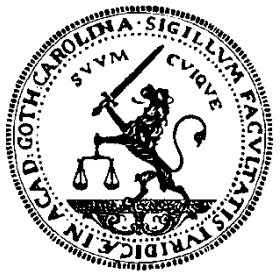

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Is Proportionality Dependent on Legal Certainty?

A study on whether legal certainty constitutes an additional requirement within the proportionality assessment used when the Court assesses the compatibility of domestic tax measures with the fundamental freedoms

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Summary

Over the years it has become clear that the Court of Justice of the European Union may, despite the principle of fiscal sovereignty rule on the compatibility of domestic tax measures belonging to the field of direct taxation, with the fundamental freedoms. Truthfully, the compatibility assessment is found much earlier in other fields of law. [1] The last step of the methodology used by the Court encompasses a proportionality assessment, which could be said to form part of the justification process. It could however, also be viewed as an independent step in the method used by the Court. This master thesis concerns the question of whether the principle of proportionality is dependent on legal certainty. In the light of recent case law delivered by the ECJ such conclusion may be drawn.

The principle of proportionality is portrayed as a substantive principle often expressed by the Court with the wording that; *the measures in question must be appropriate and necessary to achieve its objectives.*[2] Apart from this there have been a discussion on whether the principle of proportionality entail procedural requirement as well. This is commonly referred to as the proceduralization. Procedural requirements have occasionally surfaced in the context of the compatibility assessment in EU law in general. However, this may also been seen in the case law of the Court concerning measures belonging to the field of direct taxation. In the *ITELCAR*-case[3] following the *SIAT*-case[4], the Court held that the measures were not proportionate, as they did not fulfil the principle of legal certainty, as a procedural requirement imposed by the principle of proportionality. In both cases the Court made it all the way to the proportionality assessment before contemplating that since the rules where not sufficiently precise, they did not fulfil the principle of legal certainty, hence, they could, according to the Court not be considered proportionate. Consequently, the domestic measures in question were not justifiable. So is legal certainty a requirement for proportionality?

The question on whether legal certainty constitutes an additional requirement for proportionality has been seen within other fields of law where the domestic measures in question have been somewhat ambiguous with regard to certain expressions and definitions, or whether the system laid down by the domestic measures have not been foreseeable. Examples are seen in *inter alia* the *Laval*-case[5], concerning the Swedish labour legislation, the *golden shares*-case[6] concerning a system of prior authorisation for acquisition of shares in a certain entity and in the *Church of Scientology*-case[7] concerning a similar system of prior authorisation, both concerning French legislation. Both the *SIAT*-case and the *ITELCAR*-case suggests that this development have reached the field of direct taxation.

The questions to ask are perhaps if this construction of the principle of proportionality, with the procedural requirements is desirable, whether legal certainty as a general principle of law, really fits within the technical frame of that principle and what consequences that follows from such a technical construction? Nonetheless, legal certainty will most certainly continue to surface as a procedural requirement within the proportionality assessment.

[1] See, *inter alia*, the case law concerning the free movement of goods.
[2] See *inter alia,* Case C-318/10 *SIAT,* para 49.
[3] Case C-282/12 *ITELCAR.*
[4] Case C-318/10 *SIAT.*
[5] Case C-341/05 *Laval.*
[6] Case C-483/99 *golden shares* .
[7] Case C-54/99 *Church of Scientology.*

Sammanfattning

Varje medlemsstat har förbehållit sig rätten att lagstifta inom rättsområdet direkt beskattning. Det medför att medlemsstaterna är skatterättsligt suveräna och att gemensamma EU-beslut kan fattas inom detta rättsområde, under särskilda omständigheter. Trots detta har EU-domstolen sedan ca 30 år tillbaka, avkunnat domar som berör frågor huruvida regler inom den direkta beskattningens område är förenliga med den fria rörligheten.[8] Möjligheten för EU-domstolen att fördöma en medlemsstats lagstiftning inom andra rättsområden har dock funnits betydligt längre.[9] Vid en prövning av huruvida en medlemsstats nationella lagstiftning är förenlig med den fria rörligheten använder sig EU-domstolen av en fler-stegs-metod. Den sista prövningen, som kan sägas ingå i rättfärdigandeprövningen, innefattar en proportionalitetsprövning. Det är själva proportionalitetsprövningen som är föremål för behandling i detta examensarbete.

