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Protection of the taxpayer in the European Union: recent case-law of the European Court of Justice

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Protection of taxpayer rights from the perspective of human rights protection remains until now relatively new question which still should be developed in doctrine and practice. Traditionally, even in legal doctrine the problem of protection of the taxpayers was presented mostly as a protection of their interests in general framework of safeguard taxpayers' money: as a control of spending of State or the EU budget, fighting against corruption in public sector, control of legality of State aid, new criminal law rules against counterfeiting of the euro and other currencies, etc. Without neglecting the importance of legality of spending of public resources, including the EU budget money, and fighting against trans-boundary fraud we should draw more attention to the legality of collecting taxes, to the legal status and the rights of taxpayer. Protection of taxpayer’s rights in modern society should be regarded as a one of criteria of rule of law and an important part of protection of human rights even if current international and European instruments of human rights protection do not contain specific provisions of the rights of taxpayers. Welfare of society and welfare of its members are closely linked by mutual respect of taxpayer’s duties, rights and legitimate interests.

Today this line of protection of taxpayers’ rights became more and more significant in the case-law of the European Court of Justice concerning tax law. It seems that his trend is due to recent development of the EU tax law, even if this area of Union law is mostly limited to indirect taxation (turnover taxes, excise duties and other forms of indirect taxation). It is well-known that the EU does not set direct tax rates or collect taxes itself, and businesses pay tax on profits according to the rules applicable in their Member State. Under Article 115 TFEU, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market. Direct taxation remains the sole responsibility of MS, except if taxation creates obstacles within internal market.[[1]](#footnote-1)

Contrary to direct taxation and national income tax systems of the Member States (thereafter – the MS), what is still outside of the EU competence, the VAT and excise duties have been significantly harmonised by Union legislation. Nevertheless, the EU Treaties do not contain explicit rules for the adoption of secondary legislation aimed at approximating the national income tax systems of the MS.[[2]](#footnote-2) As far as corporate taxation is concerned, the existing direct tax directives, adopted on the basis of Article 115 Treaty on the Functioning of the European Union (thereafter - TFEU), are scarce and deal with specific cross border tax obstacles to intra-Community operations, such as corporate reorganisations or intra-group dividends, interest and royalties. However, differences and gaps of the national direct tax systems may distort the allocation of resources and generate double taxation or create other obstacles for four freedoms, hindering the achievement of the Internal market. At the same time, double taxation or other obstacles created by national legal systems may lead to violations of fundamental rights protected by the Charter of Fundamental Rights of the EU (therafter – Charter) and European Convention on Human Rights (thereafter – ECHR): for instance, may be in breach of property rights under Charter and ECHR, right of free movement of EU citizens and right of establishment under Charter, etc.). In the ECJ case-law concerning the infringements of tax law in many cases were linked with non-respect of fundamental freedoms of the EU and thus hindering the functioning of Internal Market, which is characterized as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured", an objective affirmed in Article 26 TFEU. Since the 1986 Avoir fiscal case (C-270/83)[[3]](#footnote-3), the Court has repeatedly reaffirmed this principle. In the area of taxation, it is also important to note, that EU Treaties confers upon European citizens general rights and freedoms aiming at guaranteeing non-discrimination and freedom to circulate and to undertake economic activities throughout the Union. These rights and freedoms are the free movement of workers (Articles 45 to 48 TFEU), the right of establishment (Articles 49 to 55 TFEU), the freedom to provide and to receive services (Articles 56 to 62 TFEU), the free movement of capital and payments (Articles 63 to 66 and 75 TFEU), and the right to move and reside freely within the territory of the EU (Article 21 TFEU). EU law precludes national taxation rules and practices hindering fundamental freedoms of the Union.

