the actual ability to pay tax. If compliance is burdensome and costly, it lowers the ability to pay taxes. Rules may conflict directly with the substance rules (following one regulation results in non-compliance with another regulation) or indirectly. Complying with the tax rules might create an obstacle to complying with other policies. As an example, I would raise again the Finnish law proposal 322/2022 on the so-called windfall profits: it creates a high tax burden for power producers to pay tax on profit (to even out the impacts of the high electricity prices) but equally, it steers new investments to other countries where the tax is collected in line with the Council Regulation (EU) 2022/1854. This again means that power prices are not going to be reduced in the near future, which was the original objective of the Council Regulation.

¹⁰⁰³ The ECJ has in case C-318/10 SIAT considered taxpayers' conduct beyond the powers of a taxpayer. The ECJ states in paragraph 55: "Accordingly, as the Advocate General noted in point 71 of his Opinion, the special rule requires the Belgian taxpayer to provide, as a matter of course, proof that all the services are genuine and proper and that all related payments are normal, without the tax authority being required to provide even prima facie evidence of tax evasion or avoidance." In paragraph 57 the ECJ states further that: "It must be stated that, as has been noted in paragraph 27 above, a rule framed in such terms does not make it possible, at the outset, to determine its scope with sufficient precision and its applicability remains a matter of uncertainty." Finally, in paragraphs 58 and 59 the ECJ concludes: "Such a rule does not, therefore, meet the requirements of the principle of legal certainty, in accordance with which rules of law must be clear, precise and predictable as regards their effects, in particular where they may have unfavorable consequences for individuals and undertakings [...] As it is, a rule which does not meet the requirements of the principle of legal certainty cannot be considered to be proportionate to the objectives pursued."

¹⁰⁰⁴ Ibid. The interference is legitimated, but nevertheless interference.

¹⁰⁰⁵ The OECD and the EU were seeking a change in taxpayer behaviour, at least as one goal, for BEPS actions. Responsible tax management is a response to this wish. But if the tax legislation is drafted in a form that goes beyond the powers of a taxpayer, commitment to responsible tax behaviour does not improve the situation. How are taxpayers going to demonstrate their best efforts for compliance? Responsible tax management aims to support business optimally, but still comply even with the purpose

alone basis be “doable”, complying with all of them may be beyond the powers of a taxpayer. Tax laws should be proportional also in consideration to the totality of legislation¹⁰⁰⁶. Therefore, we should consider not only tax law itself, but also the consequences of tax law in relation to and combined with other legislation. This should be put into the governance model of a legislator and even the EU when drafting directives.

Obligations set to a taxpayer should not weaken the ability to pay taxes due to on one the hand high level of complex tax compliance and the other hand laws steering taxpayer behaviour purely to reach targeted fiscal interest¹⁰⁰⁷. There is a risk that far-reaching fiscal interests as a motivation for tax legislation will restrict regular business. Even though limits for tax legislation are broad, they are not totally without limits. Therefore, tax law among other things may create conduct beyond the powers of taxpayers¹⁰⁰⁸.

7.3.5 Examples of conduct beyond the powers of affected parties

I will illustrate how conduct beyond the powers of affected parties may appear, merely by accident, not by purpose.

The first example concerns DAC 6 directive¹⁰⁰⁹. The directive aims to tackle aggressive tax planning by the means of reporting obligations to allow the exchange

of the law. If taxpayers' freedoms are not respected in the legislative or assessment process, responsible tax management is useless. Taxpayers' behaviour cannot change as compliance is made impossible.

¹⁰⁰⁶ Legal principles are obviously reflected in Fuller's principles, see Douma, p. 228.

¹⁰⁰⁷ Using tax legislation (alone or in combination with other legislation) is problematic as it may result in unexpected reactions. Englisch 2014, pp 442–443 states that some scholars are leaning more towards neutrality of foundations of the tax system with the cost of the ability to pay principle.

¹⁰⁰⁸ Conduct beyond the powers of taxpayers may include at the same time conflicts with other rules, so Fuller's conditions for good legislation may be conflicted on multiple levels. Englisch considers important “that the ECtHR has recently held that article 1 of Protocol 1 to the ECHR can be relied on against excessive tax burdens, which constitute a disproportionate interference with the entitlement to the peaceful enjoyment of possessions.” Englisch refers to the ECtHR judgment of 14 May 2013, case of N.K.M. v. Hungary, Englisch 2014, pp. 450–451.

¹⁰⁰⁹ Council Directive (EU) 2018/822.

of information¹⁰¹⁰. I want to raise a point that illustrates the difficulty of complying with the rules¹⁰¹¹.

DAC 6 sets reporting obligations to intermediaries, i.e. advisors¹⁰¹². Intermediaries should report the arrangement when it is ready for implementation. This means that the planned arrangement could be implemented independently of whether it actually is decided to be implemented or will ever be executed¹⁰¹³. This may result in a situation where advisors are reporting an arrangement or part of an arrangement that the taxpayer is obliged to communicate through stock exchange rules. The timing of the communication is not aligned.

Communication based on the stock exchange rules depends more on the fact that there is something to communicate, in other words, there exists an agreement or a committed understanding¹⁰¹⁴. In that case, the taxpayer needs to give the relevant information to all stakeholders to ensure that investors have sufficient information for their investment decisions.

¹⁰¹⁰ Recital 3 of the Council Directive states: “Considering that most of the potentially aggressive tax-planning arrangements span across more than one jurisdiction, the disclosure of information about those arrangements would bring additional positive results where that information was also exchanged amongst Member States”.

¹⁰¹¹ To be clear, the issue I am analysing here is different than what was raised in the ECJ case C-632/22 Volvo. The ECJ considered whether DAC 6 interferes with fundamental rights such as the legality principle in relation to criminal law. My concern is that as the definitions are unclear and reporting deadlines very early, taxpayers may have challenges being capable of complying or that there are challenges with other compliance obligations.

¹⁰¹² According to the directive rules, also a group internal organisation can be considered as an intermediary. For example, a taxpayer’s tax organisation on a group level may be regarded as an advisor and intermediary with reporting obligations. Article 3(21) of directive 2011/16/EU states: “intermediary” means any person that designs, markets, organises or makes available for implementation or manages the implementation of a reportable cross-border arrangement.”

¹⁰¹³ Article 8ab of directive 2011/16/EU states that the information needs to be filed: “a) on the day after the reportable cross-border arrangement is made available for implementation; or (b) on the day after the reportable cross-border arrangement is ready for implementation; or (c) when the first step in the implementation of the reportable cross-border arrangement has been made, whichever occurs first.” It seems to be a practice that intermediaries report arrangements a lot earlier than the business considers them to be ready for implementation. This is due to the intermediary taking into account only tax factors, perhaps even accounting factors, but taxpayers should consider the totality. This different view is most likely based on external advisor’s view on tax technical details that have been solved while the taxpayer may still consider whether the whole arrangement requires more analysis and consideration.

¹⁰¹⁴ Considering stock exchange rules, a taxpayer needs to consider also the risk of leakage. The taxpayer has to ensure that it has given the stock market all relevant information at the right time. Transparency is in this sense crucial for all stakeholders, see for example OECD principles for group governance.

There seems to be a clear conflict between these two communication obligations – intermediaries should inform tax authorities of arrangements or parts of arrangements already when they are “ready to implementation”¹⁰¹⁵. This may be clear before the related parties can communicate anything based on stock exchange rules¹⁰¹⁶. Typically, in these kinds of cases the information sharing could be tackled with insider registration and non-disclosure commitments. Tax authority reporting does however not comply with this requirement either. Tax authorities' confidentiality requirements are not detailed enough for this purpose and taxpayer has no control over who has the information¹⁰¹⁷.

It seems to be that tax authorities may be informed about an arrangement clearly before the stock exchange release, which could be considered as leakage. Taxpayers' capability to comply with these two rules may be beyond taxpayers' powers¹⁰¹⁸, not on a stand-alone basis, but with regard to both of them at the same time.

The second example is about taxpayers' requirement of identifying beneficial owners for dividend distribution purposes. Applying the tax treaty-based withholding tax rate, the receiver of the dividend must be the beneficial owner of the income.

When a listed company makes a dividend distribution, it must conclude which withholding tax rate to use. For this purpose, the Finnish tax authorities launched guidance that dividend distributors may not rely on the information taxpayer has provided unless certain requirements have been met¹⁰¹⁹.

¹⁰¹⁵ My experience is that, depending on the advisor's internal policy, this may be regarded as the case even before a taxpayer is of the opinion that the setup is sorted out from a tax point of view, but not from a business point of view.

¹⁰¹⁶ Typically, strategic M&A transactions are sensitive in this respect. They are often started by preparatory arrangements even though there is no visibility of the likelihood of actual execution. These preparatory arrangements are sensitive and confidential to maintain the momentum for the plan. The list of insiders is kept extremely restricted.

¹⁰¹⁷ Tax authority confidentiality is defined by national law, which may not be sufficient for business confidentiality purposes. If authorities would behave responsibly and in line with the purpose of this rule, they would commit to insider register.

¹⁰¹⁸ One could argue that there is nothing new in this – taxpayers have requested rulings on transactions before communicating the transaction based on stock exchange rules. This is true, but the form, timing, and level of information in the ruling requests have been controlled by the taxpayer whereas in DAC 6 the taxpayer or the advisor is obliged to deliver detailed defined information so that the transaction can be identified.

¹⁰¹⁹ Guidance 26.9.2022 reference number VH/2706/00.01.00/2022. The guidance states (5.3 and 5.4) that in case withholding tax is less than 15% or the dividend is more than 10 000 euros the custody account holder should secure the correctness of the information provided that there has been ownership or financial instrument arrangements in relation to the shares within 30 days to the dividend payment. The guidance talks about what kind of clarification a taxpayer should seek and that the

In practical terms, it would be the bank to whom the distributing company has outsourced dividend payment who should check the information (registered account holder), or finally the distributing company if there is no such bank that has this sufficient process in place. The bank that arranges dividend payment¹⁰²⁰ or the distributing company itself has in practical terms no access to all the information that is required to be controlled, not at least when considering the volumes and the amount of required information. This means that there is no other option than to withhold a national withholding tax on the dividend contradictory to tax treaty rules.

Here one could argue that compliance is simple. Instead of applying the treaty rate taxpayers can apply the domestic rate¹⁰²¹. Meanwhile, this is true, the actual case is more complex. A company making dividend distribution has an obligation to withhold tax on dividends, the shareholder has the right to rely on the tax treaty rate.

The distributing company has no liability to carry the cost, in this case shareholders' tax¹⁰²². The purpose of the tax treaty is to settle the level of withholding. To eliminate misuse of tax treaties, tax authorities have created requirements for distributing entities that are practically impossible to comply with¹⁰²³. This could result in the distributing company paying the tax on behalf of the shareholder, paying a penalty, and to set all shareholders in an equal position, claiming the withholding tax from these shareholders. In case the distributing company withholds the domestic rate, the shareholder has to engage in a lengthy and complex process of refund. It appears that the conduct of the rules goes far beyond the powers of both the shareholder and the distributing company.

These examples illustrate well that failing a good legislative process will create situations where tax legislation goes beyond the conduct of taxpayers. This failure cannot be corrected by any appeal processes.

information would be reliable. What on the other hand can be considered reliable has not been defined clearly at all.

¹⁰²⁰ The "trusted bank" who is arranging the dividend payments and withholding taxes has no means to collect the information as the shareholder is not necessarily the "trusted bank's" client. Banks can request all the information required from another bank as bank secrecy limits their as well as distributing company's right to receive the information. A bank has surely all the required data, but not necessarily the correct bank.

¹⁰²¹ Shareholders can then afterwards request for refund of the excessive withholding tax.

¹⁰²² Withholding tax is a tax that the distributing company is withholding and paying on behalf of the shareholder, not for its own purposes. The distributing company collects withholding tax.

¹⁰²³ Compliance is impossible as the time between the AGM decision and the payment day is short, only a few days, and the number of shareholders is usually large. A few days are not sufficient to find and analyse the last-minute changes in the shareholding.

7.4 Conclusions on the legislative process

My conclusion is that Fuller's principles are crucial for good legislation and the legislative process. Fuller's principles can be considered as a road map for the legislative process. Many of them are in reality included in the constitutional principles, and European constitutions and respected by the ECJ¹⁰²⁴. Proportionality in relation to constitutional and EU-law-based institutional rights is crucial when ensuring that tax laws do not require the impossible of a taxpayer to use his or her rights *bona fide*. Legal principles founded in many European constitutions are crucial in the legislative work. They guide tax legislation to fulfil Fuller's qualifications of good legislation illustrating the morality of aspiration in the legislative work. The quality of the legislative process is a key factor for taxpayers' legal protection even in cases when political pressure driving at urgency¹⁰²⁵.

To be capable of complying with Fuller's qualifications for a good legislative process the impact assessment and public hearings are key parts of the process. They will allow understanding of the impacts on the economic freedoms as well as the property rights and different circumstances that the new rules would apply. It makes it possible to draft the rules in a way that they are predictable, clear, and can be complied without creating unintended consequences. All consequences cannot be considered despite impact assessment and public hearings. Legal principles will give guidance for taxpayers, tax authorities, and courts to interpret the law in line with the constitutional framework and purpose of the law¹⁰²⁶.

¹⁰²⁴ See Douma, p. 228. Article 5(4) of the EU Treaty refers to the proportionality principle.

¹⁰²⁵ This can be seen even in cases where one could consider the legislative process failing. Most of the time improvements can be identified even though the final outcome might still be far from acceptable. In this respect, post-control would be crucial.

¹⁰²⁶ For example, the Finnish SAC respects the legal principles by using a constitutional interpretation.

8 Legal principles

Legal principles have a dual role within the different levels of taxpayers' legal protection. They inspire the legislative process as well as assist in the "use" and interpretation of the law¹⁰²⁷. I have already considered the importance of legal principles in the legislative process. Vanistendael describes legal principles when judging taxation through different levels of principles. These levels within the area of tax law are 1. general principles, 2. general principles in constitutional form, 3. constitutional principles of taxation, 4. constitutional principles of state organisation, 5. principles in the EU legal order, and 6. tax technical principles¹⁰²⁸.

8.1 Are legal principles affected by political pressure?

Urpilainen has considered taxation not to be a system of rights, but a system of obligations¹⁰²⁹. Fundamental rights have for some reason, not found their way to tax

¹⁰²⁷ See for example Vanistendael 2014, p. 32. This is reflected also in the SAC (Finland) decision 2016:180 where the SAC considered that the constitution will overrule tax law based on 106 § of the Finnish Constitution only in case the conflict cannot be solved through a normal constitutional interpretation of the law. This seems to refer not only to the constitution itself directly, but also to legal principles that are based on constitutional tradition.

¹⁰²⁸ Vanistendael 2014, pp. 32–38. General principles are seldom found in written texts of positive law, such as *ne bis in idem*. Some principles are included in written constitutional texts (general principles in constitutional form). Constitutional principles of taxation contain real principles of taxation such as the ability to pay, and the prohibition of excessive or confiscatory taxation. The principles of legality and non-discrimination are non-tax principles, but they are often used in tax cases.

¹⁰²⁹ Urpilainen 2012 (p. 37) considers that taxation is a system of obligations as taxpayers are not granted basically any rights, but rather obligations to comply with tax laws and pay tax. I would agree with this statement, taxation is a system of obligations, but when considering constitutional rights, being the basis for legal principles, taxpayers' protection is a system of rights that limit the system of obligations. This is clear when we consider tax as a consequence of business. Business enjoys economic freedoms and the cost of these freedoms is the obligation to pay tax. Therefore, the comparison of these rights and obligations is an important balance where legal principles play a crucial role.

law so far in the same way as to other branches of law even though taxation interferes with these rights in a fundamental manner¹⁰³⁰. This interference has legitimisation at least to a certain extent: funding the functions of society. Perhaps this legitimisation has an overemphasis¹⁰³¹ as taxation has such a strong financial and economic foundation. As Wikström has stated, tax laws are steered quite far in line with financial ecosystems¹⁰³² whereas constitutional rights' function is to protect taxpayers from political interventions.

I find that Wikström's conclusion is in line with my conclusions. Constitutional freedom rights and rules including general principles of law should protect even taxpayers from political interventions. Impacts that taxation makes to the financial ecosystem should still be considered properly based on constitutional rights and legal

¹⁰³⁰ There could be another angle to this view. Whereas taxing rights have traditionally been seen as extensive, we might not have seen yet such a case in broader terms where the limits would have been tested. On the other hand, constitutional regulation and principles are measured by the courts and as the principles are included in the constitutions, they set requirements for tax law. For example, 81 § of the Finnish Constitution defines the rule of law approach as well as the clarity and predictability requirements, see for example Tikka. While these are not taxpayers' rights, they are obligations set for legislators, tax authorities, and courts offering taxpayers the right to make a claim. This approach may become crucial when the new BEPS 1 and 2 rules reach the point of assessment of different practical events and cases.

¹⁰³¹ Overemphasis may be the case, especially in countries where there is no constitutional court. The pre-control is dependent on whether the parliamentary constitutional committee has at all reviewed the legislation. As Lehtonen considers, at least in Finland tax laws are reviewed only rarely by the Constitutional Law Committee and when they are considered there, changes done due to the comments are not reviewed anymore. This means that the pre-control does not exist due to the evaluation of other legislative bodies or the assumption that constitutional rights are not infringed. The same overemphasis on fiscal interests can be seen also in different studies, such as the EU Tax Observatory study of 2021. This study analyses tax competition to tackle the inequity between SMEs and MNEs as MNEs are benefitting from cross-border opportunities. The study explains (p. 21) the reasons for MNEs' low effective tax rates. The reasons are however narrowed only to capital allowances, tax-deductible interest payments, and some special tax regimes. Some of these are consequences of normal business for both MNEs and SMEs. However, the EU Tax Observatory fails to explain the vast majority of reasons for low ETRs, such as loss carry forwards, consolidation impacts, branch restructurings, and deferred and permanent differences between taxable income and accounting standards. Further, the EU Tax Observatory explains on page 29 how advanced rulings are providing generous interpretations of tax rules. This again is a question of aspiration, how to judge the advanced rulings. The EU Tax Observatory seems to emphasise fiscal interests more than constitutional principles.

¹⁰³² Wikström 2013, pp. 254–256. The BEPS-related developments as well as the EU's interest in the area of taxation could be an example of these kinds of political interventions. Fiscal rights are considered without properly considering the constitutional requirements on them. See also Wikström 2003, pp 416–417.

principles. Vanistendael has described the purpose of constitutional rights similarly as protection against extreme legislative actions. Legal principles originating from constitutional written rules have an impact also on how law is interpreted¹⁰³³. This means that meanwhile Wikströms statement is right, it is somewhat narrow.

Before going any further, I want to highlight the fundament nature of legal principles. As legal principles protect taxpayers from political interventions, they also set limits protecting governments¹⁰³⁴. A good example of this is the discussion on aggressive tax planning. The legality principle states clearly that taxation must be based on law meaning that taxation cannot be subject to a contractual arrangement¹⁰³⁵.

Legal principles, especially constitutional principles in relation to taxation, and principles in the EU legal order, are considered in the interpretation of tax law. In the Finnish court praxis, in tax law issues, constitutional principles have been used conservatively, at least as an open argument¹⁰³⁶. This may be due to a narrow legal

¹⁰³³ Vanistendael 2014 (p. 33) considers that legal principles are not targeted for well-circumscribed situation. They create concepts that give rise to principles, such as justice gives a rise to the principle of equality. Scaccia (p. 33) analysed proportionality and concluded that constant debate between Constitutional Courts and political institutions prohibits extreme outcomes of respect for the legislator from turning into submission, and judicial protagonism escalating into prevarication.

¹⁰³⁴ For example, in PeVL 9/2023, para. 5, the Constitutional Law Committee considers tax legislation through the proportionality principle.

¹⁰³⁵ The principle of legality is stated in numerous constitutions and illustrates its mandatory nature. See Vanistendael 2014, pp. 30–31. Advanced rulings, that the EU Tax Observatory 2021 refers to, are actually agreements between tax authorities and taxpayers, at least in the meaning that rulings have in Finland and Sweden. An advanced ruling is a confirmation of how tax authorities interpret the law in a specific case. The possibility of getting clearance from tax authorities is crucial for taxpayers, compare to for example the Finnish Chamber of Commerce statement on the Pillar 2 rules. On the other hand, earlier some tax authorities had a practice where taxpayers could agree to the tax treatment within the frame of tax law, even far-fetched interpretations of the law, so called sweetheart deals. These deals may be based on law, but often on quite a narrow interpretation. Taxpayers have been looking for tax inspectors who are regarded to be friendly or open-minded and who would confirm a far-fetched interpretation in a case. This means that taxpayers have used the system intended for predictability even to confirm formally feasible cases, where the substance has not been strongly in line with the purpose of the rule. This means that there has until 2010 been some sort of “inspector shopping” especially in the Netherlands and Luxembourg. At least based on the Dutch tax authorities report 2020, for 2020 the ruling policy has become stricter, i.e. sweetheart deals are not possible anymore

¹⁰³⁶ The Constitutional Law Committee considers constitutional aspects of laws, even tax laws. Traditionally fiscal interests are regarded to be extensive, but not without limits. The fact that for example impact assessments are not executed properly creates a challenge for the Constitutional Law Committee to analyse where the borders of fiscal

perspective concentrating narrowly on tax law and excluding other areas of law in legal analysis¹⁰³⁷. As Finnish courts are considering EU law aspects, the role of constitutional legal principles and EU legal order has grown in the past years¹⁰³⁸.

As legal principles are the focus of this study, I will analyse their relation to the post-BEPS and post-ATAD environment based on transparency¹⁰³⁹. All taxpayers paying CIT or VAT are bound for more reporting to tax authorities, in the case of large multinational entities the transparency goes even further¹⁰⁴⁰. Taxpayers' reporting obligations go quite far covering all taxpayers independently of their

powers are. Instead, it is more likely that the Constitutional Law Committee will focus on tax law proposals in the light of clarity and certainty. Therefore, the high threshold for the SAC to take a position on the constitutional aspects may illustrate a weakness in post-control. The SAC has noted in 2016:180 that the SAC has no mandate to consider if the legislative process has been correct. The SAC is using the 106 § of the Finnish Constitution possibility only if the question cannot be solved through constitutional interpretation. The constitution is clearly guiding the SAC in the interpretation of tax laws even though the SAC is avoiding stepping into the role of a legislator. For example, in cases 2017:78 and 2017:5 the SAC considered that a taxpayer had the right to choose to do or not to do issues that are within the taxpayer's choice even though it may create a lower tax burden. This illustrates the judgment between fiscal rights and constitutional freedoms. See also SAC 2018:166, SAC 2022:53, and SAC 2022:149.

¹⁰³⁷ Urpilainen, p. 39. The SAC is basing its decisions on law based on the facts and questions presented.

¹⁰³⁸ Finnish courts refer questions to the ECJ to be judged based on EU law even more than Swedish and Danish courts, see Bernitz 2010 and 2106.

¹⁰³⁹ Even though transparency seems to be a solution that is seen to solve all the challenges created by unwanted behaviour, transparency is a complex topic. Transparency, i.e. reporting data and information is connected to the purpose for which it is reported. As tax rules approach issues from a certain angle, data and information reported for some other purposes may not be applicable at all or conclusions should be made with caution. Standardised data and information delivered to tax authorities, such as c-b-c-r, are also complex. As the data and information are standardised, i.e. same data and information for all businesses, it is hard to make harmonised or comparable conclusions. If the data is gathered for risk assessment purposes, it should not be used for any other purposes to ensure the reliability of tax assessment. Some conclusions of the challenges of using data can be seen for example in transfer pricing: finding a real comparable uncontrolled transaction is extremely difficult. If the data is complex for the tax authorities to understand it is far more complex for the policymakers and other stakeholders. Typically for example low tax rates are analysed based on public c-b-c-r and explained with a narrow approach from tax rules, not with the business background, i.e. what has been the driving force of profits or tax, *ibid*.

¹⁰⁴⁰ Revenue more than € 750 million (based on BEPS rules for country-by-country reporting or DAC 6 reporting obligations).

behaviour¹⁰⁴¹. The scope of the reporting rules is wide even though the focus of the rules is narrow¹⁰⁴².

I think that Urpilainen's statement of taxation being a system of obligations describes the status well not only from a tax legal point of view¹⁰⁴³ but also from a political point of view¹⁰⁴⁴. Taxpayers have an obligation to pay tax and to do so comply with multiple overlapping tax rules¹⁰⁴⁵ in order to be in compliance with all existing rules. Tax authorities have extensive rights to request more information in multiple different formats¹⁰⁴⁶. This describes well Urpilainen's statement, the scope of BEPS and ATAD legislation, and perhaps even academic research. Due to political interventions, the focus is on taxpayer obligations even though it should be always paired with preceding taxpayers' rights. Legal principles, even within the

¹⁰⁴¹ Both BEPS and ATAD studies refer to the tax behaviour of MNEs, at least of a few MNEs, *ibid*. This means that these MNEs represent the behaviour that is seen as important to be eliminated. However, all MNEs do not behave the same way and many MNEs have committed to responsible and sustainable tax management principles. The rules will be applied however the same way to these taxpayers. The risk of overcompensating exists, i.e. going further than would be needed.

¹⁰⁴² Another new trend is so-called online reporting where taxpayers are to report detailed data to tax authorities, who in their turn assess taxes almost exclusively online. This is due to further digitalisation of the processes and is used more and more in transactional taxes such as VAT. From a taxpayers' point of view, this approach requires a totally new approach controlling more processes than stand-alone transactions. It leaves a very short time for controls and checks to ensure the correctness of the data and tax treatment. At the same time, penalty rules are not changed at all.

¹⁰⁴³ Tax legal view is often disconnected from the source of tax, i.e. business or economic activity.

¹⁰⁴⁴ New regulations add new requirements, i.e. obligations to taxpayers all the time without taking out a single old obligation. G20 and the EU have been executing multiple new rules in relation to BEPS 1 and BEPS 2 to eliminate tax evasion. BEPS 1 rules limit the deductibility of costs, ensure that income is taxed, and prevent hybrid situations. In spite of all this the OECD followed by the EU proposed global minimum taxes to solve in practical terms the same issues that BEPS 1 was to solve already earlier. Every new proposal adds to compliance burden without the legislator considering whether it is possible for taxpayers to comply with all the rules.

¹⁰⁴⁵ Additionally, a taxpayer has to comply with all other financial compliance obligations, surprisingly often even in relation to taxes. For example, the new taxonomy rules, which relate to sustainability, have a separate tax reporting section where taxpayers' tax governance and tax behaviour are assessed and audited. The report and the audit are separate from all the other tax compliance and reporting. Lately large companies are obliged to draft a CSRD. See Niskala, Palmuaro pp 40–41 report on sustainability. Even this reporting may include tax aspects. CSRD report has to be audited as financial statement.

¹⁰⁴⁶ As even tax authorities request data and information for multiple purposes and different forms of taxation, there is a risk that data and information are used for purposes for which they were not reported. Equally, there is a risk that applicable information and data are not found in the data "ocean".

interpretation of the new rules, will create reactive protection against politically-coloured rules¹⁰⁴⁷. Legal principles connect taxpayers' economic freedom to tax law.

Taxpayers' substantive obligation to pay tax is defined by law and therefore fundamental rights protect taxpayers against excessive tax burden¹⁰⁴⁸. Legal principles create limiting obligations to tax authorities when they are using their right to assess taxes. Therefore, legal principles set an obligation to tax authorities already prior to any trial to consider the legitimacy of their decisions and assessments. Tax authorities have to assess business transactions based on tax law, not judge the quality of business decisions¹⁰⁴⁹. This limits efficiently tax authorities' sometimes narrow, tax revenue-based approach¹⁰⁵⁰. These principles are applicable both on the national and EU levels.

The best form of taxpayers' legal protection in practice is most likely trust¹⁰⁵¹. For example, Bentley considers trust to be crucial as trust will commit tax authorities

¹⁰⁴⁷ See for example cases C-885/19 P and C-898/19 P Fiat, where the ECJ ruled against the European Commission's view in a state aid case related to transfer pricing. The Commission had lost already earlier cases against Starbucks, and Amazon.

¹⁰⁴⁸ There are two angles to this protection: the question is whether constitutions and constitutional principles protect against confiscatory tax. Confiscatory tax relates to the protection of property and the principle of the ability to pay taxes (see for example Englisch). This protection is complex as it relates to fairness and is hard to define. Where these borders are not tested yet in large numbers, the other angle of fundamental rights and principles is tested relatively frequently: whether a taxpayer has the obligation to pay the maximum amount of tax or if a taxpayer has the right to choose an option where the tax burden is not the highest one. This is crucial especially if tax authorities have revenue-maximising incentives, see Knijnenburg, p. 2.

¹⁰⁴⁹ Tax authorities cannot claim that taxpayers should have done a different kind of transaction due to different tax treatment. Tax authorities can claim whether the transaction is true by form and nature, but this is an underlying detail in the abuse of economic freedoms. Tax authorities have to interpret tax law also, even in unclear cases (interpretation of substance rules) such as whether the payment can be considered to be interest or dividend. I see also that the argument of abuse is more complex when Pillar 2 rules are applicable. The Pillar 2 rules cover low-taxed situations and the threshold for tax benefit is higher. For tax authorities, this means that they need to make evident that the taxpayer has abused economic freedoms in order to get an income tax benefit and avoid Pillar 2.

¹⁰⁵⁰ Knijnenburg (p. 2) states that tax authorities sometimes play tactics where tax authorities shake down a taxpayer by playing with the corporate reputation through leaking information, appropriate or not, to press or to assess highly inflated tax assessments as they know that multinationals want to avoid lengthy appeals. This I can verify by my own experience. Knijnenburg promotes taxpayers' charter and rights, work on which has already been started by the OECD, IBFD, and numerous countries.