Proportionalitetsprincipen uttrycks ofta av EU-domstolen genom följande referens: *Lagstiftningen ska inte gå utöver vad som krävs för att uppnå dess syfte.*[10] Denna kärna har tidvis kompletterats med ytterligare krav eller kriterier av processuell eller administrativ karaktär. Dessa krav har sporadiskt dykt upp i proportionalitetsprövningen, och så har även skett i mål rörande lagstiftning som tillhör den direkta beskattningens område. I målen *SIAT*[11] och *ITELCAR*[12] uppmärksammade EU-domstolen att de ifrågasatta reglerna innehöll begrepp som inte hade någon uttalad definition inom respektive stats lagstiftning och praxis. EU-domstolen konstaterade att då reglerna inte uppfyllde principen om rättssäkerhet så kunde de inte anses vara proportionerliga och således kunde reglerna inte rättfärdigas. Utgör rättssäkerhetsprincipen således ett krav inom ramen för proportionalitetsprövningen?

Vid prövning av regler inom andra rättsområden har EU-domstolen sporadiskt lyft fram principen om rättssäkerhet som krav inom ramen för proportionalitetsprincipen. Kriteriet har främst använts i mål där den nationella lagstiftningen bygger på begrepp och definitioner som inte är tydliga eller där den nationella lagstiftningen har uppställt ett krav på beslut innan vissa handlingar har kunnat vidtas. Exempelvis kan *Laval*-målet[13] som berör den svenska arbetsrätten nämnas tillsammans med *golden shares*-målet[14] samt *Church of Scientology*-målet[15] som båda berörde franska regler om auktorisering i förtid av vissa investeringar. *SIAT*- respektive *ITELCAR*-målet indikerar att denna utveckling har nått regler som tillhör den direkta beskattningens område.

Frågorna som bör ställas är kanske om proportionalitetsprövningen bör konstrueras på detta sätt. Är det eftersträvansvärt att utöka kraven inom ramen för själva proportionalitetsprincipen? Finns det utrymme för principen om rättssäkerhet och vilka effekter får en sådan konstruktion? Oavsett bör det framhållas att principen om rättsäkerhet, med stor sannolikhet, kommer att utgöra ett krav inom ramen för proportionalitetsprövningen i framtiden.

[8] Här ”the fundamental freedoms”.
[9] Se, *inter alia,* mål gällande den fria rörligheten för varor.
[10] Se, *inter alia,* Case C-318/10 *SIAT,* para 49.
[11] Case C-318/10 *SIAT.*
[12] Case C-282/12 *ITELCAR.*
[13] Case C-341/05 Laval.
[14] Case C-483/99 golden shares.
[15] Case C-54/99 *Church of Scientology.*

Acknowledgment

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During the summer of 2014 I was able to complete this master thesis and graduate from the University of Lund and finally receive my eagerly awaited Master of Law. This master's thesis does not solely represent the completion of my LLM in law with a specialisation in European and international taxation, it also marks the end of an era in my life at the University. However, I am convinced that Lund and the academic world will never leave me, as I will never leave it, and I know that we will, at some point meet again under different circumstance. That being said moving on has never been part of my strong side. Even though this master thesis marks the end of an era it also symbolizes the beginning of something new and not yet familiar, and perhaps that is my way of moving on. With those experiences in mind I move on to new challenges.

The journey, that has for now reached its destination started in the fall of 2009. The first time I was introduced to tax law as a legal matter was in the spring semester of 2011 and ever since, I have been convinced that this is my field of specialisation. Throughout this journey I have of course made great friendship and developed my personal legal skills, but also been challenged to broaden my mind and my perspective on society. For these personal developments I have some extraordinary academic professionals to thank. I must therefor give many thanks to the people who have supported me throughout this journey and who have stood by my side when the days have been long and who have celebrated with me during my success.