In general, five main characteristics of protection of taxpayers in the EU tax law system may be found:

1. EU tax law contains harmonised system of taxation rules, especially the rules established by secondary legislation in the areas of indirect taxation (VAT, Excise Duties). However, main aim of EU tax law rules remains to protect and to develop Internal Market and to protect the EU own resources (budget).[[4]](#footnote-4) Also in non-harmonised areas, like direct taxation, Member States are bound to respect their general commitment of sincere cooperation under Article 4 (3) Treaty on European Union (TEU). As the Court of Justice constantly held, “although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with Community law”.[[5]](#footnote-5) Moreover, national direct tax provisions (including international tax conventions) must not compromise the freedoms enshrined in the EC Treaty.

2. In the EU law, a taxpayer enjoys protection both under EU Charter of Fundamental Rights and European Convention of Human Rights (ECHR). At the same time, both human rights instruments do not contain specific provisions for protection of taxpayers. Indirect protection under ECHR was derived from protection of property, private life, etc. EU Charter protects fundamental EU rights and freedoms: in addition to rights deriving from the ECHR included into the Charter, it guarantees the right to good administration, right of access to documents (non-discrimination, four free movements, freedom of movement and of residence of the EU citizens, etc.)

3. Notwithstanding the fact that taxation still remains mainly under national sovereignty, the level of harmonisation of national law in indirect taxation has already reached very high intensity and level.

4. Litigation in tax matters remains under main jurisdiction of national judiciary. At the same time, national courts use broad possibilities to ask the ECJ for preliminary rulings, especially with regard to VAT and excise duties.

5. ECJ case-law played fundamental role in interpretation of EU tax rules. The number of decided cases is growing each year, together with the areas within direct taxation that have been subject to Court of Justice scrutiny. In this way, the EU law has by now not only affected Member States’ personal and corporate income taxes, but also wealth and property taxes, inheritance and gift taxes and taxes on commercial activities, whether adopted at national, regional or local level.

In recent Judgment of 6 October 2015 in Case C‑69/14, Târșia, the Court of Justice confirmed full applicability of the principle of State liability for infringements of individual rights in the area of the EU tax law. In this case a reference for preliminary ruling concerned the recovery of undue payments (special automotive importation tax) already made but incompatible with an interpretation of EU law upheld by the Court of Justice of the European Union after the date on which national judicial decision became final. On one hand, the Court gave priority to ‘’the importance, both in the legal order of the European Union and in national legal systems, of the principle of res judicata. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that decisions of courts or tribunals which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question’’ (paragraph 28). On the other hand, the Court reminded:

‘’40. None the less, in so far as the final judicial decision obliging Mr Târșia to pay a tax which, in essence, was subsequently declared incompatible with EU law, was taken by a national court adjudicating at last instance, it should be borne in mind that, according to settled case-law, by reason (inter alia) of the fact that an infringement, by such a decision, of rights deriving from EU law cannot thereafter normally be corrected, individuals cannot be deprived of the possibility of rendering the State liable in order to obtain legal protection of their rights (…)’’.

In recent infringement case Commission v UK, C‑640/13, p. 30, the Court on 14 December 2014 recalled that ‘’the right to a refund of taxes levied in a Member State in breach of EU law is the consequence and complement of the rights conferred on individuals by the provisions of EU law. A Member State is thus in principle required to repay taxes levied in breach of EU law (see judgment in Test Claimants in the Franked Investment Income Group Litigation, C‑362/12, paragraph 30).’’ In this Judgement the Court also held that EU law prohibits the retroactive application of a new, shorter, and, as the case may be, more restrictive limitation period than that previously applicable, where its application concerns actions for the recovery of domestic taxes contrary to EU law which have already been commenced at the time the new period comes into force (p. 33). Moreover, that principle precludes national legislation which curtails, retroactively and without any transitional arrangements, the period within which repayment of the sums collected in breach of EU law could be sought (p. 34).

Article 47 of the EU Charter of Fundamental Rights provides that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. This disposition is closely linked with and interpreted in the light of Article 6 (Right to a fair trial) and Article 13 (Right to an effective remedy) of the European Convention on Human Rights (thereafter – ECHR).