¹⁰⁵¹ Trust is covered also by legal principles as the taxpayer can get protection to taxpayers' legitimate expectations. Legal legitimate expectations may be described even tax laws as a concrete rule, such as VML 26 §. Taxpayers can get protection acting *bona fide* based on tax authorities' guidance or specific earlier decisions in the equal matter.

and taxpayers to create an understanding of different views¹⁰⁵². This will lead to a common understanding of how and why rules should be applied and efficiently reduce legal disputes. Knijnenburg explains that equal commitment to complying with rules is crucial for trust¹⁰⁵³. A system of obligations fails to work if there is a risk of it resulting in conflict escalation. It leaves the judge to decide what is the correct interpretation of the applicable rules. The parties involved, taxpayers, and tax authorities, are often left with a mistrust that may escalate¹⁰⁵⁴.

Legal principles set limitations (sometimes reflected in constitutions, human rights agreements, and the EU Charter) to protect the confidentiality of personal information¹⁰⁵⁵, obligations to incriminate oneself, fair trial, and the ability to pay. For the approach of this section, these legal principles offer support, framework, and limitations for the interpretation of the laws and set obligations for tax authorities¹⁰⁵⁶ for assessing taxation.

As transparency can be regarded as a new paradigm, I am going to analyse the principles of legality¹⁰⁵⁷ and proportionality as regards this new paradigm¹⁰⁵⁸. Tax authorities are offered new powers resulting in additional taxpayer obligations. More obligations increase the risk of conflict escalation. The EU and the OECD are

¹⁰⁵² Trust that Bentley refers to in this case is not based on legal principles, but on how tax authorities and taxpayers communicate with each other. This *bona fide* communication may lead to trust referred to as a legal principle.

¹⁰⁵³ Knijnenburg (p. 6) refers also to the OECD publication “Tax Morale II: Building Trust between Tax Administrations and Large Businesses (2022). This report measures for example the trust between MNE’s and tax authorities.

¹⁰⁵⁴ See Bentley (pp. 185–186), conflict escalation creates a serious challenge as it reduces the commitment to comply with the rules. For example, the Australian tax authorities are examining ways to reduce conflict escalation.

¹⁰⁵⁵ For example, the German Constitution protects personal data in multiple ways and it can be violated only for good reason. Article 6 TEU recognises rights and freedoms set out in the Charter of Fundamental Rights of the European Union. Further, European Union respects the constitutional traditions common to Member States, Rust & Fort, pp. 177–190. Knijnenburg’s comment on trust is important: taxpayers’ responsible behaviour is not enough unless tax authorities commit to the same kind of responsible behaviour. This ties also the legal principles into the framework.

¹⁰⁵⁶ See Vanistendael; *ibid*.

¹⁰⁵⁷ The principle of legal expectation is a principle that has its origin in the legality principle, and it may be discussed shortly, even though the main focus is not on this principle.

¹⁰⁵⁸ The principle of good administration could be also an approach. Not to analyse this too far, the principle of good administration is reflected in the principles of legality and proportionality.

committed to assessing the efficiency of the new rules. This creates a point where the proportionality of the new rules should be assessed¹⁰⁵⁹.

The legality principle is key for constitutional aspects. The principle is an underlying principle and framework even for proportionality – at the minimum, the purpose of the law has to be compared with the final law to consider whether the law goes beyond what is needed¹⁰⁶⁰. Or if we approach the issue from another angle, the legality principle defines the maximum range for taxpayers’ right to choose business models.

8.2 Legality principle

Tax law, like criminal law, is regarded to be hard law. This is due to them both interfering with basic constitutional rights: freedom and property¹⁰⁶¹. Therefore tax law should result in a precise outcome with certainty¹⁰⁶². To reach the different aspects of clarity and certainty taxes should be based on laws, not subjective measures like aspiration¹⁰⁶³. The principle of legality, the rule of law, is the basis for this requirement. According to a number of EU constitutions, and even worldwide, the principle of legality is set to be the requirement for taxes to be assessed only based on law¹⁰⁶⁴.

¹⁰⁵⁹ This is likely to happen if tax authorities see an increased work burden without any additional revenue resulting in more far-reaching interpretations and rules, i.e. some sort of escalation. Strong fiscal interest seems to drive the development into the opposite, such as the OECD proposal on BEPS 2 creating a global minimum tax for digital operations. To understand properly the proportionality of tax consequence and tax compliance should be reflected more to the business and the purpose of the tax law than just tax law itself.

¹⁰⁶⁰ If we analyse as an example the government proposal 320/2022 vp, we can easily find the objective and purpose to be legitimate, but the law proposal itself goes far beyond what is required for the purpose. The purpose was to tax high energy prices (price cap) and extra profits but the parameters in the law proposal were set to tax even a normal profit in companies within the electricity branch.

¹⁰⁶¹ For example, Fuller considers both tax and criminal law to have the same basis resulting in certain requirements for the law, Fuller, pp. 73–75. Fuller states: “What the internal morality of law demands of a rule of strict liability is not that it cease to commanding the impossible, but that it define as clearly as possible the kind of activity that carries a special surcharge of legal responsibility.”

¹⁰⁶² As Tikka 1972 states, taxpayers have the right to understand what the tax consequence of their transactions or financial activities are as well as what the size of the tax cost is, Tikka, p. 81.

¹⁰⁶³ Ibid.

¹⁰⁶⁴ The principle of legality is based on the principle of “No taxation without representation” having its roots in the Magna Carta of 1215. Legal systems under the French influence recognise another hard concept of tax law of “ordre public”. Even

In tax law the legality principle could be called the *nullum tributum sine lege* principle¹⁰⁶⁵. Independently of the name, it is clearly expressed that tax cannot be assessed if it is not based on law¹⁰⁶⁶. Äimä considers that the legality principle results also in a requirement for equal treatment of taxpayers¹⁰⁶⁷. The concept of applying the law based on the purpose of law is closely connected to the rule of law, more than the spirit of law¹⁰⁶⁸.

The principle of legality creates multiple levels of terms and conditions for taxes to be assessed. These terms and conditions protect taxpayers by ensuring the visibility of tax assessments. First of all, there should be a clear rule from where taxpayers can conclude the tax treatment of their transactions¹⁰⁶⁹. In other words, taxpayers should understand how the transaction in question would be treated for tax purposes. Secondly, taxpayers should be able to conclude from the law the amount of taxes to be paid¹⁰⁷⁰. Thirdly, as Fuller has stated, tax law should be applicable equally to all taxpayers in the same position¹⁰⁷¹. As the last angle of the legality

here both criminal and tax law are regarded to be areas of “ordre public”. Vanistendael 2014, pp. 30–31. This principle is to a certain extent confused by the OECD and the EU, which are not tax legislators at all, initiated policies or regulations looking like policies. As they appear to a certain extent to be policies, they do not create sufficient clarity. On the other hand, they are executed by local laws, that should finalise and ensure the rule of law. The EU’s unclear mandate and confused preparatory process with political colour may still impact the new rules in a way that cannot be “fixed” in the local legislative process.

¹⁰⁶⁵ Äimä 2011, p. 102.

¹⁰⁶⁶ This is in line with Fuller’s principles. Law is expressing the level of moral rules that are approved by the required majority and are expressed clearly. We can see some other views on this also where the fundamental political view should be taken into account when assessing tax, sort of an ideological interpretation. See for example Raitasuo. The challenge of this kind of interpretation is that it relates to a certain understanding of morality. This kind of interpretation would change depending on the judge or the existing majority without any change in the law itself. It ignores predictability fully.

¹⁰⁶⁷ Äimä 2011, pp. 102–103.

¹⁰⁶⁸ The spirit of law reflects more aspiration and is more of a subjective measure than the purpose of the law. The purpose of the law is often stated in the preparatory material of the law while the spirit of the law is not.

¹⁰⁶⁹ Tikka 1996, p. 469, Knuutinen 2009, pp. 24–25.

¹⁰⁷⁰ See Tikka 1972, p. 81. Tikka 1983, pp. 8–9. Legal certainty means in this respect that the taxpayer should be able to conclude what the tax impacts of an arrangement are and that the tax assessment would most likely be correct. Predictability again means that a taxpayer can conclude this already before entering into the arrangement and filing a tax return. Tikka 1972, p. 81.

¹⁰⁷¹ Fuller considers the equal treatment of taxpayers that are in the same position is crucial. Äimä’s consideration seems to refer strongly to Fuller’s point. Further considering equal treatment includes, as so many other things, complex angles. When considering equal treatment, horizontal and vertical equality may have different approaches, Pahlsson, p 152.

principle, I would raise the need for the tax assessment process itself to be stipulated by law ensuring taxpayers' capability to comply with the new law¹⁰⁷². Tax authorities need to confirm their reading of the law¹⁰⁷³.

As a whole, the principle of legality limits the interpretation of law clearly to respect tax law¹⁰⁷⁴. The interpretation of tax law should respect tax law independently of what interpretation method is used. It is important for taxpayers' legal protection that tax authorities follow the process defined by the law¹⁰⁷⁵. It creates predictability as taxpayers can for example trust that tax authorities will give arguments for their interpretation of the law¹⁰⁷⁶ and tax authorities know that they need to respect tax law in their interpretation¹⁰⁷⁷. Especially when referring to anti-

¹⁰⁷² This means that taxpayers should have a possibility to get official confirmation of how tax authorities understand and interpret the rule in a specific case. For example, in the case of the EU's regulation on so-called revenue (2022) and Pillar 2 rules, the Finnish tax legislation limited the possibilities for rulings. Especially in the case of Pillar 2 rules the ruling possibility was denied as a whole. Taking into account the complexity of both of these rules, the limitation is not in line with Fuller's principles. In the case of Pillar 2 rules, this will risk taxpayers' legal position not only from a tax point of view but also from a financial compliance point of view.

¹⁰⁷³ *Bona fide* taxpayers cannot be left with a risk of changed interpretation or poor guidance. Tax authorities must give sufficient arguments for their view so that a taxpayer can understand the view. These aspects would reflect the responsible behaviour of tax authorities, not just complying with the letter of the law.

¹⁰⁷⁴ This could be seen as a conservative approach or even a politically-oriented approach, see for example Raitasuo. However, the legality principle creates a clear requirement for taxpayers to comply with and a possibility to assess what is acceptable and what is not acceptable tax treatment. This is crucial information for taxpayers to be able to assess what kind of business decisions make sense.

¹⁰⁷⁵ The new BEPS-style regulation has changed taxpayers' obligations of reporting required data and exchange of information to transparency and availability of data, see for example Ruiter 2018 and Urpilainen 2017. Tax law and rules for good administration require tax authorities to be transparent in the consideration of at least some parts of the assessment process. As these rules have not been developed at all, they do not offer the same kind of protection to taxpayers anymore as tax authorities are interpreting their obligations restrictively. Tax authority governance and tax morale have changed. Tax authorities' commitment to good administration has partly been diluted, see Knijnenburg, p. 2.

¹⁰⁷⁶ When comparing tax authorities' obligation to follow and respect both tax law and administrative rules to taxpayers' commitment to responsible tax management principles, purely following the law is not sufficient. Tax authorities should actually draft governance that the administrative rules are followed, risk assessment of failure when assessing taxes is done, tax authorities have sufficient internal controls in place, and the same procedures are followed in all parts of the tax authority.

¹⁰⁷⁷ In case tax authorities are not transparent about the data and information they are using; the assessment process will fail as taxpayers cannot respond to used facts or views. This illustrates one point of possible conflict escalation. An example of this could be the use

avoidance rules, tax authorities should ensure proportionality of the interpretation to objectives of anti-avoidance rules and economic freedoms. Under the Pillar 2 regime tax authorities should make it evident that taxpayers have avoided artificially also Pillar 2 rules to be proportional to the purpose of both anti-avoidance rules and Pillar 2 rules¹⁰⁷⁸.

While the interpretation of tax law is interesting and important, I will focus briefly on how the legality principle should impact tax authorities' methods when assessing taxes. Even though this approach is somewhat high level and, does not give direct, precise guidance for tax authorities in a single case, legal principles outline in broad terms support for how the issues should be approached. This is how legal principles give guidance on how to use the powers offered to tax authorities by the law and also for the taxpayers' angle as predictability is key for taxpayers' economic freedom rights.

The new tools created by the OECD and the EU for tax authorities concern tax authorities' right to get data and information. Therefore, tax authorities' settlement' obligation is a key question for taxpayers' legal protection.

8.2.1 Settlement obligation and the legality principle

Traditionally ordinary tax assessments have been based on tax returns. Tax returns provide information for tax assessment purposes in line with the set standard, i.e. tax law, concerning a taxpayer's taxable income based on the understanding and interpretation that the taxpayer has based on the facts¹⁰⁷⁹. As information that a taxpayer provides for tax authorities has been created and formulated for tax assessment purposes, it should be more reliable than information generated for some

of court praxis. Taxpayers can refer to published cases, to be more precise SAC cases. Tax authorities instead utilise often other than published court cases as an argument for their decisions. Naturally the weight of that kind of decisions should be low, if any at all. This aspect illustrates well the lack of transparency in the tax authority process.

¹⁰⁷⁸ The aim of Pillar 2 rules was to ensure taxation of the events that are by purpose or by accident lowly taxed. To be proportional, a simple single tax avoidance transaction does not create any more low-income tax due to the minimum tax system. Pillar 2 rules are applicable to only MNEs.

¹⁰⁷⁹ Lehtonen considers that the more detailed tax returns are, the more tax authorities have an obligation to analyse. This would mean that the threshold for taxpayers' trust in the assessment would be lower. On the other hand, tax authorities will have a challenge to pick out all the details and their relevance to the tax assessment especially in case of mass procedures such as VAT.

other purposes¹⁰⁸⁰. In addition to tax returns, the taxpayer has had an obligation to deliver information on certain topics, such as transfer pricing, to tax authorities¹⁰⁸¹.

Clarity and predictability, which have their origin in the legality principle, have multiple levels. Tax compliance and tax payment require clarity and predictability, which is connected to assessment obligation and the right to have clearance from tax authorities. Also, other regulations require taxpayers to report on their taxes, though differently than for tax authorities. For example, IFRS-based reporting takes a future view on tax impacts that should be reported. The legality principle is vital also for this taxpayer reporting obligation as taxpayers need clarity and understanding sometimes years before the tax return or tax assessment¹⁰⁸².

Legality principle requires taxes to be assessed based on law, i.e. taxes cannot be assessed based on interpretation that cannot be concluded from the law itself¹⁰⁸³. The principle has two fundamental aspects when protecting taxpayers' rights. First of all, the legislator has stipulated how a transaction should be taxed¹⁰⁸⁴. Tax legislation

¹⁰⁸⁰ This is crucial for the statutory tax assessment process. In tax audits, the issue becomes different as tax authorities are controlling the facts. Even in this case the reliability of for example operative investment proposals is limited for tax purposes unless tax authorities understand the difference in the standards. The same terms may have totally different definitions based on the purpose and standard used.

¹⁰⁸¹ Taxpayers have to define what data is valid and relevant for assessing taxes with respect to transfer pricing instead of having to report data that may be irrelevant to the taxpayers.

¹⁰⁸² This is problematic for example in the case of Pillar 2. Taxpayers need to report already in Q1 2024 the possible outcomes of Pillar 2 rules without having necessarily the right to get clearance from tax authorities. The tax assessment in Finland will take place possibly in 2027. The OECD is developing Pillar 2 rules and gives guidance on how the rules should be understood whereas the EU and national legislators are trying to navigate between unchanged directives/law and these OECD guidelines while taxpayers have the risk of financial non-compliance.

¹⁰⁸³ See for example Äimä 2011, p. 102, and Hultqvist 2015, pp. 9–10. The Finnish Supreme Administrative Court confirmed the requirement of clarity based on 81 § of the Finnish Constitution on penalty payments (in case of VAT) in case SAC:2022:149. Ojanen 2008 (pp. 304–305) considers that the Constitutional Law Committee of the Finnish Parliament requires exactness and univocal meaning that the taxpayer can conclude from the law itself the tax consequence.

¹⁰⁸⁴ Fuller has described qualities of good tax legislation, that are respected for example by the ECJ, see Douma, p. 220.

sets limits to tax authorities' possibility to¹⁰⁸⁵ assess taxation¹⁰⁸⁶. Taxpayers' protection allows taxpayers to rely on the rules set in tax law. One of these protected rights is the right to choose the optimal transaction.

Secondly, based on the legality principle anti-avoidance rules among other rules should be clear and precise to prevent extreme taxation¹⁰⁸⁷. Tax authorities' mandate to use anti-avoidance rules has, therefore, to be limited to protect taxpayers' fundamental rights as well as to ensure legal protection by achieving clarity but also to make it clear that these rights may not be abused¹⁰⁸⁸.

8.2.1.1 Transparency and the legality principle

In the post-BEPS era, the importance of the legality principle is growing from the taxpayers' rights point of view¹⁰⁸⁹. The high volume of new regulations drafted by

¹⁰⁸⁵ Ignoring the legal form as the basis of assessment or assessing a transaction very differently than the legal form defines, is not within the mandate of tax authority if there is no clear mandate in legislation. The Finnish SAC considered that even though there were some definitions and descriptions in the preparatory works of the law, they did not create enough clarity and basis for tax authorities to assess penalties in this case, SAC:2022:149.

¹⁰⁸⁶ For example, requesting more information or data is a topic that should be considered based on the legality principle. In the Finnish tax procedural law (11 §) taxpayers have been set an obligation to give such information that may be necessary when assessing taxation. If tax authorities are requesting information that is used for other purposes than defining taxation, such as investment calculations on a specific project, taxpayers' obligation to give such information should be limited. Project calculations reflect other factors than taxable or even IFRS profits. They can therefore offer no additional help for assessing taxation, sometimes possibly the opposite as the standard and purpose of the calculations differ from taxable income factors.

¹⁰⁸⁷ This obligation exists despite that it is challenging to draft precise anti-avoidance rules. In case it is too broad, the interpretation should be limited to ensure that freedom rights are not interfered with. The proportionality principle should limit the interpretation of these kinds of rules.

¹⁰⁸⁸ This is even though Penttilä (2022) considered that currently there seem to be no limits for applying anti-avoidance rules.

¹⁰⁸⁹ The new era seems to be politically driven and employing political pressure. The request to increase transparency seems to be the solution to most of the challenges resulting in a large number of data KPIs being published. This results easily in an excessive amount of data hiding the real issues among details. Transparency does not create visibility. Another example is the Council Regulation (EU) 2022/1854 on the emergency actions on energy prices. The regulation was created within weeks, commented for example by the Finnish Parliament with a critical view on the proportionality and effectiveness of the rule. However, the regulation was adopted in September 2022 resulting in a number of national applications of the regulation, from precise revenue cap rules to windfall taxes. The quality of law is poor, which means

regulators with no tradition for the tax legislative process under high political pressure creates a challenge as taxpayers' reporting obligations are increased on multiple levels. Tax authorities will receive data and information, both relevant and irrelevant.

Tax authorities are sourcing information also from public sources¹⁰⁹⁰. The increased amount of details and information based on different standards is putting a challenge for tax authorities: how to ensure the quality of assessments, and act in accordance with legal principles of good administration as well as within the mandate set by the rule of law.

When considering the end-to-end assessment process from a legality point of view, it is important to understand the difference between data and information. Data is raw fact-based data without any translation, opinion, or view. Information again is created from the data based on the purpose of the information presenting the taxpayer's view. Different taxpayers produce entirely different-looking information based on different needs, differences in their business, strategies, risk mitigation actions, and business assessments¹⁰⁹¹.

The OECD's and the EU's actions are creating a new era where tax authorities are moving from the exchange and sourcing of information to transparency¹⁰⁹². Where exchange or national sourcing of information requires active considerations of the details needed and action from tax authorities¹⁰⁹³, transparency makes data

that the legality principle together with other legal principles may create an obstacle for these regulations.

¹⁰⁹⁰ One example is LinkedIn. There is a challenge in using public sources. As the information is drafted for non-tax purposes, it should be treated in line with its objective. The information should be used in line with its original objective as the objective and purpose are automatically becoming a tax purpose due to tax authorities using the information, see for example Knijnenburg and van Den Hurk.

¹⁰⁹¹ An example of this is the restructuring of the utility branch. Where for example German EON considered its future strategy in 2015 to be in regulated distribution network businesses, Finnish Fortum came to an opposite decision, i.e. to sell the distribution business. These decisions were based on different views and strategies, surely not due to taxation.

¹⁰⁹² Tax authorities receive or can request pre-prepared information both from national and international sources. Taxpayers and intermediaries will also automatically report so-called tax planning arrangements to tax authorities based on DAC 6. Compared with the old paradigm, taxpayers were aware of data requests but that is not necessarily the case anymore, see De Ruitter, 2018 Helsinki.

¹⁰⁹³ Actively means that tax authorities considered the data or information to be useful and chose to use it while passively received data and information has a low threshold creating the possibility of data shopping. A good example of this is the use of information from LinkedIn. The objective of a person putting information on LinkedIn may be to look for a new position. The employing taxpayer does not have, and should

and information available passively. As the threshold to use available information is low it creates a risk of information used inappropriately¹⁰⁹⁴. This may create a challenge for taxpayers leading to outcomes that were not intended and would require definition or limitation by law.

The new transparency era offers tax authorities data for national decision-making. The different dimensions of transparency are complex. Where the new rules of transparency create some sort of justification for sources of new data and information, new kinds of details, relevant or irrelevant, applicable or not, comparable or not, the legality principle, including taxpayers' right to legal certainty, should set limits on how information and data are used¹⁰⁹⁵. In other words, the rules for making use of data and information should be developed to align with the legality principle concerning the tax assessment process.

The challenge that new transparency is creating, becomes more obvious if we list the new transparency obligations that have been created post BEPS for taxpayers towards tax authorities alone¹⁰⁹⁶:

not have the possibility to control this information. Similarly, tax authorities should not employ the information as a clear fact either. The same challenge is with taxpayers' financial information. Financial information is based on such different objectives and standards that the use of the information for tax purposes is complex.

¹⁰⁹⁴ The information is available for tax authorities and it may seem relevant even though the information is intended for other stakeholders for other purposes. Therefore, it may not reflect the facts and circumstances crucial for tax assessment purposes. Prior to the BEPS era tax authorities had to ask for the information and taxpayers had an opportunity to ensure that they were delivering information relevant for tax authorities.

¹⁰⁹⁵ Seer, EATLP seminar 2018 Zurich. The procedural rules should make an effort to safeguard balanced use and appropriate understanding of data and information.

¹⁰⁹⁶ Stevens, EATLP seminar 2018 Zurich. The table presents the Dutch situation, but it reflects quite well topics in many other EU countries and the EU. Some parts, such as publishing tax strategy may be obligatory in some countries, such as the UK and Poland.

	Status	Mandatory / voluntary	Taxpayer / third party	International exchange
Request of information	Law	Mandatory	Taxpayer & third party	Exchange
Cooperative compliance	Soft Law	Voluntary	Taxpayer	Exchange /?
CRS / FATCA	Law	Mandatory	Third parties	Exchange
APA / ATR	Law	Mandatory / Voluntary	Taxpayer	Exchange / EU database
Mandatory disclosure rules	Directive / law	Mandatory	Taxpayer	EU database
Ultimate Beneficial Owner	Law	Mandatory	Third parties	Public
C-b-c-r	Law	Mandatory	Taxpayer	Exchange
Reporting payments to government agencies	Law	Mandatory	Taxpayer	Public
Public c-b-c-r	Law	Mandatory	Taxpayer	Public
Tax risks annual accounts	Proposal	Mandatory	Taxpayer	Public
Tax strategy		Voluntary	Taxpayer	Public

Stevens, New instruments to create tax transparency, EATLP seminar 2018

8.2.1.2 Challenges of using information

If we consider taxpayers' rights and protection in the era of transparency, we can identify different levels of protection. Tax authorities have an obligation to treat confidential information as confidential¹⁰⁹⁷. This secrecy obligation is based on law and tax authorities naturally have to respect it¹⁰⁹⁸. Secrecy becomes, as Rust considers, a challenge when information is exchanged between countries. This obligation refers more to the taxpayers' right to trust tax authorities to treat the information as confidential when using the information as an authority¹⁰⁹⁹. This

¹⁰⁹⁷ Maintaining confidentiality in international relations may depend on tax treaties: what kind of protection is offered. So-called equal treatment obligation in tax treaties data protection does not guarantee the same secrecy level applicable in the state from where the information is requested to apply when passed on to the requesting state. The requesting state will apply its secrecy standards. See closer Rust & Fort 2012, pp. 180–181.

¹⁰⁹⁸ In some cases, I have seen that tax authorities use the confidentiality clause not to state what information or data has been requested or why it has been requested when the taxpayer is asking for clarification. The typical argument for this is that tax authorities cannot give confidential information relating to taxpayers in the other country or the considerations the other tax authority has. This argument seems, at least to a certain extent, to demonstrate the lack of transparency of tax authorities' procedures by using confidentiality as an excuse.

¹⁰⁹⁹ Confidentiality may be challenging if some part of the information is publicly available. Public information may cover different issues or be considered on a higher level not to

challenge is more complex as secrecy is difficult to apply in the era of transparency¹¹⁰⁰.

Another angle of transparency relates to third-party information. Information may be protected by law, such as professional secrecy, client-attorney secrecy, or bank secrecy. Taxpayers are protected due to legislation protecting this kind of information and limiting the tax authorities' right to receive the information. This creates protection for taxpayers but a challenge for tax authorities¹¹⁰¹. From a legal protection point of view, this protection is important as it ensures taxpayers the possibility to assess different legal alternatives and prepare for future audits in a confident way.

The third, and the most interesting level for the purposes of this study, is whether tax authorities may use legally sourced or available information without any limitations authorised by the law¹¹⁰². Tax authorities find publicly available information that tax authorities may consider relevant not being taxpayers' official information¹¹⁰³. Tax authorities receive data and information from taxpayers to assess other taxpayers' taxation. Tax authorities may collect data and information

be relieving confidentiality aspects at all. But if tax authorities are referring to confidentiality in order not to express their objectives in the matter, it violates the principles of good administration as tax authorities should be transparent, at least when considering tax assessment. The purpose of tax assessment is not to prevent crime but to make a decision on what the correct tax treatment is.

¹¹⁰⁰ Even the information that is required to be reported may include some confidential information. Taxpayers have no possibility to ensure confidentiality and tax authorities may have problems understanding the confidentiality of the information.

¹¹⁰¹ Ehrke-Rabe, 2018. It may be attractive for tax authorities to find out what weaknesses an attorney has identified in a case. It is however fundamentally important for taxpayers to be able to have a confidential dialogue with an attorney or advisor as taxpayers have the right to review and discuss with an attorney tax treatment and ensure compliance with the law without being challenged due to different stages of planning factors.

¹¹⁰² Availability of data and information may create some kind of blindness for tax authorities when using information and data received or when requesting it. Public interest to ensure the correctness of tax collection (see for example Hongler, 2018) is a legitimate reason to collect data and information, but only if it is also proportional to the purpose of the assessment. The Finnish SAC confirmed this requirement of balance between public interest and proportionality between the purpose and planned information request (SAC 2020:8). Proportionality was based the EU General Data Protection Regulation ((EU) 2016/679). This illustrates well that even in a situation where tax authorities have more tools and powers to execute tax assessment, the principle of legality sets limits to these powers in the form of a legal framework.

¹¹⁰³ For example, employees' profiles on LinkedIn are a good example. Tax authorities refer to LinkedIn information in relation to substance topics. As LinkedIn is not taxpayers' official information it is questionable if that information may be used as such as a basis for taxation. The person in question may be seeking a new position promoting him/herself or is seeing the position differently than what it actually is.

for other purposes than tax assessments to be used by other authorities¹¹⁰⁴. This means that tax authorities have currently access to a wide range of data and information¹¹⁰⁵. Taxpayers cannot estimate how and for what purposes information, reported based on the new regulation, is used in the tax assessment process¹¹⁰⁶. This is why the rule of law even in relation to tax authorities' processes and the formality concerning utilization of unofficial information is crucial¹¹⁰⁷ and should be developed to allow the rule of law to be respected in the assessment process¹¹⁰⁸. One alternative could be the tax authorities' obligation to ensure that the information tax authorities have sourced from third parties or from publicly available sources is relevant for tax assessment purposes.

8.2.1.3 Excessive information

The taxpayer files a tax return and assists tax authorities in assessing its taxes by answering questions¹¹⁰⁹. The new reporting obligations offer tax authorities focused

¹¹⁰⁴ The challenge in this case is that tax authorities are collecting the data for other purposes than tax assessment purposes. It becomes a challenge as tax authorities may not consider the relevance of that data. If it is sourced for other purposes than tax assessment, it may not be reliable to be used for tax assessment purposes as it is intended to be used to assess something else. Even more complex are situations where data is collected for example for corporate income tax purposes, but is used for VAT purposes. As the rules set different kinds of definitions and terms, the applicability of data has to be at least considered.

¹¹⁰⁵ For example, 11 § of the law on procedures in tax matters in Finland (Laki verotusmenettelystä) states that taxpayers have an obligation to deliver additional information and data (in addition to tax returns) that may be necessary to assess taxpayers' taxation.

¹¹⁰⁶ Reporting is neither voluntary nor initiated by taxpayers for disclosure purposes. Reporting is obligatory and subject to penalties and despite reporting taxpayers may face penalties when taxes are also assessed due to poor quality of the assessment process or tax authority capabilities. Also, reliability of data and information is crucial as the used standard and purpose of the information will adjust the information to fit for the purpose, not necessarily any other purpose. This is why utilising information is complex as information should be assessed against its purpose.