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Abbreviations

AG	Advocate General
Charter	The European Charter of Fundamental Rights
ECJ/Court	The Court of Justice of the European Union
ECHR	European Convention on Human Rights
EU	European Union
Inter Alia (i.a.)	For example
Id Est (i.e.)	In other words
MBL	Lag (1976:580) om medbestämmande i arbetslivet / Employment (Co-Determination in the Workplace) Act
Para	Paragraph
Sensu Stricto	In the narrow sense
TEU	Treaty of the European Union
TFEU	Treaty of Functioning of the European Union

1 Introduction

1.1 Background

It was not until 1986 that the Court of Justice of the European Union[16] for the first time ruled in a matter relating to direct taxation. In *Commission v France*[17] the question concerned the compatibility of a phenomena in French tax law commonly known as *avoir fiscal*, resembling a tax credit for entities established in France who received dividends from French subsidiaries. Direct taxation, distinguished from indirect taxation, is not a completely harmonized field of law[18], thus it forms part of the fiscal sovereignty of each Member State.[19] Despite the principle of fiscal sovereignty, the Court has continuously delivered preliminary rulings on the compatibility of domestic measures belonging to the field of direct taxation by reiterating that the competence [regarding the field of direct taxation] rests within the Member States, but such competence must nevertheless be exercised in compliance with EU law, i.e. with the fundamental freedoms.[20]

The compatibility assessment of the Court follows a methodological approach and culminates in the justification process with the proportionality assessment, entailing the principle of proportionality, as the last factor to determine whether the measures in question are possible to justify or not. Proportionality is an old phenomena dating back to the ancient judicial systems. The Court often expresses the justification process with the following statement:

> *"[…]a restriction on [the freedom in question] may be permissible if it is justified by overriding reasons in the public interest. It is further necessary, in such a case, that it is appropriate to ensuring the attainment of the objective at issue and does not go beyond what is necessary to attain it."*[21]

More or less this phrase is seen within the Courts reasoning when the justification process is reached. The domestic measures must pursue an interest corresponding to *overriding reasons in the public interest.* In other words the Court must accept the justification ground, moreover, the domestic measures must be appropriate for the objective they pursue and they must not go beyond what is necessary. As shall be discussed further, this proportionality assessment, entailing the principle of proportionality, may be constructed in different ways. However, most commonly it is referred to as having three pillars, *appropriateness, necessity* and *proportionality* (sensu stricto).

Within the last two years, the Court has delivered two cases within the field of direct taxation that, within the proportionality assessment, raise the question on whether it could be concluded that the principle of proportionality contains yet another pillar,

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[16] The Court with a capital C is consistently used in this thesis as a synonymy to the shortening ECJ [European Court of Justice] For more information on terminology see section 1.3.
[17] ECJ 28 January 1986, Case 279/83 *Commission v France – Avoir Fiscal.*
[18] See *inter alia* the VAT Directive on the matter of harmonization of indirect taxation.
[19] The fiscal sovereignty it portrayed through the competence of the Union. The Union may adopt legislation concerning direct taxation however the decisions have to be made unanimously, hence the Member States have a veto right. See to this extent also Ståhl, et al., *EU Skatterätt,* p 70.
[20] The Court has continuously reiterated this in its case law concerning direct taxation. See for example Case C-282/12 *ITELCAR,* para 26. It has also been mentioned with regard to other fields of law where the competence of the union is not exclusive. See for example Case C-341/05 *Laval*, para 87 where the Court also makes a reference to the case C-446/03 *Marks & Spencer* concerning direct taxation.
[21] Case C-18/11 *Philips Electronics*, para 22, my underlining.

namely the requirement of legal certainty.[22] Other procedural requirements have been seen in the case law of the Court and the question concerning the role of the principle of legal certainty used in this context remains. If the previous premise regarding the argument that legal certainty constitutes a third pillar is valid and true, it could be concluded that a rule cannot, within the proportionality assessment, be proportionate, if it lacks legal certainty. This development has proceeded within other fields of EU law[23] and the intriguing question to be asked is whether the proportionality assessment, when relating to national provisions of direct taxation, has changed.

1.2 Purpose

The objective of this thesis is to examine whether the principle of proportionality, entailed in the proportionality assessment, poses an additional requirement on domestic measures belonging to the field of direct taxation. The Court recently held in the *SIAT* case that;

> *[…]legislation which does not meet the requirements of the principle of legal certainty cannot be considered to be proportionate to the objectives pursued.*

This phrase is likely to imply that there is a relationship between the principle of proportionality and legal certainty, and thus, the purpose of this thesis is to examine to what extent this relationship exists and what consequences it implicates for the role of the principle of proportionality. Hence, the legal questions to examine are:

Has legal certainty become an additional step of assessment within the principle of proportionality applied with regard to the fundamental freedoms?