As a matter of principle, Article 47 guarantees right to a fair trial in all cases where the EU law is directly applicable. It covers not only civil cases and cases of criminal charge as it would be according to dispositions of Article 6 (1) ECHR. Therefore, it extends main guarantees of fair trial already provided by Article 6 ECHR to all cases where EU law shall be applicable. It implies that right of fair trial with all guarantees thereof should be applicable in administrative judicial procedure: in this framework taxation cases are adjudicated in majority of MS. The problem is that under traditional administrative procedure the judicial control exercised by administrative courts was limited, as a rule, to control of legality of contested administrative measure including decisions to impose taxes and duties. As ECJ has held it in DEB Case, C‑279/09:

‘’28 As is apparent from well-established case-law on the principle of effectiveness, the detailed procedural rules governing actions for safeguarding an individual’s rights under EU law must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (…).’’

The rights deriving from the EU tax law shall enjoy the same level of protection as the rights according to national tax law. In this respect, the leading is the Case C-617/10, Åkerberg, decided by Court of Justice on 26 February 2013:

‘’21 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 being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.’’

At the same time, it is for national law to establish applicable administrative and judicial procedures. In its Judgment of 12 February 2015 in Surgicare case (C‑662/13), the Court of Justice held:

‘’26 In the absence of any EU rules in the area, the means of preventing VAT fraud falls within the internal legal order of the Member States under the principle of procedural autonomy of the latter. In that regard, it is apparent from the Court’s settled case-law that it is for the domestic legal system of each Member State, in particular, to designate the authorities responsible for combatting VAT fraud and to lay down detailed procedural rules for safeguarding rights which individuals derive from EU law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order (principle of effectiveness).’’[[6]](#footnote-6)

The Court in this case also concluded that ‘’Directive 2006/112 must be interpreted as meaning that it does not preclude the mandatory preliminary application of a national administrative procedure (…), in the event that the revenue authorities suspect the existence of an abusive practice.’’

Discrimination in taxation which hinders freedom of establishment (Article 49 TFEU) and freedom to provide services (Article 56 TFEU) is prohibited. From this point of view it is important to quote the Judgment of Court of Justice of 22 October 2014 in Joined Cases C‑344/13 and C‑367/13, Blanco and Fabretti. In the cases in main proceedings before Italian court, the claimants contested accusations of failing to file income tax returns and of failing to declare the sums of winnings obtained from casinos located in other Member States and in third countries. By its question, the referring court asked, in essence, whether Articles 52[[7]](#footnote-7) and 56 TFEU must be interpreted as precluding legislation of a Member State according to which winnings from games of chance obtained in its national casinos are not subject to income tax, whereas those obtained in other Member States are, and whether reasons of public policy, public security or public health can justify such a difference in treatment. One of the applicants claimed that the tax assessments infringe, in particular, the principle prohibiting double taxation laid down in international agreements with reference to Article 2 of the Model Tax Convention on Income and on Capital developed by the Organization for Economic Cooperation and Development (OECD), the principle of the freedom to provide services under Article 56 TFEU, the principle of non-discrimination established by Article 21 of the Charter of Fundamental Rights of the European Union, and Articles 18 (prohibition of discrimination) and 49 TFEU (freedom of establishment).

The court first of all held that ‘’a discriminatory restriction is compatible with EU law only if it falls under an express derogation.’’ In addition, the restrictions imposed by the Member States must satisfy the conditions of proportionality. As regards the objectives relating to the prevention of money laundering and the need to limit the flow of capital abroad or the arrival of capital whose origin is uncertain, it is not justifiable for the authorities of a Member State to assume, in a general way and without distinction, that bodies and entities established in another Member State are engaging in criminal activity.[[8]](#footnote-8) Consequently, the Court ruled:

‘’Articles 52 and 56 TFEU must be interpreted as precluding legislation of a Member State which subjects winnings from games of chance obtained in casinos in other Member States to income tax and exempts similar income from that tax if it is obtained from casinos in its national territory.’’