¹¹⁰⁷ The importance is evident if we take into account that it is actually tax authorities who have been drafting the new rules at the OECD. It is at least questionable whether the assessment of taxpayers' legal protection has been considered in a balanced manner.

¹¹⁰⁸ I'll illustrate this with an example. VAT reporting is planned to be more online (so-called VIDA approach). This means that a taxpayer needs to report transactions within two days after the transaction. Unless tax authorities' time to assess is shortened equally the taxpayer is left with a risk of non-compliance due to a slow tax authority process.

¹¹⁰⁹ Additional questions should be focused, proportional, and essential for assessing taxation.

data and information¹¹¹⁰ to tackle tax avoidance or evasion¹¹¹¹. In the post-BEPS world, the taxpayer (or an intermediary) is obliged to deliver data and information described in the new rules, even if they may be regarded to be irrelevant or misleading for tax assessment purposes. For example, in a case where a transaction is executed purely for operative purposes even without any tax optimisation considerations¹¹¹² but naturally having a tax consequence that could be considered to create a tax benefit.

Tax authorities need an authority or a format set by the law to source the data or information. This authority or format may be restricted by regulation¹¹¹³. In other words, the tax authorities' mandate is broad but has limits in any case. When using information that is publicly available¹¹¹⁴ or available due to statistical objectives set for tax authorities, the use of information is not regulated by procedural rules. Rules

¹¹¹⁰ To clarify the importance of the rule of law we need to analyse the difference between data, information, and public information as well as how to use it. Data is raw facts that have not been treated for any purpose such as net sales or interest rate. Information is representing a statement or a view based on facts from a certain perspective for a certain purpose such as the strategy of a company.

¹¹¹¹ It is stated in recital 4 of the Council Directive (EU) 2018/822 of 25 May 2018: "Recognising how a transparent framework for developing business activity could contribute to clamping down on tax avoidance and evasion in the internal market [...]". The purpose of the reporting is to offer tax authorities availability of data and information gathered for anti-money laundering purposes, ruling purposes, or planning of a transaction purpose without the taxpayer to consider at all whether this information is relevant for tax assessment purposes.

¹¹¹² The EU has considered in ATAD that a taxpayer has the right to make tax planning as long as it relates to genuine business. Further DAC 6 rules creating the MDR obligation are not intended to limit taxpayers' fundamental economic rights. However, the wide reporting obligation creates a confusing outcome; tax authorities receive reports on transactions of genuine business objectives, but which could have been organised so that the tax burden could have been different and therefore considered to create a tax benefit.

¹¹¹³ Such restrictive regulation may be in addition to specific law on procedural rules for tax assessment Article 8 in ECHR (requirements are a condition of legality (including foreseeability), condition of legitimacy, and condition of necessity) protecting private life. The action of tax authority or legal measures to protect a taxpayer's private life is covered by Article 6 in ECHR including a condition of foreseeability and necessity, which are often assessed by examining the presence of sufficient procedural safeguards against abuse. Judicial review is considered the most important procedural safeguard as it offers the best guarantees of independence, impartiality, and proper procedure. See DeRaedt, 2018. Also, the GDPR sets limitations for data sourcing, see SAC 2020:8. It is important to notice that even though national constitutional rules do not necessarily protect taxpayers in cases applicable for these rules the EU Charter may.

¹¹¹⁴ Public information is challenging as it should be put in light of the purpose of the information. Authority transparency in the process is therefore crucial to ensure that the information is used correctly.

on good administration may however set some limits in relation to how the information is used. These rules should not be underestimated.

The legality principle protects taxpayers from abusive taxation¹¹¹⁵. Tax law sets tax authorities the obligation to ensure correct taxation, at least in the scope of the legislation¹¹¹⁶. I think that on the one hand law gives the tax authorities a legitimate authority to request and receive data and information, but the law sets, and should set, also the limits and rules for tax authorities on what can be requested and how to use the data and information¹¹¹⁷. They have an obligation to assess taxation based on valid and relevant data and information. This may be difficult when tax authorities have available a lot of details.

The use of information is complex as tax authorities have the power to assess taxation, but they do not have the power or authority to assess business. If “one of the principal motives” for tax assessment is beneficial tax consequence, it may illustrate thin and narrow argumentation of the arrangement for the tax assessment. In order to avoid fiscal planning, tax authorities should put the information into a big

¹¹¹⁵ See for example Vanistendael, 2014 p. 30. It is not sufficient from a taxpayers’ legal protection point of view that tax is technically ruled by law. As described earlier, tax law should be clear and precise, as defined by multiple constitutions, such as 81 § of the Finnish Constitution. Vanistendael 2011 explains this well (pp. 190–191) with an example of GAAR wording. If the requirement is set as “sole purpose” GAAR will be applicable to very few cases where tax is the sole motive for an arrangement. But if the wording is changed to “one of the principal motives” tax authorities have a wide range of arguments to apply GAAR as tax consequence is always a material factor in an arrangement. This is the point where legal order, freedom rights, and legal principles step in to ensure a proportional interpretation.

¹¹¹⁶ Unclear or very broad definitions, as Vanistendael illustrated, *ibid*, are a serious challenge from taxpayers’ legal protection point of view. If tax authorities act aggressively and they do not respect the purpose of the law, outcome may, in spite of legality principle, be extreme unless taxing powers are put in the constitutional framework. Transparency is a challenge for taxpayers’ legal protection as large amounts of often irrelevant data and information allow tax authorities to refer to facts that may not be relevant or are misleading. Details are challenging. This risk could be minimised by tax authority transparency.

¹¹¹⁷ This is important in order to ensure trust for taxation. The issue of tax authorities’ request for information is slightly different from the case referred to here. In reality, tax authorities are delivered the data and information without requesting it. This means that tax authorities should have self-control and self-assessment of what data is applicable for tax assessment and how the data and information are used. This self-assessment is challenging as it may be difficult for tax authorities to know and understand the applicability of data and information for tax purposes. For example, definition of WACC for investment purposes may seem like the headquarters is pricing group internal debt, not a separate finance entity meanwhile for operative purposes WACC expresses a profitability measure when comparing investments with each other in order to mandate some investments to proceed and others not.

picture objectively and precisely including a proper explanation on how the information is understood¹¹¹⁸ and how it correlates to assessing taxation.

When considering the use of information that is available based on the “new” rules, legal principles, such as the rule of law or the proportionality principle, give strong guidance for parties. Legal principles guide tax authorities to base their decision strictly on the law and be proportional. If the information is used irresponsibly¹¹¹⁹ and not considering properly the taxpayers’ arguments, legal principles indeed have a role¹¹²⁰. New rules should be used in line with the rule of law principle. Also, tax authorities have to ensure that they base their arguments on the law and respect the purpose of the rules, while taxpayers should be able to assess the outcome before tax assessment¹¹²¹.

Anti-avoidance rules, also the new ATAD-based rules, may interfere with legitimate business transactions if they are applied in a broad approach. This is not the purpose of the rules¹¹²². Therefore, the new anti-avoidance rules should be applied with a narrow approach and interpreted against their purpose respecting the rule of law test¹¹²³, especially when considering the use of available information. This conclusion is supported by the ECJ principle of prohibiting abuse based on a “wholly artificial arrangement” basis¹¹²⁴, which seems to be the spirit also post BEPS

¹¹¹⁸ This challenge may be seen in the OECD BEPS II work on Pillars 1 and 2. They are defining a model for how to define a share of taxable income for countries irrespective of what the business model is. The balancing question here is when securing a tax base in a country becomes government tax planning especially when the focus is purely on tax revenue. This sets a challenge for tax authorities to act proportionally when reaching out for correct taxes.

¹¹¹⁹ For example, in the way that Knijnenbourg describes, pp. 2–3.

¹¹²⁰ For this purpose, the ECJ has illustrated the rule of law test by considering if the Member State laws are applied in a non-discriminatory manner, if the legislation has a legitimate public interest, does the law meet its objectives and is the law going beyond what would be necessary for the objective. See for example Urpilainen 2012 p. 80.

¹¹²¹ Vainstendael considers legal principles to be soft law rules not giving an answer to a specific question, but stating different levels of guiding principles depending on the type of legal principle, see Vanistendael 2014 pp. 29–31. Tikka 1972 states that the outcome should be available for a taxpayer prior to the transaction, see p. 81. This requirement is in line also with Fullers’ definitions of good rules.

¹¹²² This weakness is obvious as the rules were not assessed in a proper impact assessment.

¹¹²³ This would mean that legality principles, principles of good administration, and legitimate expectation guided tax authorities and also courts as constitutional principles when assessing taxation prohibiting in the worst-case confiscatory taxation. See Vanistendael 2014 pp. 34–35.

¹¹²⁴ Vanistendael, 2104 pp. 43–45. A wholly artificial arrangement is used to measure taxpayers’ solutions, but equally, it can be used when considering also tax authorities’ arguments.

and ATAD¹¹²⁵. This would mean that new rules should be used with care and by respecting the legal principles¹¹²⁶.

8.2.1.4 Legality principle challenging ATAD

The process for using the sourced information is complex and it includes multiple challenges for tax authorities if the target is to make an assessment based on an objective basis and respecting the purpose of the law¹¹²⁷. A responsible tax authority¹¹²⁸ respects the purpose of information¹¹²⁹, uses it accordingly, and

¹¹²⁵ Transactions resulting in minimising tax are allowed as long as they are genuine, see Council Directive (EU) 2016/1164.

¹¹²⁶ The post-BEPS situation is different from the time before BEPS. Transactions are assessed independently and sometimes even simultaneously in two countries each protecting their tax base. The transparency paradigm offers tax authorities information to be used to reach their target. As Vanistendael states, the legality principle protects taxpayers from extreme tax consequences (*ibid*), but this was valid strictly in one country at the time. One approach is that the legality principle and legal principles as a whole have to be taken into account at least in the EU through EU law aspects. EU law is filling in the gaps left in the OECD work and the EU's own legislative work.

¹¹²⁷ Challenges may appear on multiple levels. If the tax assessment process is not done effectively, legal certainty is not reached (see for example Knuutinen or Juusela) or conflict escalates between taxpayers and tax authorities lowering compliance with rules (see Bentley). Avoiding aggressive tax assessments tax authorities should not seek "data shopping" but put the data and information in relation to its purpose. A good example of this is one of my early experiences in a tax audit: tax authorities reviewed documentation in a case where the parent company had supported a subsidiary. The subsidiary had technical problems with getting a production equipment working. This machinery was delivered by the parent company. An engineer had sent a report where he requested more technological equity to the subsidiary, i.e. technical support from the parent company. Partly based on this tax authorities interpreted that this means that the parent company should have made an equity injection to the subsidiary. The purpose of the report as well as the actual meaning of the words in the connection were in this case misleading.

¹¹²⁸ Responsible tax authority means here tax authority who assesses transparently taxation in accordance with the purpose of the law rather than seeking opportunities to assess the maximum amount of taxes. A responsible tax authority will challenge a taxpayer's tax treatment, not business decisions to reach a balanced taxation within the limits of the law equally while a responsible taxpayer is planning taxes within the frame of business strategies and needs. In this case taxpayer and tax authority will concentrate on substantive tax rules, not GAAR or SAAR.

¹¹²⁹ This can be reached by allowing taxpayers to give their view on tax authorities' conclusions and views before any assessment. This is a procedure built in formally for example in 26-26c § of the Finnish tax procedural law. Acting responsibly means in this sense strong commitment to the rules rather than a formality.

assesses business purpose, not based on tax consequences, but based on the real targets that the business has¹¹³⁰.

Reflection on the legality principle from another angle is crucial. Transparency of tax authorities' process is essential to ensure reliable taxation¹¹³¹ as it will not only help taxpayers in understanding their position but in an optimal case bring the assessment into a stage where no lengthy appeal is needed¹¹³². Abuse can be concluded based on a transparent and rule of law respecting process in which economic freedoms are respected and tax collection has no overemphasis in the assessment. The legal requirement to ensure a correct, justified tax assessment process basically articulates the need to respect the right to choose strategy¹¹³³.

However new rules, such as the EU's directive on tax avoidance¹¹³⁴, require different measures such as the purpose test where tax treatment depends on the purpose of the arrangement¹¹³⁵. This measure creates at minimum challenge from a legality principle point of view.

ATAD states some fundamental targets for actions taken by the EU. First, "[...] tax is paid where profits and value are generated. It is thus imperative to restore trust in the fairness of tax systems and allow governments to effectively exercise their tax

¹¹³⁰ Even in cases where the tax authority respects the business targets and strategies tax law will give sufficient power to assess taxes as tax laws and court praxis will leave room for interpretation of tax treatment without challenging the business purpose or ignoring a transaction. In a clear majority of cases the question is, and should be, what is the correct tax treatment based on substance rules in tax law. Using anti-avoidance rules may illustrate signals of tax revenue maximisation or planning.

¹¹³¹ See for example Knijnenbourg. If tax authorities are not transparent about their process, taxpayers' views and opinions as well as hearing taxpayers in the process become useless.

¹¹³² See Bentley 2007 (pp. 257–258). Bentley states that with respect to the rule of law "any form of separation of authority becomes a useful means to increase transparency simply by virtue of the requirement to share information among a wider group [...] the assumption that the tax system is not simply an instrument of executive authority, which entrenches the systemic opportunity to act arbitrarily. At the point where application of the rule of law and observance of the constitution become uncertain, no structural measure will have much effect in protecting taxpayer's rights". See also Knijnenbourg.

¹¹³³ One reflection here could be that tax authorities would have to identify the purpose the information has been generated for and whether it can provide actual facts or only background information.

¹¹³⁴ Council Directive (EU) 2016/1164.

¹¹³⁵ Another example of the measures is the main benefit test included in DAC 6 concerning mandatory reporting. This measure is difficult to quantify and is not precise. The intention of such measures has surely been good offering tax authorities some support to assess taxes, but the wording is often wide creating a low threshold for a stand-alone tax authority to use it in a way that goes beyond what would have been needed to reach the purpose of the rule.

sovereignty¹¹³⁶.” It seems to be, that the purpose is to eliminate tax avoidance, or aggressive planning, and to ensure that taxes are paid efficiently where profits and value are generated.

This target is bold and easy to agree on but at the same time it states merely an aspiration, not a clear rule. It aims to ensure that correct taxes are paid to the correct country without offering a clear measure of what it would be. The directive ensures transparency of some identified arrangements or arrangements with material tax impacts without measuring if they are legitimate. Being on the level of aspiration, it does not solve the issue of where tax should be paid – rather the opposite. Each country has tax sovereignty and they compete for tax revenue, i.e. have conflicting interests of where profits are generated. By ensuring the availability of information on justified business transactions, it increases the risk of arbitrary tax assessments. ATAD in this sense seems to fail with legal certainty and the rule of law¹¹³⁷.

ATAD states as a function for GAAR in recital 11 that it is “[...] aimed to fill in gaps, which should not affect the applicability of specific anti-abuse rules. Within the Union, GAARs should be applied to *arrangements that are not genuine*; otherwise, the taxpayer should *have the right to choose the most tax efficient structure for its commercial affairs*.” GAAR should be used in case specific anti-

¹¹³⁶ Recital 1 of the Council Directive (EU) 2016/1164. This is an interesting statement as on one hand it confirms that profits should be taxed where value is generated, in other words strengthening Member States’ taxing power in a fair way. In 2023, that is seven years later the EU is shifting more to tax regulative harmonisation by making a BEFIT proposal. This proposal is based on Article 115 and aims to regulate the tax base in each Member State, in other words, it touches on tax sovereignty.

¹¹³⁷ This failure may be due to the urgency in which the rules were created without understanding the framework of taxation, that is being the consequence. When the business objectives are not considered and on the other hand the aim is to catch all the transaction types that may be used in aggressive tax planning, the threshold becomes low, even if this might not have been the intention. Urgency can be seen from the EU Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market stating p 6 “Many Member States, in their capacity as OECD Members, have undertaken to transpose the output of the BEPS project into their national laws, and to do so urgently. Considering this, it is critical to make fast progress on agreeing rules for coordinating the implementation of the conclusions on BEPS in the EU. In the light of a great risk of fragmentation of the internal market, which would possibly result from uncoordinated unilateral actions by Member States, the Commission is putting forward, in this proposal, common minimum solutions for implementation. The Commission has made every effort to respond simultaneously to both the urgency to act, and the imperative need to avoid that the functioning of the internal market is compromised either by unilateral measures adopted by Member States (whether OECD members or not) acting on their own, or lack of action by other Member States altogether.”

abuse rules do not cover the issue¹¹³⁸ though limited only to arrangements that are not genuine. At the same time, it is confirmed on the one hand that taxpayers have the freedom to choose the best solution for business, but on the other hand confusingly, if taxpayers' business requires specifically features that are included in the defined hallmarks and covered by SAAR and there is a gap in the application of a SAAR, that could still be filled in by GAAR¹¹³⁹. Taxpayers' actual possibility to choose the most efficient business model is challenged for fiscal purposes.

The challenge to the legality principle is obvious as genuine solutions vary from business to business. What is a genuine solution in one business is not in another business. Labelling a specific solution to be questionable or not genuine is therefore not possible. This may create a conflict between SAARs and EU freedoms due to the broad formulation of the rules: taxation may be based on a view rather than on facts and appropriate application of law.

The applicability of GAAR is not clearly defined, which means that there is a lot of room for interpretation. Terms such as "tax benefit" or "one of the main reasons" are subjective and unclear. Does an alternative solution with a heavier tax burden than the chosen option illustrates a tax benefit, as an example¹¹⁴⁰? The answer that respects taxpayers' economic freedoms is obviously no. Therefore, ATAD's statement may lead to accidental tax consequences and contrariety to the legality principle¹¹⁴¹. I will explain this with an example:

¹¹³⁸ This statement seems to be somewhat problematic. On one hand, each country has the right to set rules for its tax authorities to ensure the correct assessment of taxes and on the other hand, some circumstances are labeled under specific anti-avoidance supported by GAAR. Further, some of the specific anti-avoidance rules are applicable independently of whether the setup is genuine or not. See Knuutinen 2020.

¹¹³⁹ Knuutinen 2020 p 55. SAAR and TAAR type of anti-avoidance rules are applicable to certain specific cases where the avoidance has been defined more specifically or the rule applies only to certain cases, such as interest deduction. GAAR rules typically are applicable if there is an unjustified tax benefit, whether the arrangement has sufficient business reasons, and whether the arrangements are loyal to the purpose of the law.

¹¹⁴⁰ The ECJ refers for example in the Danish cases to benefits that are not intended by the tax law. This would already be a measure as it excluded differences in Member State tax rates to create a tax benefit. Internal market intends to eliminate the obstacles in the internal market. It could be argued that it creates tax competition and is not equal for taxpayers in different Member States. This argument however ignores that the competition of Member States is not eliminated nor fiscally neutralized by harmonising tax rates. It does not make the competition any fairer either, as small Member States need to attract investments.

¹¹⁴¹ For example, the Swedish tax authorities' view is that group internal arrangements do not have sufficient business reasons and financing should always be done through equity financing. Business reasons can be found, according to Swedish tax authorities, only from external arrangements. See Skatterättsnämnden 21 / 22D 2022-05-13 where

Group A is acquiring a foreign operation (country B) through an acquisition of shares. The acquisition is financed 80% by debt. The external debt is taken on by the parent company A, which is not the acquiring entity. The group's debt-to-equity ratio changes. To ensure that costs are deductible and offsetting income is taxed, the debt-to-equity ratio in each group company is adjusted to meet the consolidated new debt-to-equity ratio, one of ATAD's safe harbour rules. This means that the debt level in country C, that has nothing to do with the acquisition, is increasing.

In the example, tax authorities in country C could and perhaps should state that A is misusing safe harbour rules by artificial allocation of debt to allow maximum interest deduction and apply GAAR to the increased interest deduction. Facts in the case are: consolidated debt increase is genuine and the business transaction behind financing is real and genuine. The solution used is in line with ATAD safe harbor rules. However, the debt created for C is artificial as C had no increase in its financing needs.

The example illustrates two conclusions: the EU directive has failed in its purpose and in improving the functioning of the EU internal market. This is due to insufficient understanding of group financing when designing the rules¹¹⁴² and

tax authorities stated in the case that: "Vidare är valet av finansiering inte irrelevant och just vid interna förvärv får enligt förarbetena frågan om kapitaltillskott särskild betydelse (prop. 2017/18:245 s. 191). Av förarbetena framgår också att vägledning bör hämtas från tidigare praxis vid prövningen av om ett internt förvärv av delägarätter är väsentligen affärsmässigt motiverat eller ej (a prop. s. 195). Genom hänvisningen till denna praxis är det lagstiftarens avsikt att skillnaden mellan organisatoriska och affärsmässiga skäl ska upprätthållas vid tillämpningen av 2019 års regler. De bevekelsegrunder som nu presenterats för X AB:s förvärv av aktierna i Y AB är inte affärsmässiga skäl i den mening som avses i 19 §." Further, the Swedish SAC (HFD 2022 ref. 49 in the same case) makes still a reference to its own old praxis HFD 2011 ref. 90 meaning that group internal arrangements most often are done for group internal comfort that may improve profitability or competitiveness, but are not sufficient business reasons for the purposes of interest deduction. The law itself does not make this kind of reference. As we can see, the term business reason seems to have a specific meaning for Swedish tax authorities that for example the ECJ does not share (see ECJ 2021 C-484/19 – Lexel).

¹¹⁴² OECD considered group consolidated debt-equity ratio to be a good "arm's length" benchmark for interest deduction, see for example BEPS Action 4 public discussion draft 2014, point 60. However, a worldwide position, or consolidated debt equity in other words, illustrates basically an average debt-equity ratio. It does not take into account specific financing needs in one country/company. The funding needs most often refer to an acquisition or an investment rather than any base erosion or profit shifting. Finally, SAAR in this case, as Knuutinen 2020 considers, is not connected to actual tax avoidance at all.

therefore fulfilling purpose fails due to national interests. Secondly, it means that the safe harbour rule may create a new conflicting interest between Member States¹¹⁴³. Solving this kind of SAAR-based challenge by applying GAAR is contradictory although possible based on the legality principle, if interpreted narrowly based on the wording of the law. The challenge is initiated by ATAD¹¹⁴⁴. The real challenge in the rules, however, is the reference to “genuine purpose”. As I considered earlier, what is genuine for one business may be artificial for another business.

I will clarify this with an example by comparing dividend distribution and financing arrangements against interest deduction limitations and GAAR in Council Directive (EU) 2016/1164, DAC 6, the OECD’s guidelines on transfer pricing, and tax legislation on the substantive topics against the set targets.

1. The EU has set minimum limitations for interest deductions. The limitation is basically based on a percentage of taxable EBITDA. The background for this lies within the OECD’s BEPS work, though the Council of the EU stated the background for this as:

“In an effort to reduce their global tax liability, groups of companies have increasingly engaged in BEPS, through excessive interest payments¹¹⁴⁵. The interest limitation rule is necessary to discourage such practices by limiting the deductibility of taxpayers’ exceeding borrowing costs.”

EBITDA is then selected as the key ratio to discouraging aggressive practices. The business objectives and arm’s length nature are not included in the limitation parameters.

These rules set the limitation actually to be dependent on interest level and profitability. Interest level is primarily dependent on market interests, terms of the loan, and the borrower’s credit rating¹¹⁴⁶. The amount of interest is dependent on the

¹¹⁴³ Operations may differ between countries for legitimate reasons resulting in different financing needs. Overlapping the application of SAAR and GAAR creates a situation that has not been covered in ATAD rules.

¹¹⁴⁴ On the national level this may be covered by the tax legislation, but only for national purposes. In order to solve the challenge, the EU should also commit to the legality principle. This may be challenging as for example ATAD does not stipulate any concrete, exact rules.

¹¹⁴⁵ Excessive interest can be a reference to an absolute amount of interest. This is a complex measure as in capital-intensive business the interest volumes are by nature high. A better reference is arm’s length interest and debt-equity level.

¹¹⁴⁶ It is possible for taxpayers to manipulate interest rates by using such terms that would justify high interest, but on the other hand, the arm’s length nature of such loans is not

debt volume which usually reflects the capital intensity of the business, not BEPS type of behaviour. Likewise, EBITDA is dependent on the profitability of the business, not tax planning unless profit has been shifted artificially elsewhere¹¹⁴⁷. The wording of this SAAR rule, unlike the purpose, is not an anti-avoidance rule at all¹¹⁴⁸. Instead, EBITDA rules will limit for example green transition investments that are promoted by environmental climate policies¹¹⁴⁹.

2. For GAAR purposes Article 6 of ATAD states as the rule itself:

1. “Member State shall ignore an arrangement or a series of arrangements which, having been put into place *for the main purpose or one of the main purposes of obtaining a tax advantage* that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.”

2. “For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.”

impossible to identify. The main driver for increasing interest rates seems to be the European Central Bank which is deciding on the interest rate for other than tax purposes.

¹¹⁴⁷ Artificiality is not a measure in this specific tax avoidance rule. As Knuutinen states, there is no reference to tax avoidance in the rule itself at all although in the preparatory works of the law and targets of ATAD it has been clearly stated.

¹¹⁴⁸ Questions were raised on whether the rule is a tax avoidance rule at all or whether it is directive-based guidance for Member States on how to use their sovereignty in the question of interest deduction. Recital 6 of the directive states even that “[...] it could be possible for Member States to adopt an alternative measure referring to a taxpayer's earnings before interest and tax (EBIT) and fixed in a way that it is equivalent to the EBITDA-based ratio.” Member states have the freedom to select the measure in this respect though all Member States seem to use the same kind of measure, at least to a certain extent.

¹¹⁴⁹ Clean energy investments are capital intensive, have long investment periods, and have a long lifetime. EBITDA will be often poor in the beginning and difficult to impact. Visibility of market interest is neither self-evident nor creates a clear sensitivity to both profitability but especially to EBITDA as a measurement. Limitation on interest cost deductibility creates an obstacle for this kind of investment illustrating the conflict between economic freedoms, other, non-tax related policies, and tax law.

GAAR is a problematic rule from the legality point of view in itself as it creates an open mandate for tax authorities to ignore an arrangement¹¹⁵⁰. GAAR in ATAD is challenging for legality purposes as it in addition to a business purpose test requires a tax advantage test¹¹⁵¹. The business decisions, the origin of tax consequences, are a result of business analysis, considering likely and unlikely risks and opportunities¹¹⁵², normally conflicting opinions and views resulting finally to a management judgment accountable for the topic. I have a hard time understanding that this ATAD consideration could overrule taxpayers' right to make a business decision and give tax authorities the power to consider if they finally are valid often based on taxable reasons¹¹⁵³. Both the legality and proportionality of the rules could be questioned.

3. The legality principle in case of this rule as a whole is questionable. The proposal for a Council Directive on minimum tax considers that the EU's mandate within tax lies within Article 115. Taxpayers will however need to specifically illustrate that a tax issue has a link to EU law and therefore is subject to EU internal market benefits. This is obvious as the Member States have tax sovereignty, i.e. national measure, and as business activities rely on internal market benefits, i.e. free movement of capital as an example. Tax is a consequence of business and therefore it does not have a direct impact on the functioning of the internal market. EU's initiative to regulate national taxes does thus not have a legal basis.

¹¹⁵⁰ Open mandate is a challenge from a legality point of view due to its poor clarity, see for example Knuutinen and Tikka. Urpilainen 2013 p 210 considers on the other hand that flexibility of GAAR interpretation is also important. GAAR is a good example to illustrate the importance of responsible tax authority behaviour.

¹¹⁵¹ Business purpose seems to be challenging for tax authorities to understand as tax authorities are concentrated on taxable income logic, which is not the same as business logic. Further tax authorities in one country will most likely see a tax advantage differently than in the counterparty country. I have seen tax authorities using stand-alone company arguments combined with consolidated approach arguments as a basis for identifying tax advantage. This challenges the clarity of the wording and also the objectivity of tax authorities by multiple measures. Further, tax authorities have no experience nor capability to assess the validity of commercial reasons. Commercial considerations can be complex, they look forward, assume future events, and take into consideration multiple targets and values. Tax authorities are typically looking back and assessing only taxable income.

¹¹⁵² Typically risk assessment is assessing both likelihood and impact. The higher the impact, the more focus on risk mitigation has to be in place even in cases of low likelihood. This is often a challenge for tax authorities to understand as they look backwards: no risks have been realised, so risk mitigation is not necessary from a tax authority point of view.

¹¹⁵³ This takes us back to the rule of law principle that puts a frame for the considerations.

Further, even though approved unanimously, the EU-level interference with national tax rules may create tension between national tax and EU Treaty freedoms¹¹⁵⁴. This is a reflection of the legality principle.

4. DAC 6 mandatory disclosure rules, which are set to identify potential tax avoidance cases already before the arrangement is executed, are also unclear¹¹⁵⁵ in their wording. For example, circular arrangements and arrangements converting taxable transactions into non-taxable transactions are to be reported¹¹⁵⁶. I assume that the EU regulator has found out that it is difficult, if not impossible, to recognise aggressive tax planning arrangements by type as they often are based on normal business solutions¹¹⁵⁷. Rules do not include any purpose test, though some hallmarks include a benefit test¹¹⁵⁸. This could result in an overwhelming amount of reports on transactions that could be aggressive tax planning, even though in reality they are not. Complex compliance is a challenge to the legality principle.
5. Finally, the OECD has published new transfer pricing guidelines for group internal financing. Focus is paid to setting interests and group internal financing setup. For example, the OECD considers that group external loans should be reflected in the internal loans, such as if the group is taking

¹¹⁵⁴ The actual indirect impacts that the ATAD rules create indirectly to businesses and through the business impacts on the functioning of the internal market have not been analysed. Taxes have not been seen as a consequence of business although they should.