Does the requirement of a rule to fulfil the principle of legal certainty appear in certain situations or may it be applied on all domestic measures relating to direct taxation?

The purpose is not only to provide the reader with a stringent definition of the principle of proportionality, but also to dissect the methodology of the Court. The aim of this is to provide a deeper knowledge on the application of the principle of proportionality within the field of direct taxation, and thus to answer the question whether or not the proportionality assessment in case law relating to direct taxation is moving in the same direction as the assessment within other fields of law.

For the purpose of answering the legal questions posed above, additional questions will be dealt with along the way. Additional questions answered are, *inter alia,* what the proportionality assessment entails and how the principle of proportionality, as a general principle of EU law, has been influenced by the legal orders of the Member States and secondly, how legal certainty may be explained and what it requires in order to be fulfilled. Initially, questions related to the methodology of the Court will be discussed as an introduction to the legal matter in question. When the legal questions are approached, focus will be held on the last step in the methodology of the Court, namely the proportionality assessment.

Finally, the importance of this subject and purpose must be emphasised. Legal certainty is a general requirement highly affiliated with the rule of law and so it is expected that domestic measures forming part of the national legal systems fulfil this requirement. However, by making proportionality dependent on legal certainty we

[22] See with reference to direct taxation, Case C-282/12 *ITELCAR*, Case C-318/10 *SIAT*.
[23] See the case law mentioned in section 5.2 and 5.3.1.

increase the effect of the principle of proportionality as a tool used by the ECJ as well as by the national courts. By making proportionality dependent on legal certainty it may be concluded that rules may not be justified if they do not fulfil the principle of legal certainty. By contesting this approach and concluding that the principle of proportionality is not dependent on legal certainty it may be concluded that rules that do not fulfil such principle may be justified, hence, they can be compatible with the fundamental freedoms although not fulfilling the principle of legal certainty. In practice this could have had an effect on the outcome in the *SIAT* and the *ITELCAR*-case.

1.3 Method, Material and Terminology

Method

In order to answer the legal questions posed I use a method where firstly, the legal framework is presented as it stands today with a retrospective analysis. The first section therefore consist of a presentation of the Court's different methods of interpretation and the methodology used by the Court when assessing the compatibility of domestic measures with the fundamental freedoms. The legal framework is presented from a technical point of view, which is based on the case law of the Court and therefore allows for a more historical perspective in this section. My intentions was to provide the reader with an brief introduction but as the thesis grew it became obvious to me that there were plenty of interesting things to point out in this section in order to fully understand the relationship between the fundamental freedoms and direct taxation. Despite my intentions I believe that this is in no way inaccurate for the following pat of this thesis.

Secondly, the notion of the general principles of EU law is discussed in the context where it is viewed as part of the legal framework.

Thirdly, the recent developments seen in the case law of the Court is discussed with references to both case law and doctrinal debate. This chapter does not form part of the legal framework as it is discussed in this thesis as a possible new approach to the legal framework presented in the previous chapters.

Finally, the analysis forms part of the third and last section of this thesis. Throughout the thesis an ongoing analysis is made in order to keep the conclusions in close memory. The overall conclusions are however presented in the final chapter.

This method is inspired by the idea to first address the issue, secondly the relevant rules, following presenting the analysis of the outcome after the rules have been applied on the issue and finally the conclusion. In this regard it should, in my opinion resemble the method used by the Court of Justice of the European Union when addressing legal questions, hence it should reflect the approach used by the Court when reasoning in its judgments.[24]

[24] Perhaps the most relevant source in this regard is to refer to the case law of the Court. Therefore, I suggest that chapter 3 is revised in order to grasp the idea surrounding this methodology presented.

Material

To answer the legal questions posed *de lege lata* is firstly considered. The sources of law of the European Union consist of primary and secondary law. The Lisbon Treaty forms part of the primary law along with the general principles of law.[25] The hierarchy of the norms is, in itself a disputed matter, especially the role of the unwritten general principles of EU law. They are however considered as forming part of the primary law of the European Union in this section.[26]

Secondary EU law refers to various legislative acts issues by the European Union institutions by exercising their powers.[27] Lastly, case law of the Court is used as the primary source of this thesis. It is by way of negative integration that the case law of the Court becomes legally binding.[28] It should be emphasised already in this section, that negative integration is a method that integrates the European legal orders through the case law rather than through adoption of legislative decisions. As a comparison, positive integration can be mentioned and explained with reference to the VAT Directive, which is the result of a number of the decisions taken by the relevant institution of the European Union. When referring to direct taxation and the abolition of obstacles in the different domestic legislations it is more accurate to refer to coordination, rather than a harmonization.[29]

The case law of the Court prevails over the Member States' legislation due to the principle of primacy of EU law. The role of the European Court of Justice is to interpret European Union law and the case law is therefore a vital source, which allows for the Union law to constantly evolve.