At the same time it should be noted that the protection of taxpayer provided by EU law is not absolute. The Court of Justice in its Judgment of 22 October 2013 in Case C-276/12, Sabou, ruled:

‘’European Union law, as it results in particular from Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums, as amended by Council Directive 2006/98/EC of 20 November 2006, and the fundamental right to be heard, must be interpreted as not conferring on a taxpayer of a Member State either the right to be informed of a request for assistance from that Member State addressed to another Member State, in particular in order to verify the information provided by that taxpayer in his income tax return, or the right to take part in formulating the request addressed to the requested Member State, or the right to take part in examinations of witnesses organised by the requested Member State.’’

ECJ in its Judgment in Case C‑434/10, Aladzhov has dealt with the prohibition on leaving national territory because of non‑payment of a tax liability and the right conferred by Article 21 TFEU to move and reside freely within the territory of the Member States. A manager of a company was prohibited from leaving the country, until the tax debt of his company owed to the State was paid or until a security covering its full payment was provided. The Court first of all ruled that, as a general rule, EU law does not preclude a legislative provision of a Member State which permits an administrative authority to prohibit in exceptional circumstances a national of that State from leaving it on the ground that a tax liability of a company of which he is one of the managers has not been settled. However, a measure such as taken in this case should be precluded if it is founded solely on the existence of the tax liability of the company of which a person is one of the joint managers, and on the basis of that status alone, without any specific assessment of the personal conduct of the person concerned and with no reference to any threat of any kind which he represents to public policy, and if the prohibition on leaving the territory is not appropriate to ensure the achievement of the objective it pursues and goes beyond what is necessary to attain it.

In any case, an excessive and broad interpretation of the case-law of the ECJ dealing with protection of taxpayers’ rights should be avoided. Well-known and already quoted Åkerberg judgment confirms this approach. The case dealt with tax evasion as a ‘criminal charge’ covered by traditional dispositions of fair trial under Article 6 (1) ECHR.[[9]](#footnote-9) In that sense, the Åkerberg judgment follows case-law of Art 6 (1) ECHR, in particular the Judgment of the European Court of Human Rights in case J.J. v. the Netherlands (no. 21351/93), 27.03.1998.

The Court found that the outcome of the proceedings before the Supreme Court had determined a “criminal charge” against the applicant. Regard being had, therefore, to the fact that it had been impossible for the applicant to reply to it before the Supreme Court took its decision had infringed his right to adversarial proceedings. That right meant in principle the opportunity for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court’s decision. There had accordingly been a violation of Article 6 § 1 of the Convention. (See also case J.B. v. Switzerland (no. 31827/96) 03.05.2001)[[10]](#footnote-10)

In addition, special attention shall be drawn to the specific field of application of the Charter of Fundamental Rights of the European Union according to its Article 51: (1) the Charter is addressed to the EU institutions and other bodies and to the MS only when they are implementing Union law; (2) principle of subsidiarity shall be respected; (3) Charter does not extend the field of application of Union law beyond the powers of the Union.[[11]](#footnote-11) In this respect, it should be noted once more that the EU has still limited powers in taxation matters. Article 51 (1) clearly stipulates that the MS shall ‘’respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.’’

It is interesting to make comparison of recent ECJ case-law with the traditional case-law of the European Court of Human Rights dealing with the right to a fair trial (Art. 6(1) ECHR), and Right of property (Art. 1 Protocol No. 1) with regard to tax law and tax litigation. In Ferrazzini v. Italy (no. 44759/98), 12.07.2001 case the European Court of Human Rights held:

‘’The Court considered that tax matters formed part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the community remaining predominant. The Court also observed that Article 1 of Protocol No. 1, which concerned the protection of property, reserved the right of States to enact such laws as they deemed necessary for the purpose of securing the payment of taxes (…). Lastly, the Court considered that tax disputes fell outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produced for the taxpayer. Accordingly, Article 6 § 1 did not apply in the instant case.’’