¹¹⁵⁵ Note the requirement of clarity by most of the constitutions, such as 81 § of the Finnish Constitution.

¹¹⁵⁶ This may or may not include for example cash pool arrangements, that are normal in cash management, but which some taxpayers may use abusively. Also, the conversion of debt to equity may be reportable even though the background may be based on something else than reaching out for any tax benefit.

¹¹⁵⁷ Council Directive (EU) 2018/822 explains how aggressive tax planning has become more complex often using offshore solutions (recital 5). Nevertheless, identification of the schemes is done by hallmarks, see explanations in recital 9 of DAC 6: “Taking this into consideration, it would be more effective to endeavour to capture potentially aggressive tax-planning arrangements through the compiling of a list of the features and elements of transactions that present a strong indication of tax avoidance or abuse rather than to define the concept of aggressive tax planning.”

¹¹⁵⁸ On the other hand, the DAC 6 rules create only a reporting obligation, not a tax assessment. The rule does not touch on the legality principle that deep as it lacks the assessment impact, it has only a penalty approach. Nevertheless, the reporting obligation may go beyond what would in reality be needed to identify unwanted arrangements, but this had required courage to focus and prioritise instead of including all possible aspects under reporting obligations. In practice, this means that many taxpayers are conservative in reporting arrangements under DAC 6, but instead document the reason why they are not reported.

a six-month loan, then these loan terms should be reflected in internal loan agreements. The OECD is giving guidance of how group internal financing could be arranged¹¹⁵⁹. As discussed earlier some countries are following OECD guidelines strictly, some are not.

Again, the OECD recommendation includes an attempt to guide how to finance business independently of the nature of the financing. This fiscally-oriented guidance will by definition impact business opportunities especially within capital-intensive businesses¹¹⁶⁰, but not based on law.

8.2.1.5 Examples

Let us consider these rules in the light of a few practical examples to make conclusions from the taxpayers' legal protection and legality point of view¹¹⁶¹.

Case 1: A group of companies has a publicly communicated dividend policy stating a material share of global profits to be distributed. The dividend policy is important for the entire business of the group. To be able to fulfil its commitment, the parent company in country A needs distributable funds. To make the distributable funds available, operations in Country B need to be restructured to allow a material dividend distribution to take place. In the restructuring operations are transferred at book value¹¹⁶² to a new owner in Country B. Transaction is financed by a group internal finance company in Country C. The net debt¹¹⁶³ of operations in Country B remained the same until the dividend was distributed.

Tax authorities raise the question of interest deduction as they consider the arrangement to be a circular transaction in line with identified arrangements where debt levels were increased by using tax-exempt sale of shares, normally at fair

¹¹⁵⁹ The OECD is basing its guidance on consolidated average. The external loan does not necessarily reflect financing needs in an investing subsidiary, as explained earlier. It illustrates rather the optimisation of external financing by efficient use of internal resources. OECD is perhaps seeking for transfer pricing type of comparable transactions, some kind of benchmark.

¹¹⁶⁰ This view reflects most likely how poor of an understanding the OECD has of how different businesses are financed, why different setups are used and finally a very narrow fiscal approach on a business topic, just like aggressive tax planning has.

¹¹⁶¹ Even though the short and simple examples are theoretical, they are also very practical. My empirical experience is that tax authorities use this kind of argumentation in focused tax audits when assessing taxes. By focused tax audit I mean an audit that is targeted for a specific area and type of setup.

¹¹⁶² Book value in accordance with IFRS means the original acquisition price reduced or added with undistributed profits earned during the ownership period.

¹¹⁶³ Debt levels may increase in some companies as the transferred entities had non-distributed profits. The increase was offset by increased cash in other companies, the net effect being stable.

market value. This means that the arrangement would be reportable under DAC 6 also. Tax authorities argue that the share transfer could have been financed by equity instead of debt and therefore the arrangement is done only to create a tax benefit, i.e. interest deduction, net debt has no bearing in the case¹¹⁶⁴.

Tax authorities' conclusion in the example is in principle correct: income tax paid is reduced after all the steps are executed. However, not due to the restructuring but because of dividend distribution¹¹⁶⁵. As the law does not include a restriction for interest deduction in relation to financing dividends, the conclusion looks like a form-over-substance approach. I make the following conclusions from this example:

1. Arguing a tax assessment based on an alternative financing model¹¹⁶⁶ illustrates that tax authorities are reviewing the case from a national taxable income logic point of view, benefitting the Country B tax basis¹¹⁶⁷. A good example of conflicting interests between countries. This BEPS-oriented approach ignores not only the business purpose and needs but also the fundamental right to choose between alternative solutions. The assessment goes beyond tax authorities' legal mandate as it compares two fully legitimate alternatives with just different tax treatment. When considering the totality interpretation is not in line with the rule of law test (law is applied even in genuine cases and interpretation goes beyond what would be needed to tackle BEPS cases).
2. As tax authorities' arguments are based on a combination of stand-alone analysis (acquiring entity, not fiscal group) and group and country-level consolidated effective tax rate analysis, argumentation seeks as an assumption GAAR-based facts. To respect the legality and proportionality

¹¹⁶⁴ Pure equity financing is not normally at arm's length. The tax authorities' view is not actually protecting the tax base in Country B, but widening the tax base: the tax authorities' alternative model would eliminate all interest deductions compared to the situation prior to restructuring.

¹¹⁶⁵ If the transaction was executed at group book value, interest cost in tax consolidation stays the same (no tax base erosion). The debt-equity changes naturally as a result of dividend distribution. Debt-equity is not necessarily the same for seller and buyer as the funds are in the transferred entities and will reach the buyer first after dividend payment. Net debt results in a stable tax basis as increased interest cost is offset by increased interest income in the fiscally consolidated group. Tax authorities can play with definitions, such as "stand-alone" and "consolidated" to illustrate their arguments.

¹¹⁶⁶ In this case the alternative solution would be equity financing, which differs materially from debt financing by nature.

¹¹⁶⁷ Cost of equity is actually the dividend, which is not tax-deductible whereas interest cost is. Dividends are tax-exempt income for the owner lowering the owner's capability to carry the cost of funding. For business, dividend is equally a cost, but more expensive due to the nature of equity compared with debt.

principles GAAR analysis should be objective¹¹⁶⁸ taking into account all relevant, applicable facts, both taxable and non-taxable¹¹⁶⁹.

3. The attention to the case may be legitimate, but any action taken should be based on neutral, objective facts ensuring an assessment that is in line with and proportional to the objective of the law. This means that actions should be justified, based on law, and they should hit the mark and seek the lowest interference with normal tax treatment.

Case 2: Company A's profitability is lowering while market interests are going up¹¹⁷⁰. This leads to non-deductibility of interest cost in Company A whereas Company B owning the shares in Company A is paying tax for the interest income resulting in financial double taxation. Company B decides to increase equity in Company A to lower the interest cost and strengthen Company A's balance sheet. Equity increase is executed through the conversion of debt into equity¹¹⁷¹.

¹¹⁶⁸ If analyses are done always based on taxable income, the outcome will always differ from business assessments. All income flows are not taxable, some of the considerations in business planning are taking into account future events to prevent risks from materialising or minimising their impacts based on impact and likelihood assessment or future strategies. To avoid excessive revenue planning and malfunctioning of the EU internal market, the GAAR assessment should always be objective. What comes to Urpilainen 2013 p.210 concern about the flexible interpretation of GAAR, objectivity requirement is not limiting interpretation of GAAR.

¹¹⁶⁹ This kind of argumentation where measures are looked at from different angles illustrates partly the approach used as well as not properly understanding the fundamental difference of the measures, such as consolidated ETR, country-level consolidated ETR, and company ETR.

¹¹⁷⁰ This option was perhaps not considered when assessing the impacts as the interest rates have been extremely low, even negative, since the financial crisis in 2008. OECD's Public Discussion Draft 2015 discusses the efficiency of interest deduction in relation to base erosion and profit shifting. The paper compares whether the limitation should be based on interest or debt level. The limitation is purely focused on tax as an independent factor, not in relation to actual business needs. On page 22, the OECD considers that interest level limiting rules tackle directly the base erosion and profit shifting risk. However, the likelihood of base erosion happening through interest deduction is not considered at all nor how the rule impacts different businesses and their genuine, varying financing needs. The Russian attack on Ukraine in 2022 impacted prices and finally, central banks increasing interests to prohibit inflation realised the risk factor that the OECD in 2015 referred to: interest levels were high even though the debt amount would not be excessive. The impact was not due to any tax planning. All of a sudden interest rates were increasing strongly compared to the last fifteen years.

¹¹⁷¹ In some countries, such as Germany, the conversion may create taxable income, if the fair market value of the loan is lower than the nominal value of the debt. This means

As Company A cannot improve its profitability nor lower the market interests, the only option is to increase equity unless Company A decides to sell its operations or part of its operations to solve the issue. Company B may have an obligation to report this arrangement according to DAC 6 / MDR rules as taxable income is converted into tax-exempt income.

Tax authorities reassess the arrangement in Country B and consider the income referring to the converted part of the equity still to be interest income and therefore taxable income. The tax authorities' argument for this could be that the conversion is done mainly to reach a tax benefit through a standardised arrangement¹¹⁷². Based on this argumentation, tax consequence of the arrangement creates a tax benefit in Country B.

The purpose of DAC 6 is not to state that reportable transactions would be tax evasion or tax avoidance nor that they would not be acceptable for tax purposes. It brings to tax authorities' attention arrangements that could be questionable or not acceptable, i.e. someone has used it artificially. Reporting never the less creates an uncertain tax position for taxpayers as reporting obligation labels the arrangement based on the hallmark. It increases compliance work to ensure tax treatment of a normal, operative arrangement. Already this assumption based on reporting may steer taxpayers' behaviour to financially less attractive options. My conclusions based on this example are:

1. Debt and equity are cornerstones of a business¹¹⁷³. Any change in the debt-equity ratio should as an assumption primarily be regarded as a business consideration¹¹⁷⁴. As in criminal law, and also in tax law broad assumption-based hallmarks are not sufficiently clearly defined, as required by the legality principle, creating a broad reporting obligation that is not easy to comply with. This illustrates well the challenge that this kind of "policy"-looking tax regulation creates: the aim is to tackle extreme behaviour dressed in the form of harmonisation, but being poorly

that in extreme circumstances first the interest cost is not deductible in the target country even though interest income is taxable at the receiver and if the debt is converted into equity due to heavy financial challenges, the conversion will be taxable in the target country without any deduction in the owners' hands. From a taxpayers' point of view, this creates a clear risk of double taxation which is exacerbated due to the widely applicable interest limitation rules.

¹¹⁷² Conversion of debt into equity is a normal, standardised arrangement defined by company law. As the term "standardised arrangement" is quite wide, this approach could be taken by a tax authority that acts formally.

¹¹⁷³ The importance of debt and equity is not the same for all businesses, but for example for start-ups and capital-intensive businesses, it plays a material role.

¹¹⁷⁴ This business consideration has a tax consequence, as all other business considerations have a tax consequence.

defined and disconnected from the framework – the business that is taxed. This means that legal principles will play a role when these cases are assessed and judged in court¹¹⁷⁵. Reporting obligation is therefore not proportional to the purpose of the rule and neither in line with the rule of law.

2. Alignment with new rules cannot be used as an assumption for a tax motive for GAAR or SAAR purposes¹¹⁷⁶. Taxpayers have the right to rely on the law and adjust transactions based on new rules in line with their purpose. The legislator has considered compliance with the law as acceptable. If this is not the case, the legislation is not predictable or clear¹¹⁷⁷. Assumption-based taxation is not in line with the rule of law.
3. The purpose of DAC 6 is to create transparency for tax authorities. As the hallmarks are extensive the rule may fail in its objective to create transparency. It rather prohibits transparency as taxpayers and advisors are reporting legitimate arrangements in addition to non-legitimate arrangements. Uncertainty is a challenge from a legality principle point of view.

¹¹⁷⁵ DAC 6 rules are actually weakening the predictability of the tax treatment as taxpayers cannot conclude why an arrangement has to be reported and what is questionable in its tax treatment.

¹¹⁷⁶ The ECJ considered in the C-115/16 Danish cases in paragraph 71 that “general principle of law must be complied with by individuals. Indeed, the application of EU legislation cannot be extended to cover transactions carried out for the purpose of fraudulently or wrongfully obtaining advantages provided for by EU law” and in paragraph 72: “It thus follows from that principle that a Member State must refuse to grant the benefit of the provisions of EU law where they are relied upon not with a view to achieving the objectives of those provisions but with the aim of benefiting from an advantage in EU law although the conditions for benefiting from that advantage are fulfilled only formally.” I think that, in line with paragraph 100 “A group of companies may be regarded as being an artificial arrangement where it is not set up for reasons that reflect economic reality, its structure is purely one of form and its principal objective or one of its principal objectives is to obtain a tax advantage running counter to the aim or purpose of the applicable tax law”, as this means that changes in a legal setup as a reaction to tax legislation may illustrate tax purpose. On the other hand, this cannot be an assumption. I have seen the same approach taken by for example the Swedish tax authorities. Meanwhile one could argue that changing a set up due to changing tax legislation creates a tax reason as such. The purpose is to react and manage the tax impact. Even in that case taxpayers should have the right to change their business to avoid double taxation or to ensure compliance with the law. Reaction to tax law changes does not in itself illustrate abuse of rules nor use of any loop holes, but rather making choices in line with the law.

¹¹⁷⁷ We come back to Fuller’s list of conditions of good legislation. Complying with new rules cannot create a violation or non-compliance with old rules.

4. Avoidance of double taxation can never illustrate tax avoidance or an illegitimate tax motivation. The purpose of GAAR is not to ensure double taxation, merely to ensure correct tax assessment and that income is taxed once. Complying with tax rules is a legitimate purpose and interfering with this creates even a question of proportionality.

As we can see, the rule of law is often connected to the proportionality principle. If the law or its interpretation is overly far-reaching, taxation may not be in line with the rule of law, or at least it is not proportional to the purpose of the law. Therefore, it is important to consider the proportionality principle.

8.3 Proportionality of assessment

As we can conclude from the examples above, the principle of proportionality is a vital legal principle for taxpayers' legal protection. The principle of proportionality is, as Zalanski puts it, a "night watchman" setting limits to regulators regulating and authorities assessing different aspects of economic and social life¹¹⁷⁸. The importance of the proportionality principle is highlighted when considering the classification of legal principles. The proportionality principle together with the principle of subsidiarity¹¹⁷⁹ can be on one hand classified as general principles in constitutional form¹¹⁸⁰ as they are included in a number of national constitutions¹¹⁸¹. Both proportionality and subsidiarity principles are included also in the principles of the EU legal order¹¹⁸².

We can see the principle of proportionality setting limits on multiple levels: for the EU in consideration to Member States, the number of countries in relation to their citizens, and finally Member States when exercising their powers within EU

¹¹⁷⁸ Zalanski p. 303 considers the principle of proportionality to be one of the core principles of modern public law. It was created originally to set limits for regulators starting to exercise their powers to regulate different sectors of life.

¹¹⁷⁹ The principle of proportionality and the principle of subsidiarity are closely related. Where the principle of proportionality regulates the exercise of powers within specified limits, the principle of subsidiarity aims to ensure that these decisions are taken as closely as possible to the citizen and that constant checks are made to verify that action is justified.

¹¹⁸⁰ Vanistendael 2013, p. 34.

¹¹⁸¹ See Zalanski, p. 303. In the Finnish Constitution, the principle of proportionality originates from constitutional law 21 § defining the relationship between public power and private powers. The proportionality principle is reflected in the administrative law in the second chapter defining the principle of good administration.

¹¹⁸² Both principles are laid down in Article 5 of the Treaty on the European Union.

rules in relation to their citizens¹¹⁸³. General principles fill a gap between the competences of the EU and national laws from the taxpayers' legal protection point of view. In this sense, the principle of proportionality is perhaps one of the strongest¹¹⁸⁴ as it can be measured in a national court and the ECJ in case it is a question of EU aspects¹¹⁸⁵. The principle of proportionality acts not only as a procedural measure against Member States' positive obligations in legislative work but also as a measure for interpretation of the provisions of law. I am now reviewing the third function that Lennaerts and Gutierrez-Fons identified as function: act as grounds for judicial review when assessing taxation.

Adam Smith and multiple authors after him have considered the qualities of a good tax system. The issue at hand now is not how a good tax system looks, but rather how the rules set by the legislator are interpreted and taxes assessed within a tax system¹¹⁸⁶. Legislators have already considered and decided what a good tax system looks like in their opinion. Tax authorities are using their execution powers within that framework. As considered above, the principle of proportionality sets a limit for tax authorities' powers.

Legislators have identified different measures to prevent tax planning that is considered mainly tax-motivated¹¹⁸⁷. Principle purpose tests, benefit tests, and

¹¹⁸³ Prechal considers that general principles of EU law act as an aid to the interpretation of other EU and national law provisions. At the same time, it is important to notice that the proportionality principle does not protect a taxpayer in case the taxpayer is seeking non-legitimate benefits, see for example ECJ joined cases C-116/16 Danish case II, paras. 80 and 81. The proportionality principle protects taxpayers from taxation that goes beyond what would be necessary to eliminate illegitimate setups.

¹¹⁸⁴ By stating this is not underestimating the value of the rule of law, rather these two principles acting jointly. Further, the proportionality principle is applied also on the national level by the legislator, such as the Constitutional Law Committee of the Finnish Parliament, and in stand-alone cases by the Supreme Administrative Court in line with constitutional interpretation.

¹¹⁸⁵ On the EU law level, the principle of proportionality is used as a measure for procedural purposes. The ECJ considers in its case law certain factors imposing positive obligations to Member States as a proportionality test, see Prechal, pp. 14–15. I have reviewed the control angle already earlier in this study when considering when the EU rules are applicable. Lennaerts and Gutierrez-Fons (p. 1629) consider general principles of EU law to have a triple function: enable the ECJ to fill normative gaps in the Treaty or EU legislation, serve as an aid to interpretation, and act as grounds for judicial review.

¹¹⁸⁶ This highlights naturally the importance of a good tax system.

¹¹⁸⁷ Vanistendael reminds us of the impacts of the definitions set by policymakers and legislators. When defining transactions to be done solely for tax purposes, tax motivation should be very clear. When defining tax to be one of the main drivers of an arrangement a whole new spectrum is opened. As tax consequence is natural in all arrangements, tax may become easily one of the main objectives. Therefore, the principle of proportionality may become critical.

beneficial ownership tests illustrate a good example of these. Common for these measures is the measurement of tax motivation of the arrangement. To understand taxpayers' legal protection better, I will turn the approach around from the fiscal interest. How strongly tax base-motivated can tax authorities' analysis and arguments be in the light of the proportionality principle?

8.3.1 Tax consequence, tax benefit, and proportionality

Cases are often analysed based on whether there are tax benefits¹¹⁸⁸ and whether there are actual business reasons for the arrangement¹¹⁸⁹. I think that this kind of analysis is perhaps problematic and narrow by their approach from the taxpayers' point of view. First of all, tax consequences are always visible as tax is a consequence of every transaction, but often with a delay. Tax consequences may easily be mixed with tax motivation or tax benefit¹¹⁹⁰. Secondly, especially for tax authorities, but also for courts, business logic is not in their area of expertise and benefits may be seen in a narrow angle¹¹⁹¹. Thirdly, business judgment is done by the management of the taxpayer. Tax authorities might make another judgment on the same issue. This, however, does not illustrate tax motivation, merely disagreement on the decision¹¹⁹². As a last point, I would remind you about an optical illusion of tax

¹¹⁸⁸ The ECJ's consideration in the Danish cases was somewhat wider as the ECJ was making an effort to identify whether the benefits of the internal market are claimed in a manner that is not in line with the legal framework, i.e. abuse of the rights.

¹¹⁸⁹ Swedish interest deduction rules (2009) go even further based on Swedish SAC praxis (2011, ref 90). The SAC considered that only transactions with third parties, i.e. other than group internal transactions are executed for business reasons. Group internal transactions again are, unless to a close connection to an external acquisition, done purely for group internal comfort purposes. They are not considered to be done for business reasons, but rather for organisational reasons in spite of that they may aim to improve the profitability or competitiveness of the group. This is surely a far-fetched understanding of business reasons and its proportionality can be challenged.

¹¹⁹⁰ As I have earlier analysed, a taxpayer has the right to choose the alternative that is best for the taxpayer, even though it would have the lowest tax burden. Exercise of economic freedoms does not illustrate tax avoidance and a comparison of different ways of executing a transaction does not illustrate necessarily at all a tax benefit. The taxpayer can even utilise the differences in tax rules in different Member States as long as the setup is genuine and has a business motivation.

¹¹⁹¹ Tax authorities may see tax benefits when they review one company in one country, especially in group internal transactions even though for the group there is no benefit. As Knuutinen considers, BEPS-based tax benefits are seen in timing differences. It seems to be that sometimes the definition of tax benefit is intended to be wide, even though wide interpretation will challenge proportionality.

¹¹⁹² Operative management may also have different views and options, but they have the mandate to decide and they carry also the risk.

benefits. Taxes are measured and reported based on different standards that are not comparable. The simplified conclusion is often far-fetched¹¹⁹³. Therefore, it could be interesting to compare tax and business-oriented approaches with each other in the light of proportionality¹¹⁹⁴.

The EU has implemented multiple initiatives on tax. I have questioned their proportionality. Proportionality appears to be an issue from a new angle in the time after Pillar 2: if taxes can interfere with taxpayers' economic freedoms in case they are abused to receive a tax benefit, tax authorities need to illustrate that this motivation exists. In the post Pillar 2 environment, demonstration of tax benefits becomes a challenge for tax authorities as the minimum tax rules ensure "minimum effective taxation of such entities operating in the internal market". In other words, if there is a tax benefit for a transaction in income taxation, this benefit is eliminated as minimum tax rules ensure minimum effective taxation. To be proportional, tax authorities should illustrate, based on the purpose of minimum tax rules, that taxpayer is abusing not only the internal market, but also minimum tax rules.

Proportionality acts as a balancing power between business and fiscal interest setting requirements for tax authorities. Prechal concludes based on ECJ case law that the criteria used in the procedures must be objective and non-discriminatory as well as decisions must be backed by a statement of reason¹¹⁹⁵. To seek objectivity we should then measure also the interests that tax authorities are representing against the business case¹¹⁹⁶.

The assumption of tax authorities being objective purely as they are acting as an authority is not sufficient¹¹⁹⁷. Tax authority objectivity is disturbed by a lack of professional skills and understanding of business metrics¹¹⁹⁸. Such an assumption ignores the objectives of proportionality as tax authorities represent fiscal interest

¹¹⁹³ Based on IFRS standards, some items that may look like a tax benefit from the cash tax or taxable income point of view are not creating any value from the ETR point of view. The cash tax rate does not correlate to the effective tax rate.

¹¹⁹⁴ Proportionality is a principle balancing private fundamental rights with authority's right to violate them in the public interest: proportionality is a limitation of political and administrative community powers for the benefit of liberty. See for example Scaccia, p. 3. Further, terms such as ETR that is reported, may be referred to, but should not be taken into account unless the one who is assessing the case truly understands the functionalities of the KPI.

¹¹⁹⁵ Prechal, p. 15. Reasons are often presented narrowly, if at all.

¹¹⁹⁶ Tax can be an important component by creating a risk rather than a benefit.

¹¹⁹⁷ See for example Knijnenburg. He considers that tax authorities' interest is not to be objective, merely to look for opportunities to collect tax. This means that courts should control that tax authorities are acting in line with the rules set for them.

¹¹⁹⁸ Tax authority is professional in applying tax law, not in business case assessment.

over business reasons¹¹⁹⁹. Taxpayers have an obligation to illustrate business reasons only to a sufficient extent, otherwise, it cannot be used as an assumption that tax avoidance is always the initial interest of taxpayer¹²⁰⁰. Similarly, tax authorities should demonstrate that they are not focusing only on tax collection, i.e. that they actually respect their role as an authority¹²⁰¹.

The issue of tax authorities' objectivity¹²⁰² is important from the taxpayers' legal protection point of view as tax authorities' knowledge, expertise, and focus are strongly on taxable income and tax basis whereas business logic includes several additional aspects outside of taxable income¹²⁰³. Additionally, tax authorities are acting in the interest of one country while business interests do not recognise country borders.

Tax authorities' information requests could have clarifications and explanations on for what purpose the information is needed and what is the issue the tax authorities are considering. This kind of transparency would ensure proportionality of the interpretation as taxpayers can also consider what information would be applicable and crucial for the issue at hand.

When a legislator takes action to protect national fiscal interests, the proportionality principle acts as insurance to ensure that these rules are not used excessively. In other words, proportionality, i.e. putting tax effect into a wider business framework, acts as a balancing power so that the fiscal interests would not be the focal point either in the authority activities. Further, also tax authorities should respect proportionality¹²⁰⁴.

¹¹⁹⁹ This does not mean that tax authorities should not ask for business reasons and background information. This information may be required to understand the content of the transaction and is needed for the assessment that is defined in tax law. In light of anti-avoidance rules, the request, however, needs to be proportional.

¹²⁰⁰ Rules for the burden of proof would be examined and followed. If a taxpayer presents valid reasons and arguments, tax authorities have an obligation to present at least as clear and hard evidence if they disagree with the evidence.

¹²⁰¹ Here a clear commitment to respect the letter and purpose of administrative law requiring objectivity would be valuable.

¹²⁰² Tax authorities should be by law objective and act on the basis of responsibility and liability of a civil servant. The threshold to question this by law set objectivity is high and therefore civil servants obligations may be overridden by the fiscal interests.

¹²⁰³ Such aspects are for example managing currencies, currency fluctuations, customer relations, investment planning, risk assessment & mitigation, WACC, ESG aspects & compliance, accounting, and employment aspects.

¹²⁰⁴ Taxpayer's committing to responsible and sustainable tax management principles usually commit to respecting the purpose of the law. This reflects taxpayers' commitment to utilise taxpayers' rights proportionality. Likewise, tax authorities should commit to using their powers respecting the proportionality of the law.

8.3.1.1 Case study as an example

I will give an example of the challenge to illustrate the importance of proportionality¹²⁰⁵:

Sweden launched a limitation for interest deduction for financing group internal acquisition of shares¹²⁰⁶. The new rules were needed as tax authorities identified certain types of round-tripping arrangements¹²⁰⁷.

The new rules denied interest deduction in group internal share acquisitions unless the interest income was taxed hypothetically more than 10% or there were mainly, i.e. more than 75% other than tax reasons for the acquisition and funding¹²⁰⁸.

In this case, a group internal restructuring was executed in 2005. Restructuring, including the group's internal acquisition of shares, was executed post-listing of an operational division from the Group (non-Swedish operations). This external sale of shares resulted in a need to adjust the group debt-equity level due to a changed risk profile. Adjustment on the group level could be done by investing in new operations and distribution of dividends, which both were used. To be able to distribute dividends, the ultimate parent company needed distributable funds from subsidiaries, including Sweden. Due to an accounting technical dividend lock dividend distribution required restructuring of the Swedish operations to allow a dividend distribution. The restructuring was done at so-called group book values¹²⁰⁹. The restructuring did not change the Swedish group net debt position at all¹²¹⁰.

Tax authorities denied the deduction of interest cost. Tax authorities' basic arguments were few. First, the tax authorities argued that the taxpayer had shifted already a large amount of income from Sweden by deducting large amounts of interest between 2005 and 2008. The tax authorities argued also that funding could equally have been done in the form of equity only, without creating any interest cost at all. The third argument was that the taxpayer could transfer cash through a cash pool to the ultimate parent company without any dividend. Finally, the tax authorities argued that the need to adjust the group debt-to-

¹²⁰⁵ This example refers to a long legal process in Sweden concerning the right to deduct interest costs after a group internal restructuring. The case can be studied from the following court decisions: Kammarrätten 30.6.2017 case number 3534-16, 4732-4734-16 and 4757-16.

¹²⁰⁶ Swedish Income Tax Act (1999:1229), chapter 16 Article 1.

¹²⁰⁷ Swedish tax authority memo of 2008.

¹²⁰⁸ The word mainly is considered to be 75% based on court and taxation praxis in Sweden.

¹²⁰⁹ These book values were materially below fair market value as they consisted of original acquisition costs and non-distributed profits during the ownership period.

¹²¹⁰ Debt could increase in one entity, but equally equity increased in another entity.

equity ratio as a result of the external sale of business is only a group internal issue and not sufficient as a business reason.

The taxpayer presented analysis and expert witnesses concerning the importance of distributing dividends, financial setup, debt-equity ratio movements (or non-movements) in the restructuring, group internal financing, and the relation of the group internal restructuring to the external transaction, i.e. sale of a subsidiary. The taxpayer explained also the challenges and differences between debt and equity financing: for operative purposes cost of equity is actually higher than debt. Therefore a balance between debt and equity is important.

The 2009 interest deduction limitation rules in Sweden were created due to taxpayer behaviour¹²¹¹. Taxpayers were using their freedom to organise their businesses in a far-reaching way¹²¹² raising a question of whether this is already a misuse of freedom rights¹²¹³. The high-level aim for the legislation as such was at least in my opinion legitimate¹²¹⁴.

The legislation around the limitation on interest deduction was initiated and to a large extent also drafted by tax authorities. Its wording was criticised for being

¹²¹¹ The law proposal was initiated by tax authorities. The key driver was stated clearly in the law proposal “Bakgrunden till förslagen i hemställan är att Skatteverket har identifierat ett antal skatteplaneringsförfaranden som vidtagits inom en intressegemenskap. De grundläggande komponenterna i förfarandena är att ränteavdrag har gjorts i Sverige medan motsvarande ränteinkomst har beskattats lågt eller inte alls. En annan viktig komponent är den år 2003 införda skattefriheten för kapitalvinster på näringsbetingade andelar. Vidare framgår av hemställan att förfarandena huvudsakligen har saknat affärsmässiga motiv”. Law proposal (Sweden) 2008/09:65, p. 30.