Case law selection

Due to the fact that the Court has been assessing national provisions relating to direct taxation since 1986, so the case law is rapidly increasing, all the case law has therefore unfortunately not been thoroughly reviewed in this thesis. However, the ground breaking cases which have lead to a development of Union law have been studied. The methodology of the Court has been described with references to case law relating to direct taxation in general, although occasionally case law relating to indirect taxation, as well as other fields of law has been mentioned when they have been considered as great value and as brining something to the dissertation on the methodology.

The case law concerning the principle of proportionality and legal certainty has been chosen on the basis of their characteristics. The cases discussed in these sections have either a great value or either it supports the argument I wish to put forth. The case law selection concerning these chapters is therefore not limited to the field of direct taxation.

In section 6.2 case law delivered between the *SIAT* and the *ITELCAR* judgements are discussed. The selection made in the case law has been made with reference to the case law concerning direct taxation with a focus on corporate taxation. Hence, case law related to individual taxation has been excluded. One of the main reasons for this is that most case law has concerned measures belonging to the corporate sector.

[25] Rosas & Armati, *EU Constitutional Law: an introduction*, p 2ff.
[26] Reichel in Korling & Zamboni, *Juridisk Metodlära,* p 126.
[27] Borchardt, *The ABC of European Union Law,* p 80ff.
[28] Helminen, *EU Tax Law – Direct Taxation – 2012,* p 5, Reichel in Korling & Zamboni, p 119.
[29] Helminen, p 5.

Consequently this paper focuses on case law discussing corporate taxation, it does not however, focus on proportionality in reference to a certain type of domestic measures, as for example anti-abuse and anti-avoidance measures. The conclusions are instead to be perceived in a general EU Law context with the (only) main focus on measures relating to direct taxation, with a focus on direct corporate taxation.

Other material

Besides the case law of the Court, doctrinal literature and articles have been consulted. Much of the literature can be referred to as the old classics, nevertheless, they are still accurate and have therefore been consulted. The collection of authors consists, *inter alia,* of; *Craig and de Burca, Barnard* and *Tridimas*. Additional literature, which more precisely focuses on the field of direct taxation in an international context, is for example *Englmair*, *Helminen*, *Hilling*, *Lang, Moëll* and *Peturssen*. In addition to this literature, articles on the matter have also been scrutinised in order to discover different opinions on the questions of proportionality and legal certainty within academic circles.

Terminology

The shortening *ECJ* or *the Court* with a capital C refers to the European Court of Justice, thus whenever the term *the court* is used it refers to the national referring court in question. Mostly *the Court*, will be the abbreviation used in the following.

The term *assessment* is commonly used in the literature as a reference to the methodology of the Court, or indeed the entire process. I have chosen to use this term both in the context of *assessing domestic measures*, but also in the context of *the proportionality assessment within the justification process*. The *proportionality test* is a commonly used phrase in the context of what the principle of proportionality contains, but it is also utilised when discussing the content of the proportionality assessment. Occasionally it can be rather confusing to speak about the proportionality assessment, the proportionality test and the principle of proportionality. They are however, all connected, and perhaps this, already, shows the flexibility that proportionality holds.

The fundamental freedoms have traditionally been called *the four freedoms* although there are arguably, more than four. In the light of recent research where the Charter has been given plenty of spotlight is has been suggested that the fundamental freedoms are no longer to be referred to as the *fundamental freedoms* but rather as *economic freedoms*.[30] The debate is interesting, however, this thesis will place emphasis on the question of categorization and terminology and therefore the following freedoms are referred to the fundamental freedoms, although they might in the future, not be referred to *fundamental* as such. I have chosen, to depart from the categorisation used by Helminen[31] where *the four freedoms* still may be referred to as such, but to alter the categorisation slightly, as this thesis does not deal with questions concerning the free movement of citizens in article 21 TFEU. My division is therefore the following; and since there are still four fundamental freedoms I have chosen to only speak in terms of *the fundamental freedoms* when referring to the following:

[30] Rosas & Armati, p 181.