As for the EU law, its development shows some clear differences. First, as we already saw before, (1) indirect taxation is highly harmonised in the EU law; (2) direct taxation cannot hinder the functioning of Internal Market, especially the four freedoms; (3) right to a fair trial under Art. 47 of the Charter cannot be limited to ‘’determination of civil rights and obligations or of any criminal charge’’ and should be extended to taxation cases involving EU law and adjudicated under administrative judicial procedure.

As far as the case-law of the European Court of Human Rights is concerned, the taxpayers challenged the rules and procedures of the Contracting States in tax matters, and the methods used by tax-authority officials mainly on the grounds of:

1. Article 1 of Protocol No. 1 (protection of property), which, on one hand, proclaiming that “no one shall be deprived of his possessions except in the public interest “ acknowledges the right of a State “to enforce such laws as it deems necessary … to secure the payment of taxes or other contributions”, on the other;
2. Article 6 (right to a fair trial);
3. Article 8, under which “everyone has the right to respect for his private and family life, his home and his correspondence”;
4. Article 4 of Protocol No. 7 (*non bis in idem*, a right not to be tried or punished twice);
5. Other dispositions of the ECHR (for ex., Art. 9 which protects “freedom of thought, conscience and religion”, etc.).

The case-law of the European Court of Human Rights and the Convention itself during long time inspired case-law of the Court of Justice in the area of human rights. It still remains important today. As far as taxpayers’ rights are concerned, the case-law of the ECHR concerning right to property, (Protocol No. 1, Article 1) seems the most important.

In Case Eko-Elda Avee v. Greece (no. 10162/02), 09.03.2006, the European Court of Human Rights observed that the tax unduly paid was refunded five years and approximately five months after the applicant company sought a refund of the sum concerned. The authorities’ refusal to pay late-payment interest for such a long period had upset the fair balance that had to be struck between the general interest and the individual interest. Therefore, the Court found that there had been a violation of right of property.

In recent Judgment in Case N.K.M. v. Hungary (no. 66529/11) 14.05.2013 the ECHR held that excessive taxation was equivalent to deprivation of property. The case concerned a civil servant who complained in particular that the imposition of a 98 per cent tax on part of her severance pay (compensation that an employer provides to an employee who has been laid off) under a legislation entered into force ten weeks before her dismissal had amounted to an unjustified deprivation of property. ECHR found violation of Article 1 of Protocol No. 1 despite the wide discretion that the Hungarian authorities enjoyed in matters of taxation, the Court held that the means employed had been disproportionate to the legitimate aim pursued of protecting the public purse against excessive severance payments. Moreover, in depriving her of an acquired right which served the special social interest of reintegrating the labour market, the Hungarian authorities had exposed the applicant to an excessive individual burden.

Search in premises of a lawyer in case of tax evasion allegedly committed by his client was considered as a violation of Article 8 (Right to respect for private and family life) in case of André and another v. France (no. 18603/03), 24.07.2008. The applicants were a lawyer and a law firm. The case concerned a search of the applicants’ offices in June 2001 by tax inspectors with a view to the discovery of evidence against a client company of the applicants’ practice which was suspected of tax evasion. The applicants complained that the search and the seizures had been unlawful. Considering that the search and seizures had been disproportionate to the aim pursued, the Court held unanimously that there had been a violation of Article 8 (right to privacy). The ECHR held unanimously that there had been also a violation right of access to court (Article 6 § 1) because of the lack of effective judicial review. Procedure before Cour de cassation showed that in the context of a tax inspection into the affairs of the applicants’ client company the tax inspectorate had targeted the applicants for the sole reason that it was finding it difficult to carry out the necessary checks and to find documents capable of confirming the suspicion that the client company was guilty of tax evasion, although at no time had the applicants been accused or suspected of committing an offence or participating in a fraud committed by their client.