¹²¹² The round-tripping structures could be used repeatedly to minimise tax burden meanwhile the business reasons were thin or at least not evident.

¹²¹³ Both tax authorities and the legislator considered financing of group internal share transactions to create a material erosion to the Swedish tax base due to profit shifting. Later when the interest deduction rules were renewed this was seen as insufficient and the limitation was broadened to financing other activities also.

¹²¹⁴ As the target of the law, at least based on the wording of the law proposal, was to prohibit arrangements without sufficient business reasons, it seems to reflect more on prohibiting tax avoidance. National tax avoidance has been accepted as a justification for rules limiting economic freedoms, see case C-446/03 Marks & Spencer. According to Vanistendael 2019, tax avoidance and misuse of treaty rights create currently a justification to limit the EU treaty rights. While ECJ case law as well as Vanistendael refer more to artificial arrangements in this respect, the Swedish law proposal is silent about the artificiality of the arrangement. Instead the proposal states that the arrangements identified have been *mainly lacking business reasons* (“Vidare framgår av hemställan att förfarandena huvudsakligen har saknat affärsmässiga motiv”). This is why I think it is justified to consider the law to have justification on the fundamental level, even though it may be questionable how this justification reaches in the light of EU law.

unclear, including subjective measures, and being executed extremely fast¹²¹⁵. Important components of the law were copied from the Dutch rules. An overwhelming majority of attorneys and academics have been of the opinion that the drafting of the rules was poor¹²¹⁶. The limitation is built to the idea of non-taxable or lowly-taxed interest income in another country than Sweden, but when compared with Swedish taxation, the interest deduction impacts the functioning of the internal market and therefore the law has EU implications. The analysis of EU law was thin in the legislative process.

The key question here is whether tax authorities' interpretation goes beyond the objective of the law and what actually is needed to fulfil the purpose of this law¹²¹⁷. The Swedish tax authorities are applying naturally primary Swedish law. Tax authorities should respect also EU law if there are EU law aspects in the law¹²¹⁸. In our example¹²¹⁹, as in most cases, the law applies in relation to Sweden and another state¹²²⁰. Therefore the Swedish tax authorities should construct their arguments not only based on the Swedish rules but also on respecting the EU rules. To respect proportionality, "mainly business reason" test would not be sufficient as it may challenge legitimate cases¹²²¹, but the test should actually require the arrangement to

¹²¹⁵ Tax authority's memorandum, being the basis for legislation, was published on 23 June 2008. The legislation was executed during the summer holiday season resulting in a very limited time for stakeholders to comment and for impact assessments. See Hultqvist 2014.

¹²¹⁶ Tax authorities proposal was made in "Förslag om begränsningar i avdragsrätten för ränta m.m. på vissa skulder" 23.6.2008. For example Hultqvist, Samuelsson, Andersson and Kovacs Kal have criticised the legislation. Also the Council on Legislation (lagrådet) proposed a number of changes to the law.

¹²¹⁷ The proportionality principle is the key component in the ECJ's doctrine rule of reason considering justification for violating with the EU law. It is included as the fourth question in the rule of reason. Where some cases may well pass the first three tests, they fall on proportionality. See Urpilainen, p. 80. Obviously, the line on what goes beyond what is needed is a delicate question not clear in ECJ case law either.

¹²¹⁸ Ibid. Taxation is primarily a national topic, but EU law can be applicable if the tax is in the focus of EU law, such as treating citizens from another Member State differently without justification.

¹²¹⁹ The law seems to be applicable almost exclusively to cases in relation to Sweden and a foreign country including EU Member States, see EU Commission questions to Sweden and the Swedish government's reply dnr Fi2013/153, 2013.

¹²²⁰ It seems to be that the cases where the rule would apply to domestic cases are extremely few even though domestic cases may also include low taxation and use of tax-exempt income. As the comparison is done on a theoretical level to the Swedish tax base, most of the low-taxed cases are based on Swedish rules and would not trigger this term.

¹²²¹ This seems obvious as the Swedish SAC defined the terms for "mainly business reason" to refer only to external acquisitions independently of how material business reasons internal restructuring would have.

be artificial¹²²². These two measurements are not conflicting, but an artificial arrangement is more narrow compared with the concept of “lacking mainly business reasons”¹²²³. The Swedish term covers even situations that are executed in line with the word and purpose of the law.

It is crucial to examine tax authorities’ main arguments in relation to proportionality.

The tax authorities’ main argument was that funding could equally have been done in the form of equity only, without creating any interest cost in Sweden, i.e. there is a tax benefit¹²²⁴. The tax authorities have recognised an alternative option to execute the arrangement with different tax consequences. This statement does not include any argument as to why it would have been a better arm’s length solution for the taxpayer to use sole equity financing instead of debt and equity financing. Nor are tax authorities presenting any arguments that the financing would be artificial. Rather, there seems to be a Swedish fiscal interest behind this argument – tax authorities actually would have increased the tax revenue¹²²⁵. This reasoning goes beyond what would have been required to reach the purpose of the law, i.e. stop circular arrangements utilising a tax-exempt step up in value with a new interest burden in Sweden. If the purpose was to eliminate this kind of group internal arrangements where new debt is shifted to Sweden artificially being taxed at a very low rate the approach taken focuses on all group internal restructurings exclusively,

¹²²² This is confirmed by the ECJ for example in cases C-446/03 Marks & Spencer, p. 35, C-196/04 Cadbury Schweppes, p. 47, and C-524/04 Thin Cap, p. 64.

¹²²³ The word “mainly” makes the interpretation quite broad compared with the ECJ’s definition of “wholly artificial” added with the arm’s length requirement. It may include even valid and legitimate business reasons and will impact the functioning of the internal market. Vanistendael considered that the main purpose test in the later EU rules may also go further than “wholly artificial”. It will be interesting to see what kind of position ECJ will take when tax authorities refer to tax being the sole or one of the main reasons.

¹²²⁴ It is important to note that Swedish tax authorities take a standpoint only on the Swedish position arguing that there would be no interest cost nor deduction in Sweden. The Swedish tax authorities are silent about the impacts in the hand of the shareholder who invests in equity of the Swedish entity.

¹²²⁵ In the starting point Swedish operations had debt and equity. The Swedish tax authorities’ claim that after the restructuring the Swedish operations would need to be financed with equity only, which leads to a situation where no debt would be approved, not the old external acquisition-related debt either. As there would be no interest deduction, this would be beneficial for Swedish fiscal interests. Tax authorities presented no business reason-related argumentation for this view. The taxpayer presented reasoning to support the selected financing model, business logic, and how the Swedish tax base did not change at all due to the restructuring.

not focusing on artificial arrangements. The chosen approach is not only protecting the Swedish tax base from being eroded, but it is also enlarging the tax base¹²²⁶.

Secondly, this argument demonstrates the poor respect that tax authorities had in respect of their actual mandate. Instead of arguing tax treatment based on tax law, they were making a business assessment based on corporate income tax regulation. This means that we should consider the proportionality of the Swedish tax authorities' assessment process: are they aiming to assess business cases by other than business factors, i.e. purely tax factors, are the internal market impacts considered, or is this just a tax collection argument? This takes us to consider two angles – the burden of proof and the tax authorities' mandate.

A taxpayer has the burden of proof in this case to make evident that the arrangement was based on actual business reasons. The arrangement should therefore be done in a balanced manner and not only for one purpose¹²²⁷. Tax authorities seem to, as Andersson considers¹²²⁸, leave the non-taxable considerations entirely out of their analysis by ignoring even regular tax consequences being in line with tax system¹²²⁹. This argument is from the other end of the spectrum where aggressive tax planning is on the opposite end, i.e. fiscal planning¹²³⁰.

¹²²⁶ This argument represents a typical fiscal argument. The ECJ has considered that a lower tax burden in another Member State as such is not a legitimate reason to restrict freedom of establishment. The rule of law test, where the proportionality principle is one part, is forcing a comparison of fiscal interest with the functioning of internal the market. Different tax rates are part of the EU legal framework, so lower taxation in another Member State as such is not sufficient reason to deny interest deduction.

¹²²⁷ The question of whether taxes are included in the business reasons or not is raised especially in connection to the Swedish interest deduction rules. Hultqvist 2014 as well as the parliament's Council on Legislation (lagrådet) seem to agree that taxes are included in the business reasons although this cannot be concluded from the interest deduction rules. Also, Samuelson and Kovacs Kal seem to agree with this view as well as Andersson & Carneborn, even though he remarks that in practical terms tax evaluation is not valid when considering business reasons. The Swedish SAC instead seems to disagree with this view. The SAC makes even a difference between organisational and external business reasons.

¹²²⁸ Andersson & Carneborn 2012.

¹²²⁹ This illustrates well the importance of how "tax benefit" is defined. In this example, tax benefit seems to be understood by the Swedish tax authorities in a way that if the effective taxation in another EU Member State would be lower than the Swedish tax level (nominal Swedish tax rate), this creates a tax benefit. This approach is fixed to the actual, legitimate level of taxation making the Swedish tax to be the standard for comparison. This is not in line with the legal framework.

¹²³⁰ By concentrating on a model that would have a maximum tax burden tax authorities are not only illustrating an artificial tax benefit but also shifting the burden of proof back to the taxpayer. Taxpayers should provide negative proof that the arrangement was not done for tax purposes.

The approach taken by the Swedish tax authorities and confirmed by the Swedish SAC, so-called administrative comfort, as the purpose of the transaction, leads to a new sub-question of proportionality. Is tax authorities' request for evidence proportional at all in light of fair trial and burden of proof? Without going into details of this aspect¹²³¹, I would conclude that tax authorities should provide evidence that taxpayers' arrangement is either artificial, not relevant or only a detail in the totality of the stated objectives and in relation to all the outcomes of the transaction(s)¹²³².

The question of tax authorities' mandate goes partly into the same question as the burden of proof. Tax authorities can claim that a transaction is artificial or even that it has been made mainly for seeking tax benefits, but to do this, tax authorities must be able to illustrate objective evidence of tax benefits being unintended for the legal system¹²³³. Tax authorities cannot conclude or decide what a taxpayer's

¹²³¹ The taxpayer has better resources when considering the burden of proof as the taxpayer runs the business and knows the background, objectives, and actual transactions. Therefore, it is natural that the taxpayer has the main burden of proof, or at least an obligation to assist in providing facts for tax authorities. This obligation is not without limits as taxpayers should consider even the self-crimination protection. On the other hand tax authorities should illustrate evidence for their assessment, which may be based on the facts authorities sourced from the taxpayer, third parties, or public sources. In all cases, tax authorities' evidence should be relevant to the case, in other words, pertain to the question based on valid facts and information. For example, reference to a LinkedIn profile may be questionable as the profile holder may have communicated topics in his/her own interest, for example, to find a new position. Further, tax authorities' evidence cannot be purely a business judgment or ignorance of the business considerations the taxpayer is illustrating. Tax authorities should present evidence that a court can consider relevant, reliable and responding to taxpayer's key arguments in the case. The arguments should be broad, in other words, not just tax-based arguments. The ECJ is talking about tax authorities' obligation to pass subjective and objective tests, see van Broe 2007, p. 909, reference to the judgment of the ECJ on the, C-433/04 *Commissio v. Belgium*, paras. 35–38.

¹²³² In our example this would mean that tax authorities should illustrate that the non-tax objectives as a total are not material enough in light of the law when compared to tax benefits, in other words, tax reduction that is not in line with the existing law or the purpose of the legal system, tax deductibility is not available for any comparable situation (i.e. even in case of external transactions) or that the arrangement is artificial.

¹²³³ See also Kovacs Kal. Even though rulings are available, at least in the highest level of courts, only for legal questions, not that much for evidence, the tax authorities' mandate could be defined based on whether tax authorities would give a ruling in the matter. In this respect it is quite obvious that the tax authorities' mandate is not sufficient to state whether a business reason is valid. Business strategies belong to taxpayers. If a taxpayer is transparent even the unintended tax benefit can be concluded from the facts.

strategy and risk profile should be in this respect. Neither have tax authorities the knowledge to do that¹²³⁴.

The tax authorities' supporting argument was that taxpayer could have reached its objectives by transferring cash through a cash pool to the ultimate parent company instead of making dividend distributions. This argument is confusing¹²³⁵. It ignores the rules and requirements set for profit distribution¹²³⁶. Tax authorities fail to be objective. Tax authorities' behaviour is not only in breach of the fair trial principle, burden of proof, proportionality, but also of fundamental tax authority obligations and legal governance¹²³⁷.

The tax authorities' approach seems to be extremely restrictive, both by interpretation and by approach to facts, than what the SAC has stated¹²³⁸. Kovac Kal states that interest deduction seems to be acceptable based on business reasons only "if 1) no complex economical arrangement has been used and 2) taxable benefit can be considered not to be material to the extent that the arrangement is mainly business motivated." Kovac Kal's view is that these circumstances are rarely fulfilled¹²³⁹.

¹²³⁴ Kovacs Kal p 2461 made the same conclusion based on Swedish tax authority's presentation. I have noticed the same kind of attitude at different tax audits. Tax authorities ignore for example risk mitigation actions with an argument that they do not see this risk ever materialise.

¹²³⁵ Shifting cash within the cash pool transfers cash between companies creating debt and receivable, but cash transfer in itself does not impact the distributable funds at all. Confusing cash positions with distributable fund positions may serve tax authorities' purposes to illustrate tax benefits and lack of business reasons. Compare also Knijnenburg.

¹²³⁶ Profit distribution is the only company-initiated method where the company creates an income for its owner. Cash management, such as cash pool arrangements, does not create income for the owner as it is merely a balance sheet transaction creating a debt relation between the company and its owner.

¹²³⁷ Based on Knijnenburg this seems to be a more common challenge than public discussion in the post-BEPS environment would give reason to think. I have not seen tax authorities having any internal contract ensuring that civil servants in reality comply with tax authority legal obligations. Simple hallmarks of responsible governance are missing.

¹²³⁸ The SAC interpretation is strict, though leaving some optionality. One of the SAC judges, judge Ståhl, did not agree with the majority's opinion. She argued that such a definition as organisational reasons should have been included in the law itself and therefore the judgment is incorrect and overly far-reaching. Even the Financial department considered during the legislative work so-called organisational reasons to be business reasons (pp. 37-38). Even the Swedish government in their letter to the European Commission has explained organisational reasons to be acceptable business reasons. See also Kovacs Kal.

¹²³⁹ Kovac Kal pp. 242–243. I would agree with this conclusion.

The tax authorities' argument is restrictive in comparison to what was stated in the legislative process¹²⁴⁰. The authorities in this example did not state any other reason for their approach than that the business reason test has to be applied in a narrow meaning. This impact is far beyond what was the purpose of the law and what has been considered acceptable by the ECJ. Financial reasons in connection to lowered fiscal revenue are not a justification for a restriction of EU freedoms¹²⁴¹. Further, the assessment is impacted by tax authorities' behaviour, which is evidently not objective nor in line with the legal governance set for tax authorities.

I would conclude that in this example proportionality is interfered with on the level of law, the SAC initiated praxis and tax authorities' approach. Challenges can be identified on multiple levels based on proportionality, which is a fundamental aspect of the example.

8.3.1.2 Comparison between Finland and Sweden

We now shortly compare this example to Finnish tax authorities' guidance¹²⁴² concerning tax evasion¹²⁴³. The Finnish rule is based on an assessment of whether the form of arrangement is not in line with reality or whether the obvious motive of an arrangement is to avoid taxation. The Finnish tax authorities are referring mainly to a comparison between the selected legal form and reality. This approach differs from what the Swedish tax authorities state. The Swedish tax authorities make an operative choice between different solutions, at least in case of interest deductions.

The Finnish tax authorities state also that the second sub-section of 28 § of the tax procedural law can be used if business reasons are remote compared with tax benefits. Here the Finnish tax authorities refer to the SAC decision 2014:66. This section of the guidance seems to refer to some kind of business reason assessment where tax authorities compare business reasons and tax benefits reached. As the SAC in the referred decision did not come to the conclusion based on a business reason

¹²⁴⁰ Samuelsson considers the preparatory works to have high value as a source for interpretation.

¹²⁴¹ ECJ C-35/98 Verkooijen, para. 48, and C-292/04 Melicke, para. 30. See also Urpilainen 2012, p. 81. Vanistendael considers that tax avoidance became a justification to restrict EU freedoms in C-446/03 Marks & Spencer, para. 51. Further, Vanistendael states that Community law is abused if conditions for obtaining advantage were created artificially. Vanistendael 2019.

¹²⁴² Finnish tax authority guidance on the interpretation of tax evasion rules, 2.8.2016.

¹²⁴³ I use the word tax evasion instead of tax avoidance. An arrangement may be regarded to be tax avoidance, but that refers more to the motive of the arrangement while tax evasion is clearly avoidance that is not acceptable based on legal criteria.

test, but rather a form-over-substance approach¹²⁴⁴, the conclusions presented are far-reaching and complex. It leaves open questions such as whose view is crucial when considering business reasons and what is a tax benefit¹²⁴⁵. The Swedish approach especially in the interest deduction cases is based on assessment of mainly tax benefit, as explained earlier. It appears that the Finnish practice is closer to the ECJ considerations of artificiality whereas the Swedish approach is not proportional to the objectives set.

8.3.2 Conclusions on proportionality and assessing taxation

To conclude the important role of proportionality for taxpayers' legal protection when assessing taxes, I would point out a few items. First of all, it is essential to consider that tax assessment is proportional to the objectives of both national law

¹²⁴⁴ The SAC considered in its analysis that the three parties involved in the arrangement were aiming to create an incentive system for A Oyj, i.e. one party in the arrangement. The interest was to make an incentive for A Oyj's management and B Oy, a company owned by A Oyj's management, was established to execute this kind of incentive. This led to an incentive comparable to salary. Salary payment was converted into another legal form. The only business purpose that was presented was the need for A Oyj's incentive system, which was respected and not ignored. In its decision the SAC (Finland) 2018:40, it considered that business reasons were thin. At the same time, the SAC considered that the whole arrangement appeared artificial, and therefore the second sub-section of 28 § of tax procedural law could be applied. This substance is reflected by strong personal interest.

¹²⁴⁵ Tax benefits are a delicate question. In common language, a tax benefit may be seen as beneficial taxation. In the light of our example, the Swedish tax authorities' view seems to be that there is a tax benefit if a taxpayer has chosen a method with a lower tax burden compared to another available solution (debt instead of equity). Even the Swedish government seems to have the same thought process in its budget proposal Prop. 2012/13:1. In consideration of business reasons it should be considered whether a taxpayer could have financed the arrangement with equity instead of debt. See also Kovack Kal. This thinking seems to be rather the opposite of taxpayers' aggressive planning or even artificial arrangement. It is seeking only a maximal tax consequence independent of whether any sensible business person would choose the method ignoring options that for example company law has identified. The Finnish SAC has stated in its decision 2017:78 about tax benefits that "as there was no evidence of concrete tax benefits nor tax benefits that would not belong to the system" there were no tax benefits. I would agree with the SAC, the tax benefit should somehow be a benefit that does not belong to the tax system but is reached through an artificial arrangement misusing freedoms. If the artificiality is given the true legal and financial form, the tax consequence would look different. See also SAC 2014:66

and EU law¹²⁴⁶, if EU law is applicable¹²⁴⁷. Tax assessment should have as a maximum focus on the objectives set for the tax law¹²⁴⁸. State budget responsibility is with the government, not with tax authorities. This comparison of taxing powers being in balance with taxpayers' economic freedoms has a few sub-angles.

The proportionality relation between ATAD and Pillar 2 needs to be solved by the ECJ as the overlapping tax regulation most likely will result in situations where the outcome goes further than intended. The proportionality needs to be reflected against the functioning of the EU internal market, proportionality, and equal treatment. I think that there are strong arguments for creating even a higher threshold for tax authorities to apply anti-avoidance rules in the future.

It is fundamental to define, even for legality principle purposes, what is a tax benefit¹²⁴⁹. The definition of tax benefit gives a frame for both taxpayers and tax authorities to understand what kinds of tax impacts are natural tax consequences, especially in cross-border transactions in line with the tax framework. Purely a difference in tax rates or different treatment of different transaction types¹²⁵⁰ creates variance of tax consequences. The difference between these tax consequences is based on the tax system itself or the principles of the EU internal market and the freedom to use these options is in accordance with the purpose of the legal framework as long as the transactions are genuine and not abusive. Proportionality sets a limit when assessing especially whether a transaction is seen to be abusive.

Taxation is regarded to be a justification to interfere with an entrepreneur's constitutional economic rights as long as it is proportional¹²⁵¹. A good tax system, as

¹²⁴⁶ In the case of for example ATAD, there is always an EU law connection.

¹²⁴⁷ The starting point for this consideration, especially from a taxpayers' legal protection point of view is, that proportionality has been measured in the legislative process in the consideration of rights based on constitutional and EU law.

¹²⁴⁸ The assessment should consider also that the interpretation is proportional to economic freedoms.

¹²⁴⁹ Tax benefit is not used only as an argument by tax authorities, such as in the example, but also for example in DAC 6 reporting requirements. On the other hand, the ECJ has stated, when considering the rule of reason, that a lower tax burden in a different Member State as such does not create a tax benefit in itself, see Urpilainen 2012, pp. 80–81, and De Broe 2007, p. 915. I have experienced an extreme impact when considering the question of subsidiary domicile. The better investment treaty protection coverage in the Netherlands pointed out to be important being more important than normal tax benefits normally considered.

¹²⁵⁰ Tax rate difference refers to the freedom to choose the country of establishment. By planning where a business is established, the tax burden varies as different countries levy taxes at different rates or have other differences in their tax systems. Different transaction types refer to the possibility of executing transactions by choosing between transaction types. A business can be sold as an asset transfer or by selling shares. Tax treatment of different transaction types may vary from each other.

¹²⁵¹ Ibid.

Smith defines it, is meant to be neutral. The existence of tax avoidance rules and ECJ case law identifies that if a taxpayer's solutions are artificial, i.e. purely tax driven, and therefore are misusing freedom rights, they can be disregarded¹²⁵².

Benefits that conflict with the purpose and structure of the tax legal system should be considered as unjustified tax benefits¹²⁵³. This conclusion is built into the rule of reason consideration¹²⁵⁴. When measuring if a transaction is done to reach a tax benefit, analysis cannot be based on tax consequences, but on a comparison between the tax consequence of the executed arrangement and arrangement that would be in line with the purpose of the tax legal system as the ECJ has confirmed

¹²⁵² The ECJ stated in joined cases C-115/16 Danish case, that based on existing case law a taxpayer cannot refer to EU freedoms to misuse then EU freedom rights (legal principle prohibiting misuse) (para. 96), and that a legal person cannot benefit from an EU law-based right if the arrangement is financially wholly artificial and aims to avoid impacts of Member State legislation (para. 109). This statement makes a clear statement that prohibiting misuse of legal rights is not allowed. *E contrario* it includes also a statement that as long as the arrangement is real, rights are available.

¹²⁵³ ECJ case C-196/04 Cadbury Schweppes states this principle from an EU law point of view. The case concerned the United Kingdom's controlled foreign corporation rules. The UK rules applied differential treatment to UK-resident companies on the basis of the level of taxation of the relevant associated company, specifically "a difference in treatment of resident companies on the basis of the level of taxation impose on the company in which they have a controlling holding" (para. 43). The ECJ concluded in paragraph 44: "where the resident company has incorporated a CFC in a Member State in which it is subject to a lower level of taxation within the meaning of the legislation on CFCs, the profits made by such a controlled company are, pursuant to that legislation, attributed to the resident company, which is taxed on those profits. Where, on the other hand the controlled company has been incorporated and taxed in the United Kingdom or in a State in which it is not subject to a lower level of taxation within the meaning of that legislation, the latter is not applicable and, under the United Kingdom legislation on corporation tax, the resident company is not, in such circumstances, taxed on the profits of the controlled company". After this the ECJ concluded that this difference of treatment and "the resulting disadvantage of resident companies which have a subsidiary subject, in another Member State, to a lower level of taxation are such as to hinder the exercise of the freedom of establishment by such companies."

¹²⁵⁴ The ECJ's rule of reason consideration is built on the idea of EU law and the purpose of EU law. This means that the benefit reached should also be in conflict with the EU law fundamentals. See for example Case C-524/04 Thin Cap, where the ECJ adopted a commonly used three-step analysis: 1. which Treaty freedom is relevant, 2. whether the relevant Treaty Article is engaged, i.e. whether there is a restriction of the relevant Treaty freedom, and 3. whether the restriction is justified by a public interest recognised by EU law and is proportionate to that interest. EU freedoms are clearly a benchmark to consider what kind of tax consequence is the targeted outcome. See also Case C-110/99 Emsland Stärke where in paragraph 39 the Commission considered that "commercial operation was carried out essentially to obtain a financial advantage incompatible with the objective of the Community rule." In this case, the ECJ comes later back to artificiality.

in its case law¹²⁵⁵. This leaves taxpayers' the right to select any legally correct and justified method or alternative to reach the business target if it is in line with the purpose of the tax legal system¹²⁵⁶.

Analysing artificiality may be challenging for tax authorities as it requires deeper analysis and understanding of non-taxable income logic and factors. Therefore, there is a risk that tax authority analysis and assessment are not proportional. In assessing artificiality taxpayers' own behaviour becomes important: to what kind of tax governance and strategies is the taxpayer committed. For example, if a US-based entrepreneur states that they established a holding company in the Netherlands to protect the US parent company from risks in the holdings and as a consequence received a more beneficial withholding tax treatment, tax authorities should analyse if taxpayer has actually behaved accordingly, that is, in accordance with the business objective¹²⁵⁷.

I would like to stress also the importance of administrative rules, governance, and proper argumentation representing the rule of law for tax authorities' mandate. They give a frame for taxpayers to assess the proportionality of tax authorities' decisions. Proper argumentation is important for taxpayers' legal rights when challenging the decision and building trust between authorities and taxpayers¹²⁵⁸.

¹²⁵⁵ The ECJ concluded already in case C-294/97 Eurowings that "contrary to what was argued by the Finanzamt, that difference of treatment can also not be justified by the fact that the lessor established in another Member State is there subject to lower taxation." The same principle was confirmed later in Cadbury Schweppes.

¹²⁵⁶ As an example, a case where Company A postpones the process of selling a subsidiary to reach a timeline for exempt capital gain treatment, arguments stating that the transaction is postponed to reach a tax benefit would not be proportional as the purpose of the rule is to give exemption after ownership of a certain period. It is up to Company A in this case to decide when to the start sales process of a subsidiary. The treatment may be different in case Company A has agreed to all the steps to sell the shares, i.e. finalised the sale of subsidiary shares, but postpones its reach out for tax exemption. In this case, the question is of course whether the shares were in reality sold already earlier in line with the purpose of the tax law.

¹²⁵⁷ If the entity does not distribute all the profits to its owner immediately or there are sufficient timing differences, it illustrates that the holding company creates a reserve to mitigate risks. The ECJ considered in cases C-115/16 Danish case, that "the fact remains that such a taxpayer cannot enjoy a right or advantage arising from EU law where the transaction at issue is purely artificial economically and is designed to circumvent the application of the legislation of the Member State concerned" (para. 109). In this case, the taxpayer had established an intermediate company within the EU where the financial flows illustrated very thin activity and risk-bearing.

¹²⁵⁸ In this specific case there should have been even specific attention, in addition to the Cifit doctrine (C-238/81), to the argumentation as Sweden, after the European Commission's notification in 2004 has had a law requesting specific argumentation in case there is connection to EU law in the issue (lagen (2006:502) om vissa

Tax is a consequence of business activity, which gains from economic freedoms. These fundamental freedoms, EU law, and legal principles protect taxpayers' possibility to operate and choose between different operational models. None of these principles prohibit a business from taxing as such, but constitutions, EU law, and legal principles set nevertheless limits to taxing powers.

bestämmelser om förhandsavgöranden från EU-domstolen). The first paragraph states an absolute obligation to state the reasons to why not to seek for clearance from the ECJ (1 §: Om en part I ett mål eller ärende vid en domstol eller myndighet, som omfattas av skyldigheten att inhämta förhandsavgörande från Europeiska unionens domstol, har yrkat att ett förhandsavgörande ska inhämtas eller på annat sätt väckt frågan om en sådan åtgärd, ska domstolen eller myndigheten, i de fall den beslutar att inte inhämta ett förhandsavgörande, i sitt beslut ange skälen till detta).

9 Key conclusions of taxpayers' legal protection

My objective for this study is to reflect taxpayers' fundamental rights and their legal protection in a post-BEPS and ATAD world. Foundation for taxpayers' financial activities is constitutional and EU law-based freedoms and rights, not restrictions. However, these rights come with obligations, such as paying taxes. Some taxpayers have abusively used these rights, which resulted in urgently drafted new broad-based rules tackling the challenge of paying a fair share of tax. The objective was not to remove the fundamental financial freedoms nor to abolish legality principle. Proportionality is a key issue; enforcement of these rights means that they are taken into account and not violated by normal legislation, such as tax law.

I conclude that the new BEPS based rules are legally challenging, even problematic. The new rules, such as ATAD rules, were drafted urgently without taking into account the complexity of the matter¹²⁵⁹. The cornerstones for challenges are 1. the end to end legislative process, 2. the OECD role and function as a regulator, 3. the mandate and legitimisation that the EU has utilised on corporate income tax, 4. tax sovereignty of the Member States and 5. alignment of these taxation focused restrictive rules to the economic freedom¹²⁶⁰ legal framework.