In the ECJ case-law, overwhelming majority the EU tax law cases was decided by the Court of Justice. Direct actions before the General Court are limited by its jurisdiction under Article 263 (4) TFEU requiring, *inter alia*, existence direct concern of an applicant and that contested regulatory act should not entail implementing measures. [[12]](#footnote-12) An example of such jurisprudence may be found in the area of customs duties payable on the importation of goods from third countries, for example, in Case T‑380/11, Palirria Souliotis v Commission (Judgment of General Court of 12 September 2013). Palirria Souliotis AE is a manufacturer of traditional Greek food products. It imports stuffed vine leaves (sarma) ready for consumption in particular from China. Applicant contested Implementing Regulation (EU) No 447/2011 concerning the classification of certain goods in the Combined Nomenclature. The applicant contested classification of imported sarma products and, consequently, an amount of duty to be paid. General Court decided that application is inadmissible, because contested measure entails implementing measures.[[13]](#footnote-13)

With regard to the right to a fair trial in cases involving in EU tax law cases are the right to a fair trial there are also two important elements to be mentioned: first, right to be duly informed about debt or about alleged tax evasion and, second, right to be heard. In this context, Case C 233/08, Kyrian, concerning excise duty and recovery of claims may be invoked.

In case of main proceedings Hauptzollamt Regensburg (Germany) issued a payment notice and requested, pursuant to Article 6 of Directive 76/308, the requested authority in the main proceedings to recover the excise duty from Czech national Mr Kyrian. In the request for recovery, the applicant in the main proceedings was identified as the debtor by his forename, surname, address and date of birth, and the amount of the excise duty together with a penalty. Recovery of the tax was delegated to Celní úřad Tábor (Czech Republic). Judicial appeals of Mr. Kilian were dismissed.

During judicial proceedings in the main case, Mr Kyrian claimed that the identification of the addressee in the instrument permitting enforcement issued by the Hauptzollamt Weiden by forename, surname and address was insufficient, since the instrument might equally well apply to Mr Kyrian’s father or son, since they are also called Milan Kyrian and live at the same address. As the notification document does not specify to which of the three persons of the same name the instrument permitting enforcement should have been given, that instrument cannot be enforced, because it was not properly notified. Mr Kyrian also complained that, as he did not understand the documents which were addressed to him by the German customs authorities in German, he was unable to take the appropriate legal steps to defend his rights.

The ECJ held that the courts of the Member State where the requested authority is situated do not, in principle, have jurisdiction to review the enforceability of an instrument permitting enforcement. Conversely, where a court of that Member State hears a claim against the validity or correctness of the enforcement measures, such as the notification of the instrument permitting enforcement, that court has the power to review whether those measures were correctly effected in accordance with the laws and regulations of that Member State. In order for the addressee of an instrument permitting enforcement to be placed in a position to enforce his rights, he must receive the notification of that instrument in an official language of the Member State in which the requested authority is situated. In order to ensure compliance with that right, it is for the national court to apply national law while taking care to ensure the full effectiveness of Community law.

Double direct taxation cases form important part of the case-law of the ECJ. In Case C-67/08, Block, a German resident, inherited from her mother, who had also been resident in this country, assets located partly in Germany and partly in Spain. She was charged inheritance tax on the capital invested with a certain number of banks in Spain by both the Spanish and the German tax authorities. ECJ considered that the fiscal disadvantage incurred by Ms Block is the result of the exercise in parallel by the two Member States concerned of their fiscal sovereignty, under which each of these States has made its own choices. In the current stage of the development of Community law, no uniform or harmonisation measure has been adopted, the Court can only find that the Member States enjoy certain autonomy and are not obliged to adapt their own tax systems to those chosen by other MS in order to eliminate double taxation. German measure in question is therefore not contrary to the rules on the free movement of capital.