The OECD has drafted recommendations for global use, which the EU has implemented as directives to improve the functioning of the internal market by setting restrictive rules for national level of taxation. As taxes are assessed by each Member State on businesses utilizing the EU internal market, there are territorial

¹²⁵⁹ Many academics have been studying the question of tax avoidance and abuse of economic freedoms from different angles, such as DeBroe, Vanistendael, Eckl, Ensing Sorensen, Knuutinen, Tikka, Almendral and Äimä. This illustrates how sensitive the border line between utilizing economic freedom and abuse of the rights is.

¹²⁶⁰ Understanding the fundamental dynamic impacts that taxation has on business is crucial, see for example Barrett, McGuirk & Steinberg. National taxation and the functioning of the internal market has tension as Member States are protecting their national tax basis within the internal market. As Dourado (2014) stated "citizen of a Member State can benefit from the EU fundamental freedoms and exit his or her state of citizenship mainly or exclusively for tax reasons, as long as the move is not artificial" p. 210.

interest conflicts in spite of the new harmonisation. Taxpayers' capacity to challenge and enforce taxpayers' rights is crucial. Legal principles and the EU law have an important role in protecting the taxpayers' rights.

National legislators have the final opportunity to ensure the quality of the tax legislation and tax authorities are assessing taxes based on the national tax law and other applicable binding regulation. A part of taxpayers' legal protection on this level is that legislator and tax authorities identify equally their role, purpose, and obligations meanwhile legislator understand that it, i.e. parliament, has taxing rights as well as they have obligations set by legal order¹²⁶¹. These two folded obligations, i.e. the obligation for predictability through the principle of legality and the obligation to respect financial freedoms ensured by fundamental rights set limits for taxing powers.

The OECD's BEPS project started with attention to tax planning schemes that have eroded tax bases in different countries¹²⁶². The OECD's consideration on a high level was that BEPS initiatives should eliminate these mismatches¹²⁶³ by unifying tax legislation by different means¹²⁶⁴ but also change taxpayer

¹²⁶¹ Vanistendael 2014 considers that the principle of legality based on multiple European constitutions gives considerable weight to the precise wording of the tax laws and regulations.

¹²⁶² See OECD BEPS reports, OECD 2013, p. 9. The objective was to ensure that all taxpayers pay their fair share of taxes. Low effective tax rates of MNEs were considered often to illustrate that this is not the case. Different analyses, such as the EU Tax Observatory, concluded that low effective tax rates were due to different beneficial tax regimes, such as patent box or capital allowances typically available for MNEs. In the urgency, effective tax rates were not analysed properly to understand the reasons broader than just tax regimes and statistical conclusions. For example, the impact of having international operations, such as losses in some parts of the operations, differences in tax rates and divestments, impact typically more an MNE's effective tax rates than a business that has operations in one or only a very limited number of countries. This is due to being subject to multiple national taxation the operations are impacted by overlapping or economic taxation and this will most likely not be changed despite BEPS actions. The urgency of drafting new rules did not allow a true understanding of the reasons in ETR creating possibly unrealistic expectations.

¹²⁶³ The OECD has failed in implementing their main finding – taxation of digital operations. This is due to conflicting national interests, especially by USA.

¹²⁶⁴ OECD 2013 explanatory statement (p. 6) states that the OECD recognised that different instruments can be used either alternatively or cumulatively and therefore a minimum standard would be the best solution to ensure that abuse no longer would be possible by fit-for-purpose rules. On the other hand, the OECD did not analyse the cumulative impacts of these rules that might happen when minimum rules are applied in different countries. The short timeline for the OECD work did not give space to determine basic factors, such as substance, in relation to the new rules, for example in action 6. Substance is often referred to as the number of FTEs, as one factor not still determining

behaviour¹²⁶⁵. The intention was good ignoring at the same time the fact that the BEPS project was not solving the competition of tax revenue between countries¹²⁶⁶.

The new BEPS rules as well as ATAD rules were to eliminate the opportunities for aggressive tax planning. The other objective was to increase MNEs' transparency¹²⁶⁷. This objective was considered to create pressure from customers to change MNEs' behaviour, not to stop tax planning, but to do business more in a responsible and sustainable way¹²⁶⁸. The response to taxpayers' behaviour by MNEs and also SMEs has been the initiation of responsible tax management reflecting governance principles and transparency. The aim has been to create trust and understanding of MNEs' often quite complex tax footprint¹²⁶⁹.

Taxation is a matter of each Member State. Taxes are assessed based on this territorial approach by each Member State even within the era of ATAD¹²⁷⁰. However, there has been hardly any proper consideration of how the new rules impact the functioning of the internal market. If they interfere with EU Treaty rights, taxpayers can still challenge them legally. The old, fundamental legal protection still

the totality. For example, the EU's directive proposal 2021 for the so-called Unshell Directive referring to the OECD actions 5,6 and 8–10, includes one measure of having 5 FTEs as an indicator of substance among other indicators. One could consider that it would be more crucial to consider what the FTEs do than how many there are.

¹²⁶⁵ For example, action 5 aims to increase transparency offering tax authorities possibilities to assess taxation based on a bigger picture, not just a one-country approach, and thereby stop BEPS activities, i.e. aggressive tax planning.

¹²⁶⁶ This is a dilemma; meanwhile natural tax sovereignty of every state creating the basis competition of tax revenue is one root cause for base erosion and profit shifting, it is also the reason why taxpayers' legal protection is needed, see for example Vanistendael (2011).

¹²⁶⁷ The objective was to make MNEs report on their taxes so that the public could consider the fairness of their tax contribution. This transparency target is good, but equally complex to execute and creates challenges for readers. The challenge has multiple angles: the framework with the EU's transparency approach was set to the OECD's approach to transparency. This, however, was intended for tax authorities, who have other technical information that a c-b-c-r supports. The other challenge is that there is no actual, well-defined standard for the reporting giving any framework to reflect the data to. Finally, one can make statistical conclusions out of the data, but not really put the tax contribution to the framework of business as tax is a consequence of business.

¹²⁶⁸ The behavioural aspects were considered as the new rules were assumed to impact taxpayer behaviour. The new rules, i.e. "fighting BEPS should not result in harming growth and the investment climate", see OECD 2013, p. 5.

¹²⁶⁹ For example, B Team movement for responsible tax management, EBTF promoting MNEs' reporting on total tax contribution, B Team, EBTF, and Executive Tax Council study on best practices for tax governance.

¹²⁷⁰ This means that taxes are not assessed on the EU level, but on the Member State level. The fiscal borders within the EU will create the tension for the functioning of the internal market.

exists. The enforcement of these rights may require an effort and has a threshold, but one day there is the first case with a correct fact pattern solved by the ECJ.

I will now conclude my findings.

9.1 Constitutional rules actually protect taxpayers

As constitutional rules and EU Treaty-based rules are stable, they create a framework for tax legislation. These fundamental regulations ensuring economic freedom and property rights connect civil law-based opportunities to tax law. To respect economic freedoms tax law has to be assessed together with business, not in a silo.

This connection is crucial for taxpayers' legal protection and can be enforced broadly through constitutional interpretation. This part of taxpayers' legal protection should not be underestimated¹²⁷¹. It seems to be that taxpayers will need and can get EU law protection even in the case of EU directives. This protection is surely needed as the EU's legislative initiatives have been drafted urgently and poorly. A good illustration is the question of proportionality when eliminating some targeted but assumed BEPS transactions. Pillar 2 rules should fundamentally ensure an effective minimum tax, which means that the application of anti-avoidance measures is not proportional¹²⁷².

9.2 Tax is a consequence of business connecting tax and civil law

Our legal framework is the fundament of organised society. Organised society needs rules to define how individuals should behave. To exist the society requires funding, i.e. taxes. Money is invented to be the remuneration in exchange for goods and services. This means that society has to collect money in order to maintain activities such as legislation, courts, etc.

Tax is levied based on the activities, i.e. tax is always a consequence of some sort of financial activity, such as employment, ownership, sale of goods or services, and so on. The financial benefits are shared in one way or another¹²⁷³.

¹²⁷¹ Constitutional rules and EU rules jointly have an effective, though time-consuming enforcement as tax issues are automatically connected to EU law.

¹²⁷² Pillar 2 rules' purpose as a system was to eliminate too low taxation of profits.

¹²⁷³ What is then the fair share of taxes out of financial impacts, is a separate question that I am not even trying to analyse. This depends, as Fuller stated, on moral understanding that depends on our personal views. What is fair for one, is not fair for another.

As taxes are always, even when considering them from a BEPS and ATAD point of view, a consequence of business transactions¹²⁷⁴, taxes have also an impact on business. When the EU is referring to the functioning of the internal market, it refers to the limited applicability of certain taxpayers only. ECJ case law demonstrates that proportionality is protecting all taxpayers, even specific taxpayers, from taxation that goes beyond the objective of the law, for example, non-taxation or low taxation. Economic freedoms are this way linked to taxpayers' legal protection as they ensure proportional tax contribution. For some reason, the EU regulator has ignored these core business objectives, i.e. the functioning of the internal market. Tax is not the driver of the internal market, but rather a secondary consequence¹²⁷⁵.

Due to tax being a natural consequence of business, taxes impact business decisions. This does not make the decision tax-driven or not legitimate. Tax burden steers decisions in multiple ways. It may shift investments from one country to

¹²⁷⁴ The logic is important to understand: business is not a consequence of tax. Only in this case business would truly search for tax reasons to do business as the profitability would be a consequence of tax, not business. This is crucial when respecting taxpayer's legal protection. In some cases arguments that are used for tax avoidance sometimes assume tax being sole purpose of the business as taxpayer has chosen an alternative where tax burden is lower than in another alternative. The measure, that the OECD and the EU have used, a fair amount of tax, is dependent on subjective measures, and therefore complex. As the focus is on the amount of tax paid rather than on what kind of business or, in the case of income taxes, what kind of profitability it is referring to, the conclusions are always complex and not necessarily reliable for conclusions. Unfortunately, the ETR, which is used often as an indicator, is more complex than one would think. For example, Fortum Group's ETR varied from -33% (2022) to 4,4% (2023) ETR, not because of tax planning, but due to technical standards of how losses on Uniper and Russian assets were booked through the balance sheet while tax impact was booked in the profit and loss statement. Profit was therefore at a normal level while income taxes were either negative or very low.

¹²⁷⁵ Therefore, for example, the proportionality of the BEFIT proposal is crucial. Would adjustment of the consequence impact the source, i.e. business in a way that the EU internal market is disturbed? This we will not know unless there is a proper impact assessment. An interesting legal approach was presented on 14 March 2024 by Advocate General Emiliou of the ECJ when he delivered his Opinion in response to the request for a preliminary ruling from the Dutch Supreme Court. The Advocate General stated contrary to earlier ECJ decisions that intra-group loans, that are put in place without any valid commercial and/or economic justification for the sole (or main) purpose of creating a deductible debt constitute "wholly artificial arrangements". This illustrates well how crucial of a component it is for taxpayers to commit to responsible tax principles as it highlights the objective of having business-based solutions and not committing to artificial arrangements. The tax consequence may, however, still look complex or difficult to understand. ECJ didn't go this far in this case C-585/22 S BV even though the outcome was negative for the taxpayer.

another due to lower tax burden¹²⁷⁶. It may result, in the case of mobile business, such as financing or services, businesses moving to a location where taxes are lower. Finally, a lack of certainty and predictability may slow down business decisions. Investments may be postponed¹²⁷⁷. Again we can see the sequence – business drives tax.

Business has to have the freedom to make these judgments and choices to be able to run activities successfully. The constitutional and EU law freedom rights and protection are therefore crucial for business even limiting taxing powers. Even if taxpayers' tax burden would be lowered due to taxpayers exercising their economic freedoms within the purpose of the legal system, taxing powers should not exceed taxpayers' rights. The constitutions and EU law offer protection for taxpayers.

Taxpayers' constitutional protection is not unlimited. Abusive use of these rights will give tax authorities the right to assess abusive arrangements. Abuse is finally a detail, not an assumption. Further, the threshold for having an abusive tax benefit has increased, at least for those taxpayers subject to a minimum tax.

The same proportionality principle applies to governments' right to tax. Even though the legislative rights are broad, they are not without limits. Even though the threshold is high, it still exists. As the BEPS rules are drafted urgently with a narrow tax consequence approach instead of tax as a consequence of business approach and therefore without proper understanding of the impacts, rights based on constitutional and EU law will be measured in the form of court cases. These rules will create a post-legislative protection for taxpayers¹²⁷⁸.

¹²⁷⁶ Within a group of companies investments are competing with each other and only the best investments are executed. Tax burden may therefore steer what investments are made and which ones are not executed.

¹²⁷⁷ The aim of BEPS was not to impact the investment climate. This seems to be an objective where the OECD and the EU have failed. For example, the interest deduction rules create a challenge for green transition investment. The Finnish practice on so-called Mankala entities is facing challenges. The purpose of the Mankala principle is to organise a joint investment that no investor can do alone by allowing a simple cost-sharing arrangement in the spirit of contract manufacturing. This, however, creates a challenge as the Mankala entity has a very low basis for interest deduction, that is taxable EBITD.

¹²⁷⁸ My vision is that BEPS 1 and 2 rules will impact each other through constitutional and legal principle approaches, and secondly, they will be adjusted when the extreme impacts appear and are judged by courts. At that time Vanistendael's statement becomes accurate.

9.3 Is the legislative process efficient enforcement for taxpayers' legal protection

Sasi stated¹²⁷⁹ that the parliament's tax legislative powers have no limits. Another angle to this statement, that I have heard when discussing constitutions' impact on tax legislation, is that tax legislation cannot be prohibited based on constitutional rules, such as the protection of property. My conclusion would however be that the spectrum for legal protection is not black or white, whether the tax law is legitimate or not.

Rather, I would say that constitutional rules and principles impact tax legislation by steering it¹²⁸⁰. The efficiency and quality of the legislative procedure depend naturally on the time spent and the quality of the preparatory process¹²⁸¹. In case there is a poor understanding of the underlying topic to be regulated, the clarity, as well as constitutional aspects, cannot be taken fully into account¹²⁸².

If the legislative process fully utilises the possibility of public hearings, different aspects will be brought into attention and can be taken into account. This could mean that constitutional aspects are considered already early in the legislative process. This would not prohibit the proposed tax, but it would take out the extremes of the proposal.

Lehtonen considered constitutional control to be rather weak in Finland¹²⁸³ as first of all only a few tax laws end up being reviewed by the parliamentary Constitutional Law Committee and secondly, in case there are remarks to the proposal based on the constitution, corrections are not reviewed any more by the parliamentary Constitutional Law Committee. In the worst case, these comments are ignored in their entirety¹²⁸⁴. On the other hand, Myrsky considers that comments

¹²⁷⁹ Sasi 2018.

¹²⁸⁰ This seems to be the spirit even in the Finnish Constitutional Law Committee, see for example PeVL 9/2023. For example, Finnish windfall tax was adjusted based on comments from utilities on the high impact on power producers.

¹²⁸¹ Unfortunately, the factual situations are complex and authorities may not always see how poor of an understanding they have on business issues.

¹²⁸² The Finnish revenue cap-based windfall tax is a good example of that. An expert on the power market will easily see, that the legislator had a poor understanding of how the power market works, what drives power prices, how hedging works, and who actually benefits from high power prices. Finally, it appears to be that the windfall tax revenue was not even close to what the legislator anticipated.

¹²⁸³ Lehtonen 2012

¹²⁸⁴ In the case of extra profit tax for utilities (HE 320/2022vp) the parliamentary Constitutional Law Committee 97/2022 made a few remarks, for example, based on the clarity of the proposal (p. 3) and compliance with EU law (p. 4). These remarks were, under severe political pressure and urgency, ignored by the Finance Committee by making explanatory comments that were known also to the Constitutional Law Committee. This may even steer the remarks given by the Constitutional Law Committee.

from the parliamentary Constitutional Law Committee have an impact on the legislation, and he refers to a number of statements done by the Committee¹²⁸⁵. I would more agree with Lehtonen.

Myrsky states also that other boards and committees have the obligation to take into account the statements from the Constitutional Law Committee, they are binding¹²⁸⁶. The cases that Myrsky refers to in his article are good examples of constitutional, even fundamental comments that have influenced legislation. As an example of this, I would point out one of Myrsky's references concerning retroactive tax legislation. The Constitutional Law Committee stated in its statement 1/2009 that also taxpayers have the right to trust tax legislation in connection to what kind of rights and obligations are created. Also business actors have the right to such predictability from the tax legislation that they can conclude to a fair extent what kind of impact tax legislation will have on their business¹²⁸⁷.

I would conclude that the legislative process has stronger enforcement for taxpayers' legal protection if the legislative process respects the principles laid down in the constitution as well as the governance rules of good administration. This would mean that political pressure and urgency should be ignored and the quality of preparatory work is fully respected. As the political pressure impacts directly the political decision-makers, who seem to bypass the standard for good legislation¹²⁸⁸, the appeal process becomes crucially important for taxpayer protection.

The Finnish windfall tax is a good example of this. Political agenda, urgency, and insufficient understanding of the underlying issue resulted in a tax law that was not in line with EU regulation, unclear, lacking taxpayers' possibility for early clearance, and did not reach the set target¹²⁸⁹. The legislative process failed.

¹²⁸⁵ Myrsky, 2012 p. 492.

¹²⁸⁶ Myrsky, 2012 pp. 485–486.

¹²⁸⁷ See more in Myrsky 2012, pp. 487–489. The Constitutional Law Committee referred to retroactive legislation in its statement 97/2022 and concluded that the requirement of predictability limits the possibilities of retroactive tax legislation.

¹²⁸⁸ Fuller lists eight ways for how legislation can fail, p. 38. Even though Fuller wrote the analysis already in the 1960s, the list is in my view still valid. It seems to be respected by the ECJ, see Douma, p. 220. The Finnish Constitution states multiple principles that are aligned with Fuller's list. The Constitutional Law Committee has a key role in this process. We can see how the legislator fails with its duties when urgency drives over the quality, such as in the case of extra profit taxes in Finland, see Constitutional Law Committee statement 97/2022 and the Finance Committee's reactions to the statement.

¹²⁸⁹ Extra profit tax on energy (Commission Delegated Regulation (EU) 2023/363). High power prices do not necessarily correspond to profits; therefore the defined threshold was complex. In reality, those taxpayers, that benefitted from high power prices were often other than utilities and their profits were not subject to any extra profit tax. Tax revenue was finally very small compared to the original expectation, most likely as the parameters were not understood.

9.4 The EU is not a tax legislator

The EU has close to no mandate within the area of taxation, except VAT. However, the EU has taken an active role in the fight against aggressive tax planning based on the functioning of the internal market, i.e. Article 115. As I have stated already earlier, this is somewhat complex as the EU rules are often based on OECD proposals. They do not reflect at all the functioning of the EU internal market, that is, the Treaty freedoms. On the other hand, they have been drafted only as minimum rules and do not ensure the same tax treatment. EU's arguments on the legitimisation on Article 115 are equally narrow and not well-analysed, such as proportionality, which is in case of minimum tax referred to the limited number of affected taxpayers, not to the outcome of the rules.

For example, the interest deduction rules have a financial impact as also state aid rules. State aid rules are referred to when limiting interest deductions, but not considered in how the limitation of interest deduction actually impacts. Thus there would have been a framework for the internal market considerations, but they were not done¹²⁹⁰.

The challenge that Article 115 has, when legislating tax, is that tax is a consequence of business, not an independent internal market driver. In fact harmonising tax will not guarantee objectives of Article 115 as the Article relates directly to economic freedoms within the internal market and only secondarily to national income taxes.

Harmonising tax will not be sufficient to create clear and predictable legislation unless the proposals leave enough space for Member States to manoeuvre within the set objectives. Alternatively, the EU should take over taxing powers from Member States. This would ensure unified tax treatment and internal market efficiency.

Currently, the attempt, such as Pillar, 2 is focused on tax only and not drafted with a focus on the internal market. The OECD-based rules impacts' on the internal market or different Member States are not analysed, which means that the proportionality and predictability of the rules are not secured. Pillar 2 illustrates well how confusing taxation may become: the EU argues its mandate and proportionality with OECD work and fixed its position with its proposal COM (2021) 823 while the OECD continues to develop rules further. As the EU has implemented already an older version of the Pillar 2 rules and Member States are forced to implement the EU

¹²⁹⁰ The role of the OECD is in this sense confusing. The OECD has been considering different options, but not from intra-market points of view. Member States have been involved in OECD work, but more from a national interest point of view, not an intra-market point of view. Also the Finnish government proposal on interest deduction was discussing state aid aspects widely (HE 150/2018 vp), with only thin reflections to interest deduction rules.

directive, the EU is trying to manoeuvre with the complexity it has created itself by implementing a draft instead of waiting for a more final version, not to mention that rules should have been considered against EU rules and ATAD.

The missing mandate is not the only challenge the EU has as a tax legislator. The other challenge is that the EU has very limited experience in drafting tax laws, no process for impact assessments, and no proper process for public hearings. Despite this the EU “offers” Member States ready-made tax legislation solutions¹²⁹¹.

The EU is essentially “stuck” with the aggressive tax planning scheme. Aggressive tax planning is seen as a reason to continue the elimination of aggressive tax planning even though the EU has made multiple, even overlapping legislative acts, and not a single true attempt to improve predictability or certainty. The EU considers its actions coherent and necessary in the light of equality. The EU is still accusing MNEs of continuing aggressive tax planning, even though the EU has launched extensive measures. This is based on low ETRs¹²⁹².

For the EU to fulfil Fuller’s list of good legislation, it should change its foundation to cover taxes, create a proper legislative process, arrange public hearings, and conclude impact assessments. Based on that the EU could come up with proper legislative actions taking into account all aspects that are needed for good tax legislation. Even considering that tax is a consequence of business. The most important would be clarification of the EU’s mandate as a tax legislator and securing a proper legislative process based on this mandate.

9.5 Does the SAC have sufficient powers for constitutional control?

Finnish constitutional pre-control on tax legislation is executed by the parliamentary Constitutional Law Committee during the legislative process in case the concerns raised in the preparatory phase of the tax legislative process give reason to make a

¹²⁹¹ Tax, such as criminal law, is subject to the rule of law. This means that requirements are higher.

¹²⁹² Renda, Simonelli, De Groen, Iacob & Campmas still in 2020 consider aggressive tax planning to be valid as MNEs have the possibility for such behaviour and as MNEs have lower ETRs. It is not clear whether the writers truly understand the concept of ETR. However, an important conclusion is that businesses are more digital, and that raises concerns. I would state that digitalisation is not the same issue as aggressive tax planning, it is more a new way of operating business. This should act as a normal tax law adjustment rather than highlighting it and talking about aggressive tax planning in order to gain political pressure. Further, it is important to note that the EU’s final report does not review taxpayers’ position at all.

constitutional reference and if the law is referred to constitutional review¹²⁹³. This means that there is a threshold for the constitutional review.

As said earlier, tax is a consequence of business. As there is a wide range of different kinds of situations and reactions to those situations, it is difficult to conclude all the impacts in a legislative process, even in a proper, qualitative process. It is however the obligation of the government and the civil servants preparing the legislation for the government, to take all the needed steps to find out the factors impacting the legislation and its objectives. Unless this is not followed, experts and the civil servants assessing the proposal do not have proper tools to consider the tax law proposal from a constitutional point of view, merely from a legislative technical point of view¹²⁹⁴.

The severe failure is that tax law is not seen as a consequence of business. The underlying facts are unclear to the legislator, which makes it difficult to understand the impacts. This influence is accelerated when tax authorities' arguments are focused on fiscal aspects instead of analysing the artificiality of the arrangements.

The Constitutional Law Committee is from time to time reviewing proposals for tax legislation among other committees in the parliament, even though the Finance Committee is the crucial committee for tax legislation¹²⁹⁵. The Constitutional Law Committee considers strictly the constitutional aspects of the law proposal, such as whether the law defines the affected taxpayers and the tax consequence clearly enough or whether the fair trial principles are stated sufficiently¹²⁹⁶. Sometimes the Constitutional Law Committee makes reference to EU law¹²⁹⁷. Despite the Constitutional Law Committee consisting of political representatives rather than legal experts or judges, the Committee seems to make rather independent judgments

¹²⁹³ All laws are not referred to the Constitutional Law Committee.

¹²⁹⁴ This challenge can be seen in the extra profit tax legislative process. The proposal assessed profit drivers that utilities referring to separate accounting utilities need to have based on electricity market law. However, the civil servants did not review any of the publicly available profit and loss statements to consider how the profit drivers and equity components correlate to profitability or high electricity prices. Neither did the law proposal make any attempt to identify who actually benefitted from the extraordinarily high electricity prices in the second half of 2022, merely assuming that beneficiaries must be utilities and entities selling electricity. This was most likely due to urgency, i.e. time pressure and political pressure. This resulted in merely law technical statements by multiple experts in the public hearing. Even the experts consulted by the parliament stayed on a technical level without having some reflections on the actual consequences.

¹²⁹⁵ See Myrsky 2012.

¹²⁹⁶ See Finlex, Lainkirjoittaja opas. It appears that most of the reviews are done on inheritance tax.

¹²⁹⁷ See PeVL97/2022. This is not a standard procedure. There is a mismatch between national and EU law.

on the proposal at hand¹²⁹⁸. However, the quality of this assessment is also dependent on the quality of the preparatory process¹²⁹⁹. This means that the importance of constitutional post-control may not be underestimated and not replaced by pre-control.

Currently, taxpayers' only option is to appeal tax assessments in line with the normal appeal process. Courts, especially the SAC, have the possibility to make a judgment on whether the law is in compliance with the Finnish Constitution. The SAC has had a high threshold for assessing whether a tax law, or even part of it is not in line with constitution. In fact, the SAC is not willing to take the role of a constitutional court but rather employs an approach of constitutional interpretation of law. The threshold is exceeded only in stand-alone cases where some aspects in that case or assessments were seen to be in conflict with the constitution or a constitutional principle¹³⁰⁰. It seems obvious that the legal principles founded in the constitution have played an important role in the SAC's judgments in relation to the constitution in these cases.

The high threshold that the SAC has highlights the problem of poor preparatory process in the legislative process or some facts and aspects being seen or understood first after the legislation is in place. Therefore, I think that a constitutional court would fundamentally improve the respect for the constitution even in the legislative process. This would not mean that the threshold for judgments would be lowered dramatically, but the idea of challenging tax law, or any other law, from a constitutional angle, would be set as the objective of the court. This would offer the constitution and the legal principles the same weight as EU law.

9.6 EU law has stronger enforcement than the Finnish Constitution

As I considered, the Finnish Constitution has a role when finally assessing taxation even though the threshold may be high¹³⁰¹, especially when the constitutional aspects challenge not only a stand-alone case but tax treatment of a larger amount of cases.

¹²⁹⁸ This means that the Committee has a threshold on arguments it makes being critical to the statements made by all stakeholders, even the government.

¹²⁹⁹ If the preparatory process is poor, the Constitutional Law Committee cannot see properly even the main factors impacting the judgment.

¹³⁰⁰ The SAC decision SAC 2022:149 about the penalties not fulfilling legality principle, SAC 2018:166 taxation was not based on the wording nor purpose of the law, taxation would require change in law, SAC 2016:180 taxpayer has the freedom to choose between alternatives that are in line with the framework and purpose of the law.

¹³⁰¹ For example, companies and business undertakings organised in the form of a company owned by multiple persons are traditionally seen not to gain from the equality principle within the meaning of the Finnish Constitution, or at least the threshold is high.

The Finnish Constitution rules over equality¹³⁰², but its enforcement has a high threshold within the area of taxation. It seems to be more of a tradition in Finland to allow extensive powers for taxation without constitutional limitations. This results easily in two outcomes: firstly, the legislator becomes somewhat blind to constitutional aspects in the legislative process¹³⁰³, and secondly, pulls up the SAC threshold in interfering with constitutional aspects of the law.

EU law is by nature different than domestic tax legislation. EU law is based on the EU Treaty which has the same status as a constitution. The focus of the EU Treaty is the functioning of the EU internal market. This means that the focus of the EU Treaty is more directly on ensuring four freedom rights eliminating hinders moving within the internal market for example economic freedoms. The Finnish Constitution focuses more on other rights and has no equal need to concentrate on the elimination of discrimination in all financial activities.

Directives are launched based on the mandates created in the EU Treaty. EU law seems to create at least indirectly rights for EU citizens with enforcement powers by requesting cases to be referred to the ECJ. For businesses this is more efficient than what the national constitutional protection creates.

Taxation is not included in the EU's mandate, and taxing powers remain to be a topic for sovereign states. As tax is a consequence of business, taxation may create on the national level limitations or outcomes¹³⁰⁴ that violate the functioning of the EU internal market and the EU freedom rights. As a result of this ECJ praxis has formed principles that actually limit the national taxing powers¹³⁰⁵. EU law, however, cannot be applied unless there is a connection to EU law in the case¹³⁰⁶.

¹³⁰² 6 § of the Finnish Constitution rules over equality, but only for people. This is the reason why businesses are not seen to gain from equality, at least from a traditional point of view.

¹³⁰³ Lehtonen considers that the Finnish legislative process may request comments from the Constitutional Law Committee of the Parliament, but there is no control that the comments are actually taken into account, see Lehtonen, p. 41. This can be seen also in the PeVL 97/2022 statement that commented that the proposed law has challenges from clarity and predictability of the proposed law as well as alignment with EU law. The Finance Committee passed these comments lightly in its final statement (VaVM 44/2022), most likely due to time constraints and political pressure.

¹³⁰⁴ Normally this is not the main rule, but may appear when there is an EU-law connection, for example, due to cross-border situations of different treatment of a citizen from another EU Member State.

¹³⁰⁵ See Vanistendael as well as Lennaerts & Guzzerra. Note, that the principles do not question tax sovereignty, i.e. Member State power to define how national funding is sourced.

¹³⁰⁶ See Prechal, p. 6-7.

EU law, and the doctrines created by ECJ praxis, are quite extensively based on common features of EU Member States' constitutions¹³⁰⁷. These legal principles guide the ECJ in its decision-making. National courts need to apply EU law on the national level¹³⁰⁸ with an obligation to ask for a ruling from the ECJ¹³⁰⁹. This means that the ECJ is the final court judging the cases from an EU point of view¹³¹⁰.

As the pure fiscal interest impacts less the ECJ conclusions than in the Finnish pre-legislative control or in SAC procedures, the ECJ's enforcement capacity is better from a taxpayers' legal protection point of view. The enforcement strength is basically defined in very early ECJ praxis stating that the national court has to either adjust the rule to be in line with EU law, or not to apply the national rule at all in case the national court has no mandate to create rules, as the case is in Finland¹³¹¹. The ECHR case *Georgiou v. Greece* makes further an important statement about the right to a fair trial¹³¹².

The efficiency of EU law is naturally dependent on how seriously the national courts, in tax matters in Finland, finally the SAC takes the responsibility for referring

¹³⁰⁷ Vanistendael 2014, p. 33.

¹³⁰⁸ See for example ECJ C-283/81 *Cilfit* and ECJ C-144/23 *Kubera*.

¹³⁰⁹ Taxpayers relying on the single market and the fundamental rights created by the EC Treaty have a need to get the issue referred to the ECJ. If they have no possibility of securing the correct interpretation of Union law, it becomes merely only a theoretical option. The ECJ has created the *acte clair* (and *acte éclair*) principle in its *CILFIT* case. *Acte clair* means that each national court being the final instance is liable to ask for an advanced ruling from the ECJ if there are Union law topics and there is no existing court praxis in identical cases. Even though the principle leaves national courts room for assessment, it acts in favor of taxpayer's legal protection

¹³¹⁰ Case may end up in the ECJ also by the EU tribunal court, which is assessing European Commission decisions. The ECJ acts as a court of appeal for the tribunal court, ref to rules.

¹³¹¹ Consequence of a national law violation with Union law is examined in C-10/97 – C-22/97, *Ministero delle Finanze*. The ECJ stated that: 20. (...) in *Simmenthal*, the Court held that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals, setting aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule (...). That case-law has been reaffirmed on numerous occasions (...) and 21. It cannot therefore (...) be inferred from the judgment in *Simmenthal* that the incompatibility with Community law of a subsequently adopted rule of national law has the effect of rendering that rule of national law non-existent. Faced with such a situation, the national court is, however, obliged to disapply that rule, provided always that this obligation does not restrict the power of the competent national courts to apply, from among the various procedures available under national law, those which are appropriate for protecting the individual rights conferred by Community law (...). Further, case of *Georgiou v. Greece* (Application no. 57378/18) 4th March 2023 where the court formally stated that the infringement to refer the case based on Article 267 TFEU to the ECJ can be remedied by reopening the case and referring the case to the ECJ. See also case T-626/20 *Landwarme*.

¹³¹² *Ibid.*

the cases to the ECJ. Even though based on the fair trial rules, and the *acte clair* principle, national courts have this obligation. The practical interpretation of this obligation differs a lot between countries¹³¹³. Execution of the EU law enforcement may take time and effort, but even taking that into account the enforcement is stronger than the constitutional rights have in Finland on a stand-alone basis¹³¹⁴. This illustrates the importance of an appropriate legal approach and respect for EU law when applicable.

To promote the functioning of the EU internal market the European Commission should take a firmer approach towards those Member States that refuse to refer cases to the ECJ, such as Finland, Denmark and Sweden.

9.7 Responsible tax management – Attempt to eliminate abuse and gain fundamental rights

Aggressive tax planning and profit shifting were raised by multiple NGOs from early 2007 onwards. Different NGOs have proposed large losses on tax revenue, even though these reported numbers seem to be unreliable and result in simplified conclusions¹³¹⁵. Many of the reported profit shifting was referring to US companies' tax planning strategies, which as such were legally correct, but reviewing the substance the morality could be questioned. There was obviously a need to review the existing tax regulation.

The tax planning opportunities appeared as the business setup developed speedily, but tax regulation did not adjust and align with this development. Further, business objectives did not include tax as a measure, which resulted in tax management being separate from business. This silo approach enabled disconnected solutions, where substance and business objectives were thin. The result was a number of somewhat even artificial arrangements¹³¹⁶.

¹³¹³ See Bernitz 2010. The obligation to ask for a ruling from the ECJ may be somewhat confused by the CLIFIT doctrine (ECJ case C-283/81 Clifit and ECJ case C-144/23 Kubera), i.e. court has no obligation to ask for a ruling if the issue has been already solved or is so clear that no ruling is required. As this is rather a high-level statement it is applied differently in different EU Member States. Further, the Kobler principle (ECJ case C-224/01) creates quite a high threshold for the right to damages in case an EU Member state interferes with its obligations within EU law.

¹³¹⁴ In Sweden the EU law enforcement is weaker (see Bernitz) as the Swedish courts are for some reason reluctant to refer cases to the ECJ.

¹³¹⁵ Fuest, Spengel, Finke, Heckemeyer, and Nusser conclude that NGOs' estimates should be dealt with caution, p. 9.

¹³¹⁶ I would say that artificiality is the key challenge, perhaps more than transfer pricing when considering BEPS. Transfer pricing challenges originate from new kinds of

The OECD started a G-7-initiated tax-focused BEPS project to mitigate aggressive tax planning in order to tax the income where the profits are created. One objective was to change taxpayer behaviour. The final products were the BEPS proposals, multiple in numbers, tackling aggressive tax planning and profit shifting. These rules respected the idea of income being taxed where it is created. However, BEPS rules do not consolidate with business objectives and take tax management even further away from business¹³¹⁷.

Fuest, Spengel, Finke, Heckemeyer, and Nusser analysed different ways to tackle BEPS topics already in 2013. They identified most of the methods the OECD proposed and the EU later implemented. Their concern, however, was that at least some of the identified, and implemented, methods were blind to the true nature of the taxpayers' solutions¹³¹⁸. This is problematic as taxpayers have not only a legal but also a moral right to plan their business in the best possible way¹³¹⁹. This is where taxpayers' obligation to act responsibly steps in. If taxpayers make a clear commitment to responsible tax management, they commit clearly not to be involved in artificial setups or locate businesses in low-tax jurisdictions to reach tax benefits¹³²⁰.

businesses, i.e. digital businesses rather than artificial setups. The old model transfer pricing responds to traditional businesses, but not necessarily to digital businesses having data as a value driver.

¹³¹⁷ As tax rules become even more complex and technical, operative organisations are even more disconnected and failing to create commitment.

¹³¹⁸ Fuest, Spengel, Finke, Heckemeyer, and Nusser considered that for example restrictions in tax deductibility of interest cost will affect aggressive financial transactions, but equally, they impact also the “also arrangements which exist for good economic reasons”, p. 14.

¹³¹⁹ This right exists independently and it may result in a situation where the tax burden is difficult to explain and understand. The right to organise business in the best possible manner is accepted although at the same time, some studies start from how tax burden looks like in MNEs with an assumption that aggressive tax planning exists by definition. For example, Loretz presents still in 2019 conclusions that aggressive tax planning is a “firm/MNE-group-level phenomenon, aggregation to country-level is difficult” and that “Consolidated accounts (so far) bear little information for identification of ATP”, ATP meaning aggressive tax planning. It is important to note that in 2019 BEPS actions were already effectively in place. Alternatively, when looking at FIT's objectives for research around tax avoidance and tax evasion, the conclusions seem to be often based on statistical conclusions and tax authority reasoning rather than understanding what are the reasons behind tax assessment. All errors are not tax fraud or evasion, the issue is more complex (see Vero-oikeuden tutkimuspäivät 2023, Tampere). Therefore, I would state that equally assumption of MNEs' bad tax behaviour is a phenomenon.

¹³²⁰ This, however, does not eliminate the complexity of data and the outcomes. As discussed earlier, a term such as ETR is more complex than one would think. This is

I believe, that the OECD's and the EU's promotion of responsible tax management principles would have impacted taxpayer behaviour more than just a high volume of complex compliance rules¹³²¹. This would have required equal commitment from tax authorities.

My view is that responsible tax management principles¹³²² reply to multiple of the concerns raised by the OECD's BEPS projects, or the tax planning strategies identified by Fuest, Spengel, Finke, Heckemeyer, and Nusser. Taxpayers making this kind of public commitment connected to sufficient transparency should be entitled to the fundamental rights allowed by constitutions and EU law. I would even go as far as to state that diligent compliance with these kinds of principles should create an assumption of tax non-avoidance and create a higher burden of proof for tax authorities of tax avoidance or aggressive, non-wished schemes¹³²³.

Finally, I believe, that it is more a question of time before the EU's late directives are challenged legally based on the EU Treaty. Then we will see the final impact of taxpayers' rights and legal protection.

9.8 Tax authorities – Objective authority or an interested party

Tax authorities do not have an easy position in this discussion of taxpayers' legal protection. Tax authorities can surely feel pressure from NGOs failing to identify questionable arrangements, or at least arrangements that NGOs find questionable. The NGO pressure creates easily political pressure on tax authorities, not only for legislators. Under the pressure tax authorities may orient aggressively to tax assessments.

There are indicators that tax authorities' behaviour equally seems to be unwanted¹³²⁴. The basic assumption of tax authorities, in light of legislation, is that tax authorities are acting objectively and have no "interest" in the cases brought

due to different standards, such as IFRS, which are not well understood nor known by regulators resulting in outcomes that are not necessarily assumed. Each word in ETR is simple to understand, but how IFRS-based ETR reacts is far more complex. When approaching the issue of taxpayers' rights from a legal point of view more focus should be put on whether the setup is artificial or not, compare with Advocate General Emiliou's statement. This is clearly a responsible tax management issue.

¹³²¹ Taxpayers' commitment to comply with even the purpose of the law would have been stronger.

¹³²² See for example B-Team principles or best practice paper on tax management by EBTF.

¹³²³ This naturally means also that tax authorities, and most likely also the financial auditors, should review taxpayers' tax governance principles and processes to make sure that a taxpayer truly is committed to these principles.

¹³²⁴ See for example Knijnenburg's 2022 conclusions.

forward. As discussed, earlier tax authorities' statements are often tax-oriented, focusing only on tax consequences and have very thin considerations or understanding of business reasons, earning logic, and their legitimation¹³²⁵. When talking about tax avoidance, we most of the time face the question of substance and whether a setup is artificial. These questions can be solved only if there is a proper understanding of business logic in each of the cases to judge how artificial a setup is. The tax consequence is in this respect not that crucial as tax impacts are dependent on so many reasons, most of the time non-tax related.

In any case, it is clear that tax authorities do not have the authority to judge business reasons nor refer to tax benefits in case of choice between two legitimate business structures. Courts should neither consider tax authorities to be objective¹³²⁶. Secondly, I see that tax authorities' possibility to utilise tax avoidance rules has become more narrow and has a higher threshold as Pillar 2 tackles the objective of tax avoidance rules in a system-based, structural manner – it eliminates low taxation. This is the same issue that the ECJ referred to in the Danish cases: there is hardly any tax benefit if the transaction is covered by minimum tax rules¹³²⁷.

Tax authorities should similarly draft governance principles, based on law and tax authorities' mandate, to illustrate that tax authorities are acting equally in a respectful manner. Tax authorities should promote transparency of their processes and their commitments to them in order to illustrate that they and their statements earn to be respected as objective statements. This would be crucial for taxpayers' legal protection.

9.9 Political pressure and urgency

Taxpayers' legal protection is based on multiple levels, as Bentley has illustrated. Protection has traditional forms even though regulatory systems are changing, the fundamental rules and principles still work, sometimes earlier sometimes later. There is, however, one threat that is severe, is more alarming, and exists: urgency. Many of the questionable solutions that are executed often have a legitimate reason that should be supported. But as the topics are complex also the interference with them is complex. This means that political pressure and urgency will cover the complexity and true impacts of the planned regulation. We could name the Finnish extra profit tax for utilities, BEFIT, or Pillar 2 as examples of this. The true impacts are

¹³²⁵ Further, we have not seen such statements from tax authorities, where they would commit as an organisation to a “more likely than not” approach when assessing taxes. I would truly question why not.

¹³²⁶ This could happen for example by assessing the burden of proof rules.

¹³²⁷ This does not mean automatically higher actual tax as low taxation may be in accordance with the ultimate purpose of the law.

unknown, the rules are complex to comply with, and the dispute resolution has not been considered properly.

As a final remark, I would appoint urgency and political pressure as the worst enemies of taxpayers' legal protection even in a constitutional state. Unless the legislative process, including public stakeholder hearings, is including sufficient time and resources for the preparatory process to conclude how to design and draft the new rules also from economic freedom view, taxpayers' rights are too dependent on the reactive fundamental legal protective rules. Taxpayers' legal protection is important as it ensures balanced, well-working, and predictable tax legislation. This should be in the interest of all the stakeholders.

Sources

Literature

- Airaksinen, Manne, Pulkkinen, Pekka & Rasinaho, Vesa (2010) *Osakeyhtiölaki I*. Helsinki: Talentum.
- Albregtse, D.A., van Arendonk, H.P.A.M. (1996) *Taxpayer Protection in the European Union*. The Hague - London – Boston: Kluwer Law International.
- Andersson, Edward (2003) Skattetilägget, den finska skatteförhöjningen och Europakonventionen, In book Richard Arvidsson, Peter Melz & Christer Silfverberg (edit) *Festskrift till Gustav Lindencrona*. Stockholm, Nordstedts Juridikpp. 15–29.
- Andersson, Krister (2013) Base Erosion Profit Shifting – A New World Tax Order?. *Svensk Skattetidning* 2013:9, pp 659–687.
- Andersson, Thomas & Carneborn Christian (2012) HFD:s domar den 30 november 2011 avseende ränteavdragsbegränsningsreglerna – en kommentar.*Svensk Skattetidning* 2012:1, Norstedts Juridik, pp. 54–72.
- Andersson,Thomas, ”Något om föreslagen utvidgning av ränteavdragsbegränsningsreglerna”,*Svensk Skattetidning* (2012:9), pp. 711–733.
- Andre Peder (2012) Förhandsbesked direkta skatt andra halvåret 2011, *Skattenytt* 3/2012.
- van Arendonk, Henk, Engelen, Frank & Jansen, Sjaak (edit.) (2004) *A Tax Globalist The search for the borders of international taxation, Essays in honour of Maarten J. Ellis* Amsterdam: IBFD.
- Arvidsson, Richard, Melz, Peter & Silfverberg, Christer (edit) (2003) *Festskrift till Gustav Lindencrona*. Stockholm: Nordstedts Juridik.
- Atiyah, P. S. and Summers, R.S (1987) *Form and Substance in Anglo-American Law*. Oxford. Clarendon Press.
- Avi-Yonah, Reuven S. (2006) Corporate Social Responsibility and Strategic Tax Behaviour. University of Michigan Law School. https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1066&context=law_econ_archive&httpsredir=1&referer=. (loaded 9.2.2025).
- Baker, Philip (1991) *Double taxation agreements and international tax law: [A manual on the OECD Model Double Taxation Convention 1977]*. London: Sweet & Maxwell.
- Baerentzen, Susi (2020) Danish Cases on the Use of Holding Companies for Cross-Border Dividends and Interest: A New Test to Disentangle Abuse from Real Economic Activity? (January 9, 2020). In: *World tax journal*. - Amsterdam. - Vol. 12 (2020), no. 1; p. 3–52, Available at SSRN: <https://ssrn.com/abstract=4223085>.
- Barrett, Kevin Stanton, McGuirk, Anya M. & Steinberg, Richard (1997) Further evidence on the dynamic impact of taxes on charitable giving, *National Tax Journal Vol 50 no2* pp. 321–334.
- Bentley, Duncan (2007) *Taxpayers' Rights: Theory, Origin and Implementation*, The Netherlands: Kluwer Law International.
- Bernitz, Ulf (2010) *Förhandsavgörander av EU-domstolen, Rapport 2*. Stockholm, SIEPs. https://sieps.se/publikationer/2010/forhandsavgoranden-av-eu-domstolen--svenska-domstolars-hallning-och-praxis-2010/Sieps-2010_2.pdf. (loaded 9.2.2025).

- Bernitz, Ulf (2016) *Förhandsavgöranden av EU-domstolen: Utvecklingen av svenska domstolars hållning och praxis 2010–2015*. Stockholm: SIEPs.
- Bernitz, Ulf (2018) Preliminary Rulings to the CJEU and the Swedish Judiciary, Current Developments. In book Mattias Derlén & Johan Lindholm (edit.) *The Court of Justice of the European Union Multidisciplinary Perspectives*. Oxford And Portland, Oregon: Hart Publishing, pp 17–34.
- Brzeziński, Bogumil (2009) Taxpayers' rights: some theoretical issues. In book Włodzimierz Nykiel & Małgorzata Sęk (edit) *Protection of taxpayer's rights: European, international and domestic tax law perspective*: Warszawa: Oficyna. p. 17–32
- De Broe, Luc (2007) *International Tax Planning and Prevention of Abuse*. Amsterdam: IBFD.
- De Broe, Luc (2004) Hard times for emigration taxes in the EC in book Henk van Arendonk, Frank Engelen & Sjaak Jansen (edit.) *A Tax Globalist The search for the borders of international taxation, Essays in honour of Maarten J. Ellis* Amsterdam: IBFD. pp 210–236.
- Borkelind, Cecile (2014) *Principles of Law: Function, Status and Impact in EU Tax Law*. Amsterdam: IBFD.
- Costello, Cathryn (2006) The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe. *Human Rights Law Review* 6:1, pp. 87–130.
- Danon, Robert, Gutmann Daniel, Lukkien Margriet, Maisto Guglielmo, Jiménez, Adolfo Martín & Malek Benjamin (2021) The Prohibition of Abuse of Rights After the ECJ Danish Cases, *Intertax Volume 49, Issue 6/7* .
- Douma, Sjoerd (2008) The Principle of legal certainty: Enforcing international norms under community law. In book Sjoerd Douma & Frank Engelen (edit.) *The legal status of the OECD Commentaries*. Amsterdam: IBFD. pp. 217–250.
- Deak, Daniel (2009) Enforcement of taxpayers' rights in community law. In book Włodzimierz Nykiel and Małgorzata Sęk (edit) *Protection of taxpayer's rights: European, international and domestic tax law perspective*: Warszawa: Oficyna.
- Dourado, Ana Paula & Dias, Augusto Silva (2011) Information Duties, Aggressive Tax Planning and nemo tenetur se ipsum accusare in the light of Art 6(1) of ECHR (2011), in book Gerog Kofler, Miguel Poiaras Maduro and Paquale Pistone (edit) *Human Rights And Taxation in Europe and the World*, Amsterdam: IBFD. pp. 131–151.
- Dourado, Ana Paula (2014) No Taxation without Representation in the European Union: Democracy, Patriotism and Taxes. In book Cecile Brokelind (edit) *Principles of Law: Functioning, Status and Impact in EU Tax Law*. Amsterdam. pp. 205–230
- Douma, Sjoerd & Engelen, Frank. The Legal Status of the OECD Commentaries. Amsterdam: IBFD. 2008.
- Drake, Katharine, D., Hamilton, Russ, Lusch, Stephen J (2020) Are declining effective tax rates indicative of tax avoidance? Insight from effective tax rate reconciliations, *Journal of Accounting and Economics*, Vol 70, Issue 1, Elsevier. 2020. <https://www.sciencedirect.com/science/article/abs/pii/S0165410120300197>. (loaded 8.2.2025).
- Du Toit, Charl P. (1999) *Beneficial Ownership of Royalties in Bilateral tax Treaties*. Amsterdam: IBFD Publications BV.
- Dyreg, Scott and Hanlon, Michelle and Maydew, Edward L (2007) Long-Run Corporate Tax Avoidance. *Accounting Review*, Vol. 83, No. 1, 2007, Available at SSRN: <https://ssrn.com/abstract=1017610>. (loaded 9.2.2025).
- Eckl, Petra (2007) Tightening of the German Anti-Treaty Shopping Rule, *European Taxation* 47, n 3, pp. 120–125.
- van der Enden, Eelco and Klein, Bronte, Good Tax Governance? ...Govern Tax Good! (May 1, 2020). Available at SSRN: <https://ssrn.com/abstract=3610858> or <http://dx.doi.org/10.2139/ssrn.3610858> (loaded 8.2.2025).
- Ensing Soresen, K. (2006) *Abuse of rights in Community law: A principle of substance or merely rhetoric?* *Common Market Law Review* Vol.43, No.2, April 2006, p423–459.

- Englisch, Joachim (2011) The Impact of Human Rights on Domestic Substantive Taxation – the German Experience. In book Georg Kofler, Miguel Poiars Maduro and Pasquale Pistone (edit) *Human Rights and Taxation in Europe and the World*. Amsterdam: IBFD. pp 285–302.
- Englisch, Joachim (2014) Ability to Pay. In book Cecile Brokelind (edit) *Principles of Law: Functioning, Status and Impact in EU Tax Law*. Amsterdam: IBFD. pp 439–460.
- Englisch, Joachim (2021) *Effective Minimum Tax Implementation by the EU: Which Alternatives??.* Kluwer International Tax Blog. <https://kluwertaxblog.com/2021/10/25/effective-minimum-tax-implementation-by-the-eu-which-alternatives/>. (loaded 9.2.2025).
- Fuest, Clemens; Spengel, Christoph; Finke, Katharina; Heckemeyer, Jost H.; Nusser, Hannah (2013) Profit shifting and 'aggressive' tax planning by multinational firms: Issues and options for reform, ZEW Discussion Papers, No. 13-078, Zentrum für Europäische Wirtschaftsforschung (ZEW), Mannheim, <https://madoc.bib.uni-mannheim.de/34854/1/dp13078.pdf>. (loaded 8.2.2025)
- Fuller, Lon L. (1964) *The Morality of Law*. New Haven and London, Yale University press.
- Gommers, Sam. (2019) Danish Dynamite: The 26 February 2019 CJEU Judgments in the Danish Beneficial Ownership Cases. *EC Tax Review*. 28. 270–299. 10.54648/ECTA2019032.
- Haapaniemi, Matti (2001) *Virallisperiaate tuloverotuksessa ja tuloveroprosessissa: tutkimus viranomaisaloitteisuutta osoittavien normien synnystä ja kehityksestä*. Helsinki: Suomalainen lakimiesyhdistys.
- Hallberg, Pekka, Karapuu, Heikki, Ojanen, Tuomas, Scheinin, Martin, Tuori, Kaarlo and Viljanen, Veli-Pekka (edit.) (2011) *Perusoikeudet*. Helsinki: Tallentum Media Oy.
- Helenelund, Jan-Erik, Luoto, Ilpo, Mäntylä, Niina and Siikavirta, Kristian (edit.) (2012). *Julkista – yksityistä; millaisissa rakenteissa? Offentligt – privat; i hurdana strukturer?* Vaasa: Acta Wasaensia 265.
- Helminen, Marjaana (2013). The Principle of Elimination of Double Taxation under EU law – Does it Exist? In book Matti Urpilainen and Veikko Vahtera (edit). *Minne Menet Vero-Oikeus?* Turku. pp. 21–38.
- Helminen, Marjaana (2014) Mahdollistaako VML 31§ etuyhteyslainan uudelleenluokittelun ilman VML 28§:n tukea?. *Defensor Legis 1/2014* pp. 85–96.
- Hemels, Sigrid (2014) Fairness: A legal principle in EU tax Law? In book Cecile Brokelind (edit.) *Principles of Law: Function, Status and Impact in EU Tax Law*. Amsterdam: IBFD. pp. 413–436
- Hofstätter, Bernhard (2005) *A cascade of rights, or who shall care for little Catherine? Some reflections on the Chen case*. European Law Review no 4, vol 30, pp. 548–558.
- Howard, Andrew (2019) The Danish conduit cases: a landmark ruling on withholding tax and abuse of rights. *Tax Journal* 21 March 2019.
- Hultqvist, Anders (1995) *Legalitetsprincipen vid inkomstbeskattningen*. Stockholm: Juristförlaget.
- Hultqvist, Anders (2012) Affärsmässigt motiverad – en analys av bestämmelserna om ränta på koncerninterna lån. *Svensk skattetidning*, pp. 122–141.
- Hultqvist, Anders (2014) *Om beredningsprocessen för skattelag.*, Stockholm: Svenskt Näringsliv.
- Hultqvist, Anders (2015) Hur vag får en skattelag va?, Stockholm, Svensk Näringsliv.
- Isenbaert, Mathieu (2010), EC Law and the Sovereignty of the Member States in Direct Taxation (March 1, 2010). IBFD Doctoral Series; Vol. 19. IBFD, 2010., Available at SSRN: <https://ssrn.com/abstract=4720618>. (loaded 8.2.2025).
- Isonmaa-Myllymäki, Anita (2017) Konsernin sisäisen rahoituksen markkinaehtoisuus. Markkinaehtoperiaatteen soveltamisen oikeudelliset rajoitukset etuyhteysluotonannossa (väitöskirjan esittely). *Verotus 1/2017*. pp. 99–107.
- Jimenez, Martin Adolfo (2004) *The 2003 Revision of the OECD Commentaries on the Improper Use of Tax Treaties: A Case for the Declining Effect of the OECD Commentaries?* (January 1, 2004). Available at SSRN: <https://ssrn.com/abstract=2392517> or <http://dx.doi.org/10.2139/ssrn.2392517>
- Jones, Avery J.F. (2006) The Origin of Expressions in the OECD Model Convention, *Bulletin for International Taxation*, Volume 60, no 6.

- Juusela, Janne (1998) *Kansainväliset sijoitukset ja verotuksen tehokkuus. Oikeustieteellinen tutkimus verotuksen tehokkuudesta ja verovalvonnan sääntelystä erityisesti kansainvälisiä portfoliosijoituksia silmällä pitäen*. Helsinki: Lakimiesliiton Kustannus.
- Juusela, Janne (2018) Legaliteettiperiaate verotuksessa. *Defensor Legis* 4/2018, pp s. 449–467.
- Jyränki, Antero (2003) *Valta ja vapaus*. Helsinki: Talentum.
- Karapuu, Heikki (2011) Perusoikeuksien käsite ja luokittelu in book Pekka Hallberg, Heikki Karapuu, Tuomas Ojanen, Martin Scheinin, Kaarlo Tuori, Veli-Pekka Viljanen *Perusoikeudet*. Helsinki, Tallentum Media Oy. 2011 p. 63–68.
- Karhu, Juha (2003) Perusoikeudet ja oikeuslähdeoppi. *Lakimies* 5/2003, pp 789-807.
- Kerikmäe, Tanel (edit.) (2014) *Protecting Human Rights in the EU, Controversies and Challenges of the Charter of Fundamental Rights*. New: York, Springer.
- Ketels, Leen (2021) KPI's sturen de belastingheffing, Trends Money Talk 32.9.2021.
- Knechtle, Arnold A & Weisflog, W. E (1979) *Basic problems in international fiscal law*. Amsterdam: Kluwer.
- Knuts, Märten (2010) *Kursmanipulation på värdepappersmarknaden*. Helsinki: Suomalainen Lakimiesyhdistys.
- Knuutinen, Reijo (2009) *Muoto ja sisältö vero-oikeudessa – erityistarkastelussa rahoitus ja sijoitusinstrumentit*. Helsinki: Suomalainen lakimiesyhdistys.
- Knuutinen, Reijo (2012) *Verosuunnittelua vai veron kiertämistä*. Helsinki: Sanoma Pro Oy.
- Knuutinen, Reijo (2014) *Verotus ja yrityksen yhteiskuntavastuu*. Vantaa: Lakimiesliiton kustannus.
- Kofler, Georg, Poiars Miguel and Pistone, Pasquale (edit) (2011) *Human Rights and Taxation in Europe and the World*. Amsterdam. IBDF.
- Tolvanen, Matti, & Svensk, Niko (edit) (2013) *Vero ja Finanssi, Matti Myrsky 60 vuotta*. Helsinki: Edita.
- Kovacs Kal, Miklos (2013) En säkerhetsventil utan säkerhet, en analys av rekvisitet “affärsmässigt motiverat” i 24 kap. 10 e § IL. *Juridisk Publikation* 2/2012. p 229–247.
- Lang, Andrew, T.F. (2013) The Legal Construction of Economic Rationalities? *Journal of Law and Society* vol 40 no 1, pp. 155–171
- Lang Michael (2004) *Double non-taxation – General Report: Conflicts of Qualification and Double Non-Taxation. Cahiers de droit fiscal international*, Volume 89a. pp. 95–102.
- Lennaerts, Koen & Gutierrez-Fons José A. (2010) The constitutional allocation of powers and general principles of EU Law. *Common Market Law Review* 47. pp. 1629–1669.
- Linnakangas, Esko (2010) Hallintotuomioistuinten veropäätösten julkaisemisesta ja varsinkin julkaisemattomuudesta, *Verotus*, pp. 245–251.
- Lehtonen, Asko (1986) *Veropetoksesta. RL 38 luvun 11§:n i momentin tunnusmerkistöstä lähinnä tulo- ja varallisuusveron kannalta*. Helsinki: Suomen Lakimiesliiton Kustannus Oy.
- Lehtonen, Asko (2012) Tiedonantovelvollisuus tuloverotuksessa ja perustuslainmukaisuus. In book Jan-Erik Helenelund, Ilpo Luoto, Niina Mäntylä and Kristian Siikavirta (edit) *Julkista – yksityistä; millaisissa rakenteissa? Offentligt – privat; i hurdana strukturer?*. Vaasa. pp. 29–47.
- Mason, Ruth, (2021) The 2021 Compromise (July 26, 2021). 172 Tax Notes Fed. 569 (2021), Available at SSRN: <https://ssrn.com/abstract=3904054>. (loaded 9.2.2025).
- Murphy, Colleen (2005) Lon Fuller and the Moral Value of the Rule of Law. *Law and Philosophy* Vol. 24, No. 3, pp. 239-262.
- Murphy, Liam and Nagel, Thomas (2004) *The Myth of Ownership*. Oxford: Oxford University Press.
- Myrsky, Matti & Linnakangas, Esko (2007) *Verotusmenettely ja Muutoksenhaku*. Helsinki: Talentum.
- Myrsky, Matti (2012) Perustuslakivaliokunta ja verotus. *Verotus* 5/2012, pp.482–494.
- Mäenpää, Olli (2008) *Oikeus hyvään hallintoon*. Helsinki: Helsingin Yliopiston oikeustieteellinen tiedekunta. Yliopistopaino.
- Niskala, Mikael & Palmuaro, Sirkku (2023) *Uudet kestävyysraportointivaatimukset*. Helsinki: Alma Talent.