In Case C-292/04 Meilicke and Others involving the issues of double taxation and prohibition of discrimination, a German citizen resident in Germany who had been paid dividends on shares which he held in Dutch and Danish companies, did not benefit from a tax credit calculated by reference to the corporation tax rate on the dividends although German law allows entitlement to such tax credits for dividends paid out on shares in companies established in Germany. The ECJ found that the condition stipulated by German law was a restriction within the meaning of Article 56 EC (free movement of capital). Since the tax credit applied solely in respect of dividends paid by companies established in Germany, that legislation disadvantaged persons who were fully taxable in that Member State for income tax purposes and received dividends from companies established in other Member States, as such persons were taxed without being entitled to the tax credit. This restriction had two consequences: firstly, the tax legislation could deter persons who were fully taxable in Germany for income tax purposes from investing their capital in companies established in other Member States and secondly, the legislation constituted an obstacle to such companies raising capital in Germany.

The case-law of the ECJ concerning common system of value added tax (VAT) and corresponding exemptions is very rich and already well developed. Recent ECJ Judgment of 22 October 2015 in Case C‑264/14, Skatteverket v David Hedqvist dealt with „Bitcoins“. Mr Hedqvist wished to provide, through a company, services consisting of the exchange of traditional currency for the ‘bitcoin’ virtual currency and vice versa. Article 135(1) of Council Directive 2006/112/EC provides that Member States shall exempt from VAT transactions, including negotiation, concerning currency, bank notes and coins. The Court held that „the supply of services such as those at issue in the main proceedings, which consist of the exchange of traditional currencies for units of the ‘bitcoin’ virtual currency and vice versa, performed in return for payment of a sum equal to the difference between, on the one hand, the price paid by the operator to purchase the currency and, on the other hand, the price at which he sells that currency to his clients, are transactions exempt from VAT.“

New developments in the EU tax law are aimed to establish an efficient mechanism against tax eviction and provides for mandatory exchange of tax information. This development nevertheless raises a question what additional means of protection of taxpayers’ rights would be needed in such a system? This system is provided in the Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation. Political agreement of Member States was reached at the ECOFIN Council of 6 October 2015. Until now, Directive 2011/16/EU provides for mandatory spontaneous exchange of information between Member States in five specific cases and within certain deadlines. This is a spontaneous exchange of information in cases where the competent authority of one Member State has grounds for supposing that there may be a loss of tax in another Member State. Discretion permits to the issuing Member State to decide which other Member States should be informed. The mandatory automatic exchange of advance cross-border rulings and advance pricing arrangements should in each case include communication of a defined set of basic information that would be accessible to all Member States. It seems that special attention should be paid to protection of personal data which could be needed to avoid any kind of possible abuses of taxpayers’ rights in this system.

1. The European Commission is currently trying to establish a Common Consolidated Corporate Tax Base (CCCTB) to simplify the system and remove this barrier to doing business across borders. However, decisions about direct taxation must be agreed on by all member states, so progress on the CCCTB has been delayed. CCCTB would significantly improve the business environment in the Internal Market. Companies could use just one EU system to compute their taxable income, rather than having to deal with up to 28 national rulebooks. In October 2015 there was some progress in the EP in adoption of this proposal of Directive.