- Nykiel Wlodzimirz, Sek Malgorzata (edit) (2009) *Protection of Taxpayer's Rights. European, International and Domestic Tax Law perspective*, Warsaw: Oficyna Wolters Kluwer Polska Sp.z.o.o.
- Nyman-Metcalf, Katrin, Kumar Dutt, Pawan and Chochia, Archil (2014) The Freedom to Conduct Business and the Right to Property: The EU Technology Transfer Block Exemption Regulation and the Relationship Between Intellectual Property and Competition Law. In book Tanel Kerikmäe (edit) *Protecting Human Rights in the EU*. New York: Springer, pp. 37–71.
- Ojanen, Tuomas (2008) KHO 2007:77 – Pro fisco, contra legem constitutionalem. *Lakimies* 2/2008. pp. 299–310.
- Ossa, Jaakko (2002) *Sijoitustoiminnan verotus ja verosuunnittelu*. Helsinki: Lakimiesliiton kustannus.
- Papis, Marta (2014) The Principle of Neutrality in EU VAT. In book Cecile Brokelind (edit) *Principles of Law: Functioning, Status and Impact in EU Tax Law*. Amsterdam. pp. 365–388.
- Pechler, Edward & Rijn, Antoinette van (1997) Taxpayers' protection in five member countries of the European Union. *EC tax review*.1997/2, pp. p. 116–120.
- Persson Österman, Roger (2011) *The new Swedish anti-avoidance rules – are they in conformity with community law?* In publication Svensk Näringsliv Report Anti-abuse tax measures – Re-regulation of the markets or steps necessary to protect the revenue base? Stockholm. pp. 32–38. www.svensktnaringsliv.se/obsolete_multimedia/tnjuzq_tax-report-anti-abuse-tax-measures-re-regulation-of-the-markets-o_1038825.html/Tax+Report+Anti-abuse+tax+measures++Re-regulation+of+the+markets+or+steps+necessary+to+protect+the+revenue+base%253F.pd. (loaded 8.2.2025).
- Pijl, Hans (2008) Beyond legal bindingness. In book Sjoerd Douma and Frank Engelen (edit), *The Legal Status of the OECD Commentaries*. Amsterdam: IBFD. pp. 95–130
- Pistone, Pasquale (edit) (2009) *Legal Remedies in European Tax Law*. Amsterdam: IBFD.
- Posner, Richard A. (2011) *Economic Analysis of Law* (Eighth edition). New York: Aspen Publishers.
- Prechal, Sacha (2010) Competence Creep and General Principles of Law. *Review of European Administrative Law*, vol 3, nr 1, pp. 5–22.
- Påhlsson, Rober (2014) Equality in Taxation: Reflections on the Social Construction of Comparability in Tax Law. In book Cecile Brokelind (edit) *Principles of Law: Functioning, Status and Impact in EU Tax Law*. Amsterdam: IBFD. pp. 151–160.
- Quereshi Asif H (1987) The freedom of state to legislate in fiscal matters under general international law. *Bulletin for international fiscal documentation: publication of the International Bureau of Fiscal Documentation; official organ of the International Fiscal Association (IFA)*, pp. 14–21
- Raitasuo, Santtu (2018) Ideologinen laintulkinta vero-oikeudessa. *Lakimies* 3-4/2018, pp. s. 363–386.
- Rajamäki, Anu (2015) Hybridijärjestelyt BEPS -hankkeessa ja EU:ssa. *Verotus* 3, pp. 262–272.
- Romano, Carlo (2002) *Advance Tax Rulings and Principle of Law. Towards a European Tax Ruling System?* Amsterdam: IBDF Doctorial Series.
- Ross, Malcom (2006) Effectiveness in the European legal order(s): beyond supremacy to constitutional proportionality?. (2006) 31 *E.L.Rev.*, pp. 476–498.
- Almendral, Violeta Ruiz (2005) 'Tax Avoidance and the European Court of Justice: What is at Stake for European General Anti-Avoidance Rules?'. 33, *Intertax, Issue 12*, pp. 562–583, <https://kluwerlawonline.com/journalarticle/Intertax/33.12/TAXI2005091>. (loaded 10.2.2025).
- Rust, Alexander & Fort, Eric (edit) (2012) *Exchange of Information and Bank Secrecy*. Amstedam: Wolter Kluwer International BV.
- Rust, Alexander (2012) Data protection as Fundament right. In book Alexander Rust and Eric Fort (edit) *Exchange of Information and Bank Secrecy*. Amstedam: Wolter Kluwer International BV, pp. 175–195.
- Ryynänen, Olli (2000) Peitellyn osingon verotuksen edellytyksistä erityisesti silmällä pitäen veron kiertämisen yleislauseketta. *Defensor legis* 1/2000, pp. 108–129.
- Ryynänen, Olli (2000) *Bevisning i inkomstbeskattningen*. Helsingfors: Svenska Handelshögskolan.

- Samuelsson, Lars (2012) Regeringens slutliga förslag om effektivare ränteavdragsbegränsningar. *Skattenytt* 2012, pp. 820–830.
- Saraviita, Ilkka (2011) *Perustuslaki*. Helsinki: Talentum.
- Savolainen, Vesa & Teperi, Vesa (2000) *Jälkiverotus*. Helsinki: Kauppakaari.
- Scacia, di Gino (2019) Proportionality and the Balancing of Rights in the Case-law of European Courts. *federalism.it* no 4. <https://www.sipotra.it/wp-content/uploads/2019/03/Proportionality-and-the-Balancing-of-Rights-in-the-Case-law-of-European-Courts.pdf>. (loaded 10.2.2025).
- Sevón, Leif, Frände, Dan, Olsson, Olof, Rynänen, Olli & Tikka, Kari S. (edit) (2003) *Festskrift till Edward Andersson 31.12.2003*. Helsingfors: Juridiska föreningen I Finland.
- Siitari-Vanne, Eija (2005) *Hallintolainkäytön tehostaminen*. Helsinki: Suomalainen lakimiesyhdistyksen julkaisuja A-sarja no: 265.
- Jukka Snell (2015) 'Fundamental Rights Review of National Measures: Nothing New under the Charter?', 21, *European Public Law, Issue 2*, pp. 285–308, <https://kluwerlawonline.com/journalarticle/European+Public+Law/21.2/EURO2015015>.
- Soikkeli, Lauri (2013) *Luottamuksensuoja verotuksessa*. Helsinki: WSOY.
- Spavental, Eleanor (2004) From Gebhard to Carpenter: towards a (non-) Economic Constitution. *Common market law review*, 41 (3), pp. 743–773.
- Spaventa Eleanor (2007) Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Decision in Pupino. *European Constitutional Law Review*. 2007;3(1):5–24. doi:10.1017/S1574019607000053
- Terra, B. J. M. & Wattél, Peter Jacob (2005) *European Tax Law*. The Hague : Kluwer Law International.
- Tikka, Kari S. (1999) Verolakien ja perustuslainmukaisuuden tutkimisesta tuomioistuimissa. *Lakimies* 6–7, pp. 982–994.
- Tikka, Kari (1996b) Anmälan av Anders Hultqvist. Legalitetsprincipen vid inkomstbeskattningen, Juristförlaget, 1995 / SN 1996.
- Tikka, Kari. (1996) Ennakkoratkaistu ja ennakkotiedot: uusi ennakkokannanottojen järjestelmä verotukseen. *Verotus*, pp. 462–469.
- Tikka, Kari S. (1972) *Veron minimoinnista*. Helsinki: Förlagsbolaget Judex Kustannusyhtiö.
- Tikka, Kari (1982) Vad avses med rättsäkerheten i beskattningen. In book *Rättsäkerheten i beskattningen*. Rapporter vid Nordiska skattevetenskapliga forskningsrådets seminarium I Helsingfors I oktober 1982. Nordiska skattevetenskapliga forskningsrådets skriftserie. NSFS 12, Göteborg, pp. 89–118.
- Traversa, Edoardo and Pirlot, Alice (2014). Tax Sovereignty and Territoriality under Siege: How Far Should the EU Freedoms of Movement impact on the Territorial Allocation of Taxing Power between Member States? In book Cecile Brokelind (edit) *Principles of Law: Functioning, Status and Impact in EU Tax Law*. Amsterdam: IBFD. pp.125–149.
- Urpilainen, Matti (2012) *Vapaa liikkuvuus ja verosuvereniteetti Euroopan Unionin sisämarkkinoilla*, Vantaa: Lakimiesliiton kustannus.
- Urpilainen, Matti (2013) Onko VML 28 §:n veron kiertämistä estävä yleislauseke menettämässä tehonsa? In book Matti Urpilainen, & Veikko Vahtera (edit.): *Minne menet vero-oikeus? Juhlaulkaisu Raimo Immoselle*. Turku: Turun kauppakorkeakoulun julkaisuja, sarja C pp. 197–214.
- Urpilainen, Matti (2021) Kansainvälinen vero-oikeus murroksessa: sääntelyalan modernisoitumisen askelmerkkejä. *Lakimies* 7–8/2021, pp. 1312–1332.
- Van Raad, Kees (1988) *Non discrimination in international tax law*. Netherlands: Kluwer Law International.
- van Rijn, APM (1998) A Comparative Study of Taxpayer protection in Five Member. In book D.A. Albrechtse and H.P.A.M. van Arendonk (edit) *Taxpayer Protection in the European Union*. The Hague – London – Boston, pp. 45–53.

- Van Thiel, Servaas (2009) Refund of Taxes and Charges Collected Contrary to community Law, In book Pasquale Pistone (edit) *Legal Remedies in European Tax Law*, Amsterdam: IBFD, pp. 287–305.
- Van Thiel, Servaas (2002) *Free Movement of persons and Income Tax Law: The European Court in Search of Principles*. Amsterdam: IBFD.
- Van Thiel, Servaas: Is there a Need for International Enforcement of Human Rights in the Tax Area? In book Georg Kofler, Miguel Poirares Maduro and Pasquale Pistone (edit); *Human Rights and Taxation in Europe and The World*, Amsterdam IBFD, pp. 153–184.
- Van Weeghel, Stef (1998) *The Improper Use of Tax Treaties, With Particular Reference to the Netherlands and the United States*. Amsterdam: Kluwer Law International.
- Vanistendael, Frans (2006) Halifax and Cadbury Schweppes: One Single European Theory of Abuse in Tax Law?, *EC Tax Review vol 16, issue 4*, pp. 192–195.
- Vanistendael, Frans (2011) Global Law and the Search for Constitutional Pluralism. In book Georg Kofler, Miguel Poirares Maduro and Pasquale Pistone (edit) *Human Rights and Taxation in Europe and the World*. Amsterdam: IBFD. pp. 185–197.
- Vanistendael, Frans (2014) The Role of (Legal) Principles in EU Tax Law. In book Cecile Brokelind (edit) *Principles of Law: Functioning, Status and Impact in EU Tax Law*. Amsterdam: IBFD. pp. 29–49.
- Vuorenpää, Mikko (2010) Veronkorotus ja kielto käsitellä samaa asiaa kahdesti - EIT Jukka Ruotsalainen vs. Suomi 16.6.2009, *Lakimies 1/2010*, pp. 94–104.
- Vuorenpää, Mikko (2013) Veronkorotus ja ne bis in idem -kielto. In book Urpilainen, Matti ja Vahtera, Veikko (toim.): *Minne menet vero-oikeus? Juhlajulkaisu Raimo Immoselle*. Turun kauppakorkeakoulun julkaisuja, sarja C, Turku 2013 pp. 283–296.
- Ward, David A (QC) (2008) Is there an obligation in international law of OECD Member countries to follow the Commentaries on the Model? In book Sjoerd Douma and Frank Engelen (edit), *The Legal Status of the OECD Commentaries*. Amsterdam, pp. 73–94.
- Wattel, Peter J. (2014) Access to Effective Legal Remedy. In book Cecile Brokelind (edit) *Principles of Law: Functioning, Status and Impact in EU Tax Law*. Amsterdam: IBFD. pp. 183–204.
- Weber, Dennis (2005) *Tax Avoidance and the EC Treaty Freedoms, A Study of Limitations under European Law to the Prevention of Tax Avoidance*. Amsterdam: Kluwer Law International.
- Weber, Dennis, Sirithaporn, Thidaporn (2014) Legal Certainty, Legitimate Expectations, Legislative Drafting, Harmonization and Legal Enforcement in EU Tax Law. In book Cecile Brokelind (edit) *Principles of Law: Functioning, Status and Impact in EU Tax Law*. Amsterdam: IBFD. pp. 235–272.
- Weckström, Jouni (2015) (I) Veron kiertämisen tunnistaminen, osa I. *Verotus 4*, pp. 385–400.
- Weckström, Jouni (2015) (II) Veron kiertämisen tunnistaminen, osa II. *Verotus 5*, pp. 507–517.
- Wheeler, Joanna (2005) The Attribution of Income to a Person for Tax Treaty Purposes. *World tax journal* Vol. 3 (2011), no. 1, pp. 39–175.
- Wikström, Kauko (2003) Beskattningen och konstitutionen. In book Leif Sevón, Dan Frände, Olof Olsson, Olli Rynänen, Kari S. Tikka (edit) *Festskrift till Edward Andersson 31.12.2003*. Juridiska föreningen i Finland, Helsingfors 2003, pp. 411–427.
- Wikström, Kauko (2013) Millä tavalla tuloverotusta pitää uudistaa? In book Matti Urpilainen & Veikko Vahtera (edit) *Minne menet vero-oikeus? Juhlajulkaisu Raimo Immoselle*. Turku: Turun kauppakorkeakoulun julkaisuja, sarja C.
- Wikström Kauko, Ossa Jaakko & Urpilainen Mati: *Vero-oikeuden yleiset opit*, Kauppakamari, 2015.
- Wouters, Jan and Vidal, Marten (2008) The OECD Model Tax Convention Commentaries and the European Court of Justice: Law, guidance, inspiration? In book Sjoerd Douma and Frank Engelen (edit), *The Legal Status of the OECD Commentaries*. Amsterdam: IBFD. pp. 195–216.
- Zalasinski, Adam (2014) The Principle of Proportionality and (European) Tax Law. In book Cecile Brokelind (edit) *Principles of Law: Functioning, Status and Impact in EU Tax Law*. Amsterdam: IBFD, pp. 303–316.

Äimä, Kristiina (2011): *Veroprocessoikeus*. Helsinki: Wsoypro.

Seminars

- Anderson, Edward: Verotuksen korot, viivekorot, veronlisäykset ja veronkorotukset tarkasteltuina myös perustuslain ja ihmisoikeussopimuksen valossa, Presentation Helsinki University tax day 11.12.2009.
- Andersson Krister: Assessing tax Revenue Protecting Measures: the increased use of anti—abusive measure and tax incentives. Marcus Evans, May 13-14 2013, Monte Carlo.
- Andersson, Krister Turku University international tax seminar, Turku, 2016.
- Angel, Benjamin (2024) Tax Transparency in Europe. CSR Europe & Fair Tax Foundation, Tax Responsibility and Transparency Index, High level policy event Brussels
- Baker, Philip (2018) Limitations of transparency and protection of tax payer. The right to privacy and data protection. EATLP seminar "Tax transparency", EATLP Congress, Zurich.
- Beereboot, Jos (2018) Business perspective on transparency. EATLP Congress, Zurich.
- Biebel, Reinhard (2017). Transparency and Dispute Resolution. Helsinki, Tampere and Turku University international tax seminar, Helsinki.
- Brokelind, Cécile (2019) Mismatches in EU Tax Law. ? IFA Nordic tax seminar, Helsinki.
- De Raedt, Sylvie (2018) Procedural And Judicial Protection. EATLP Congress, Zurich.
- Dourado, Ana Paula & da Palma Borges, Ricardo (2007): The Acte Clair in EC Direct Tax Law, IBDF, GREIT conference, Lisbon.
- Ehrke-Rabel, Tina (2018) Third parties as supplementary sources of tax transparency. EATLP Congress, Zurich.
- Farmer, Paul (2016) EU Law Framework And Constraints For The Implementation Of Beps. Turku University international tax seminar, Turku.
- Helminen, Marjaana (2016) The BEPS proposals against hybrid mismatch arrangements in light of EU law. Turku University international tax seminar, Turku.
- Hongler, Peter (2018) Limitations of transparency and protection of the tax payer, Tax secrecy. EATLP Congress, Zurich
- Hultqvist, Anders (2016) BEPS project in Sweden in relation to the constitutional aspect. Turku University international tax seminar, Turku.
- Hultqvist, Anders (2018) Roles and responsibilities in prevention of tax avoidance. Are we in or out of balance? Helsinki, Tampere and Turku University international tax seminar, Helsinki.
- Van Den Hurk, H. & Huibregtse, S. (2022) White paper on Tax Footprints. GTC conference, Amsterdam.
- Knijnenburg, Erik (2022) White Paper on Code of Conduct: Principles for Tax Authorities, GTC conference, Amsterdam.
- Lehtonen, Asko (2012) Tiedonantovelvollisuus verotarkastuksessa. TAL-Summit.
- Kotakorpi, Kaisa (2023) Verotutkimuksen huippuyksikkö, Vero-Oikeuden Tutkimuksen Päivä, Tampere.
- Lehtonen, Asko (2012) Verovelvollisen ja verokonsultin tiedonantovelvollisuus, Suomen veroasiantuntijat ry:n vuosikokous.
- Loretz, Simon (2019) Aggressive Tax Planning Indicators, IFF Task Force, , Geneva, Wifo .
- Mitchell, Daniel (2013) The Anti-Tax Competition agenda and threats to por-growth corporate tax policy. Marcus Evans, Monte Carlo.
- DeRuitter, Marlies (2017) The role of transparency in taxing multinational groups in the post-BEPS world. Helsinki, Tampere and Turku University international tax seminar, Helsinki.
- DeRuitter, Marlies (2018) Interaction between anti-abuse rules and tax treaties. Helsinki, Tampere and Turku University international tax seminar, 2018, Helsinki.

- Seer, Roman (2018) Purpose and Problems of Tax Transparency – the legal perspective. EATLP Congress, Zurich.
- Simon Loretz (2019) Aggressive Tax Planning Indicators. IFF Task Force, Geneva WIFO. Stevens, Stan (2018). New instruments to create tax transparency. EATLP Congress, Zurich. Tang, Paul (2024): Keynote speech. CSR Europe & Fair Tax Foundation, Tax Responsibility and Transparency Index, High level policy event, Brussels.
- Penttilä, Seppo (2022) Tampereen Yliopiston vero-oikeuden tutkimuksen päivä, Tampere
- Vanistendael, Frans (2016) Conflicting concepts of tax avoidance: EU and BEPS. Turku University international tax seminar, Turku.
- Vanistendael, Frans (2019) ATAD: From Abuse to Base Erosion, How did we get there? IFA Nordic tax seminar, Helsinki. Van Thiel, S (2009). Confédération Fiscale Européenne, contribution to the 50th anniversary book of the Confédération Fiscale Européenne (first draft). Stockholm 2009.

Reports and publications

- An Roinn Aergeadais Deptment of Finance (2018), Tax Policy, Corporation Tax, Tax Strategy Group TSG 18/01. <https://assets.gov.ie/4435/131218110423-866ee0fd7f344ba6ad5fb8facc669c1.pdf>. (loaded 8.2.2025).
- Australian Government, Australian Taxation Office (2020) About ATO, our key commitments. <https://www.ato.gov.au/about-ato/who-we-are/executive-and-governance/key-committees/>. (loaded 9.2.2025).
- Australian Government, Australian Taxation Office (2025) Privately owned and wealthy groups: Information on tax obligations and compliance and assurance programs to help privately owned and wealthy groups. <https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/privately-owned-and-wealthy-groups>. (loaded 9.2.2025).
- B Team (2018) A New Bar for Responsible Tax: The B Team Responsible Tax Principles. www.bteam.org/our-thinking/reports/responsible-tax-2. (loaded 7.2.2025)
- European Commission (2017) Aggressive tax planning indicators, Final Report. TAXATION PAPERS Taxation and Customs Union WORKING PAPER No 71 – 2017. https://taxation-customs.ec.europa.eu/system/files/2018-03/taxation_papers_71_atp_.pdf (loaded 7.2.2025).
- European Commission (2020) Reflections on the EU objectives in addressing aggressive tax planning and harmful tax practices, final report. <file:///E:/Users/Omistaja/Downloads/reflections%20on%20the%20eu%20objectives%20in%20addressing%20aggressive-KP0419785ENN.pdf>. (loaded 8.2.2025)
- European Parliament (2015) Bringing transparency, coordination and convergence to corporate tax policies in the European Union, Research paper by Dr Robert Dover, Dr Benjamin Ferrett, Daniel Gravino, Professor Erik Jones and Silvia Merler. [https://www.europarl.europa.eu/RegData/etudes/STUD/2015/558773/EPRS_STU\(2015\)558773_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/558773/EPRS_STU(2015)558773_EN.pdf). (loaded 8.2.2025).
- European Parliament (2023) Measures tackling aggressive tax planning in the national recovery and resilience plans. [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/745704/EPRS_BRI\(2023\)745704_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/745704/EPRS_BRI(2023)745704_EN.pdf). (loaded 8.2.2025).
- Bilicka, Katarzyna, Dubinina, Evgeniya, Janský, Petr (2023) Fiscal Consequences of Corporate Tax Avoidance, EU Tax Observatory Working Paper No. 18, EU Tax Observatory. https://www.taxobservatory.eu/www-site/uploads/2023/06/EUTO_WP18_Fiscal-Consequences-of-Corporate-Tax-Avoidance_June2023.pdf. (loaded 8.2.2025).
- Finnwatch (2017) Verovälttelyn arkkitehdit, Kartoitus Suomen verosuunnittelumarkkinoista. finnwatch.org/images/pdf/Verovalttelyn_arkkitehdit_FINAL.pdf. (loaded 7.2.2025).

- Linnakangas, Esko (2010) Verotuksen kehittämisestä. Lausunto Hetemäen työryhmän väliraportista, Helsinki, Valtiovarainministeriön julkaisuja 35/2010.
- Ministry of Justice, Finland, Lainkirjoittajan opas Kansallisten säädösten valmistelua koskevat ohjeet. <https://lainkirjoittaja.finlex.fi/>. (loaded 8.2.2025).
- Norges Bank Investment management: Tax and transparency Expectations of <https://www.nbim.no/contentassets/29f69f7ae81449f9adc88a32aa3de8c8/tax-and-transparency.pdf>. (loaded 8.2.2025)
- OECD (2011) *OECD Guidelines for Multinational Enterprises, 2011 Edition*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264115415-en>. (loaded 8.2.2025).
- OECD (2013) Action Plan on Base Erosion and Profit Shifting, OECD Publishing. <http://dx.doi.org/10.1787/9789264202719-en>. (loaded 7.2.2025)
- OECD (2015) Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 -2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264241176-en>. (Loaded 9.2.2025).
- OECD (2017) Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 -2016 Update: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264268333-en>. (loaded 9.2.2025)
- ECD (2019), Model Tax Convention on Income and on Capital 2017 (Full Version), OECD Publishing. <http://dx.doi.org/10.1787/g2g972ee-en>.
- OECD (2019) Boosting tax morale – so people and businesses pay tax”. -archive.oecd.org/2019-09-16/529358-boosting-tax-morale-so-people-and-businesses-pay-tax.htm (loaded 7.2.2025)
- OECD (2019) Tax Morale: What Drives People and Businesses to Pay Tax?, OECD Publishing, Paris, <https://doi.org/10.1787/f3d8ea10-en>. (loaded 7.2.2025).
- OECD (2020) Tax Challenges Arising from Digitalisation – Economic Impact Assessment: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <https://doi.org/10.1787/0e3cc2d4-en>. (loaded 8.2.2025)
- OECD (2020) Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <https://doi.org/10.1787/beba0634-en>. (loaded 9.2.2025).
- OECD (2021), Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS, OECD Publishing, Paris, <https://doi.org/10.1787/782bac33-en>. (loaded 7.2.2025).
- OECD (2022) Tax Morale II: Building Trust between Tax Administrations and Large Businesses, OECD Publishing, Paris, <https://doi.org/10.1787/7587f25c-en>. (loaded 8.2.2025).
- Orstedt AS (2020) press release. <https://orsted.com/en/company-announcement-list/2020/12/2137757>. (loaded 9.2.2025)
- Oxfam, Christian Aid, and Actionaid (2015) Getting to Good – Towards Responsible Corporate Tax Behaviour. <https://oxfamlibrary.openrepository.com/bitstream/handle/10546/582243/dp-getting-to-good-corporate-tax-171115-en.pdf;jsessionid=2F9C81888A760D326AB052C855F83D69?sequence=4> (loaded 8.2.2025).
- Godar, Sarah, Flamant, Eloi and Richard, Gaspard, (2021) New Forms of Tax Competition in the European Union, An Empirical Investigation. EU Tax Observatory report no. 3. [taxobservatory.eu/www-site/uploads/2021/11/EU-Tax-Observatory-Report-3-Tax-Competition-November-2021-3.pdf](https://www-site/uploads/2021/11/EU-Tax-Observatory-Report-3-Tax-Competition-November-2021-3.pdf) (loaded 7.2.2025)
- Skatteverket (2012) Delrapport, Skattplanering med ränteavdrag. Tilläggsuppdrag avseende Svenska juridiska personer som i praktiken inte beskattas för ränteinkomster. Promemoria Dnr 131-296639-12/113.
- Skatteverket (2008) Promemoria, Ränteavdragsbegränsningar i syfte att förhindra vissa fall av skatteplanering inom en intressegemenskap. <https://regeringen.se/contentassets/b22c7788e41b4f4cb2a91a88ec6b76fa/promemoria->

- ranteavdragsbegränsningar-i-syfte-att-forhindra-vissa-fall-av-skatteplanering-inom-en-intressegemenskap. (Loaded 8.2.2025).
- Skatteverket, Regler & ställningstaganden (2008) Räntesnurror - Ny lagstiftning fr.o.m. den 1 januari 2009. <https://www4.skatteverket.se/rattsligvagledning/edition/2025.1/323746.html>. (loaded 8.2.2025).
- Skatteverket Regler & ställningstaganden (2013) Några frågor vid tillämpningen av ränteavdragsbegränsningsreglerna gällande väsentligt inflytande, undantaget från 10%-regeln och ventilen. <https://www4.skatteverket.se/rattsligvagledning/edition/2025.1/324207.html>. (loaded 8.2.2025).
- Stibbe (2020) Q&A guidance on revised Dutch tax ruling practice. <https://www.stibbe.com/publications-and-insights/qa-guidance-on-revised-dutch-tax-ruling-practice>. (loaded 8.2.2025).
- Verohallinto (2010) OHI-työryhmä: Ennakkopäätösluonteisten veroasioiden nopeutettu käsittely – esiselvitys.
- Verohallinto (2022) Osingonsaajan itse antaman ilmoituksen sisältö, voimassaolo ja luotettavuuden todentaminen, VH/2706/00.01.00/2022, 26.9.2022; Helsinki.
- Verohallinto: Henkilöverotuksen käsikirja 2011, <https://www.vero.fi/contentassets/2e4879f33c294abd849856519dda2ad1/43v11.pdf>. (loaded 8.2.2025)
- Verohallitus (2000) Luottamuksensuojasta verotusmenettelyssä annetun lain (1558/95) mukaisessa verotusmenettelyssä, Ohje, dnro 569/38/2000,

Court decisions

European Court of Justice decisions

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- ECJ Case C-115/16 *Danish case*: Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, N Luxembourg 1 (C-115/16), X Denmark A/S (C-118/16), C Danmark I (C-119/16), Z Denmark ApS. p. 29, 122, 140, 144, 154, 155, 167, 168, 169, 171, 172, 174, 184, 204, 267, 270, 283, 284.
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European Commission proposal for digital service tax 21st March 2018

European Commission proposal for a COUNCIL DIRECTIVE amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, Strasbourg, 25.10.2016 COM (2016) 687 final.

European Commission Proposal for a Council Directive on Business in Europe: Framework for Income Taxation (BEFIT) COM(2023) 532 final.

Public hearings

Ossa, Jaakko (2022): Opinion on proposal for Windfall taxes in Finland, 12.12.2022, <https://www.lausuntopalvelu.fi/FI/Proposal/Participation?proposalId=e8e8c063-bd0b-4d40-97b8-c1e453c4557d> . (loaded 9.2.2025).

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**TURUN
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UNIVERSITY
OF TURKU

ISBN 978-952-02-0154-8 (PRINT)
ISBN 978-952-02-0155-5 (PDF)
ISSN 0082-6987 (Print)
ISSN 2343-3191 (Online)