   There are also other new developments in the EU tax law. An example could be an attempt to establish financial transaction tax (FTT) between 11 MS: Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax (COM(2013) 71 final). In case C-209/13, the UK asked the Court to annul Council Decision 2013/52/EU of 22 January 2013 authorizing enhanced cooperation in the area of financial transaction tax. On 30 April 2014 the ECJ dismissed this action of the UK: adoption of an FTT which will not necessarily impose costs on Member States which are not participating in the enhanced cooperation. (11 MS: Belgium, Germany, Estonia, Greece, Spain, France, Italy, Austria, Portugal, Slovenia and Slovakia). [↑](#footnote-ref-1)
2. See, for ex., Luca Cerioni. The European Union and Direct Taxation. A solution for e difficult relationship. London and New York: Routledge, 2015. [↑](#footnote-ref-2)
3. In its Judgment of 28 January 1986, Commission v French Republic, C-270/83, the Court held:

   ‘’24 It must be noted that the fact that the laws of the Member States on corporation tax have not been harmonized cannot justify the difference of treatment in this case. Although it is true that in the absence of such harmonization, a company’s tax position depends on the national law applied to it, Article 52 of the EEC Treaty prohibits the Member States from lying down in their laws conditions for the pursuit of activities by persons exercising their right of establishment which differ from those laid down for its own nationals.

   25 Furthermore, the risk of tax avoidance cannot be relied upon in this context. Article 52 of the EEC Treaty does not permit any derogation from the fundamental principle of freedom of establishment of such a ground.’’ [↑](#footnote-ref-3)
4. The aim of protection of the EU own resources by collecting VAT revenue clearly follows, for example, from recent Judgment of 26 February 2013 of the Court of Justice in Case C-617/10, Åkerberg, p. 26: ‘’Given that the European Union’s own resources include, (…) revenue from application of a uniform rate to the harmonized VAT assessment bases determined according to European Union rules, there is thus a direct link between the collection of VAT revenue in compliance with the European Union law applicable and the availability to the European Union budget of the corresponding VAT resources, since any lacuna in the collection of the first potentially causes a reduction in the second (…).’’ [↑](#footnote-ref-4)
5. See, for example, the ECJ judgments in Case C-80/94 Wielockx, para. 16, Case C-264/96 ICI, para. 19. [↑](#footnote-ref-5)
6. With regard to principle of effectiveness the Court held: ‘’28 As regards, first, the principle of effectiveness, it should be recalled that every case in which the question arises whether a national procedural provision makes the exercise of rights arising under the EU legal order impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies. For those purposes account must be taken of the basic principles which lie at the basis of the domestic judicial system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct procedure (…).’’ [↑](#footnote-ref-6)
7. According Article 52 (1) freedom of establishment ‘’shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.’’ [↑](#footnote-ref-7)
8. See paragraphs 39-43 of the Judgment. [↑](#footnote-ref-8)
9. In particular, the Court of Justice held: ‘’24 In the case in point, it is to be noted at the outset that the tax penalties and criminal proceedings to which Mr Åkerberg Fransson has been or is subject are connected in part to breaches of his obligations to declare VAT.

   37 (…) the *ne bis in idem* principle laid down in Article 50 of the Charter does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of VAT, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature (…).’’ [↑](#footnote-ref-9)
10. ‘’The Court found that the outcome of the proceedings before the Supreme Court had determined a “criminal charge” against the applicant. Regard being had, therefore, to (…), the fact that it had been impossible for the applicant to reply to it before the Supreme Court took its decision had infringed his right to adversarial proceedings. That right meant in principle the opportunity for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court’s decision. There had accordingly been a violation of Article 6 § 1 of the Convention. (See also case J.B. v. Switzerland (no. 31827/96) 03.05.2001)’’ [↑](#footnote-ref-10)
11. Article 51 ‘Field of application’

    1. 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 to 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 of the Union as conferred on it in the Treaties.

    2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. [↑](#footnote-ref-11)
12. ‘’ Any natural or legal person may (…) institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.’’ [↑](#footnote-ref-12)
13. ‘’42 It follows that the classification of goods in the Combined Nomenclature (…) in the present case is liable to produce real and definitive legal effects on the situation of importers only through the intervention of individual measures taken by the national customs authorities following submission of the customs declaration, since those measures could, depending on the case, lead to the release of the goods or the communication to the debtor of the amount of duty payable.’’ [↑](#footnote-ref-13)