[31] See Helminen, p 22 where she distinguishes the four freedoms as; free movement of goods, free movement of persons including, the free movement of citizens, free movement of works, freedom of establishment, the freedom to provide and receive services and finally the free movement of capital and payments.

- Free movement of goods article 28 TFEU
- Free movement of workers article 45 TFEU
- Freedom of establishment article 49 TFEU
- Free movement of services[32] article 56 TFEU
- Free movement of capital and payments article 63 TFEU

I have tried to find an appropriate term when the legislation of the Member States is discussed. It is however obvious that there are plentyful of eligible terms for referring to the legislation of the Member States. Terminology used in previous research are plenty, so in the parts where the questioned legislation of the Member States is discussed I will refer to them as *domestic measures* and not, as is sometimes seen, national measures. Sometimes *domestic measures* have been substituted by *domestic provisions*, they are in this thesis therefore to regard as tantamount. The legislation of the Member States is of course a national matter for the Member States. However, as this thesis is the outcome of my Master of Laws and my Master of Tax Law, I intend to view the issues discussed from an EU law perspective and hence, the Member States' legislation is indeed domestic in my opinion. It might be argued that even the EU legislation is, with such a perspective, to be referred to as domestic, however, I shall not further discuss that matter, I solely wish to explain my train of thoughts in choosing this term when discussing measures belonging to the different Member States.

As we will see there has been plenty of debate regarding the need for an *objectively comparable situation*. The discussion emanates from the Court's way of using the terms *discrimination* and *restriction*. This will be briefly discussed in this thesis when the methodology of the Court is discussed. Reference will be made to the term *obstacle* as a neutral term referring to both *discrimination* and *restriction* and wherever the two terms are used *per se* it is by intention.

1.4 Previous Research

Plenty of research has been devoted to collect the scattered pieces of the early attempts to constitutionalise the European Union. As this thesis concerns the developments within the assessment of the compatibility of measures relating to direct taxation, the research regarding the concept of constitutionalising the European Union, might not at first glance be perceived as a research of interest for this thesis. It is however, increasingly interesting to refer to such research here as it is closely linked to the research concerning the role of the fundamental freedoms and the increasing importance of human rights.

Recent research with regard to the fundamental freedoms has primarily been focused on the status of fundamental rights and freedoms in relation to human rights, as is found for example in the ECHR and the Charter.[33] Questions regarding effective remedies have also been broadly debated within the field of direct taxation in the light of the fundamental freedoms and proportionality as a tool for the integration or the disintegration of the Union, which is a constant question of research.

[32] It is settled case law that the free movement of services confers rights not only to the provider of services but also on the recipient. It is thus more correctly to speak about free movement of services rather than the freedom to provide services. See case law Case C-294/97 *Eurowings Luftverkehr*, para 34, C-290/04 *FKP Scorpio Konzertproduktionen*, para 32, C-233/09 *Dijman and Dijkman-Lavaleije*, para 24, C-318/10 *SIAT*, para 19.

[33] See to this extent Szudoczky, *The sources of EU law and their relationships: Lessons for the field of taxation – Primary law, secondary law, fundamental freedoms and State aid rules* and Petursson, *The Proportionality Principle as a Tool for Disintegration in EU Law – of Balancing and Coherence in the Light of the Fundamental Freedoms*.

The issues surrounding the proportionality assessment and its possible procedural developments have been addressed in previous research. There are however legal questions remaining in this field since not much is written regarding the principle of legal certainty as an additional requirement with regard to direct taxation. With that being said, a few articles on the matter of legal certainty and rules concerning combating abusive practices and avoidance of taxation exist.[34] However, from a general perspective concerning direct taxation, little has been written, hence, the importance to address the concerns in this thesis.

1.5 Delimitations

Material delimitations

The free movement of goods is referred to on plenty of occasions, as will be seen later on. Initially, my intention was to leave this freedom outside the scope of this thesis, however it has been proven to me that such a delimitation was not possible to make. Even though the free movement of goods have deliberately been left outside the scope of this thesis, the older case law of the Court concerns that freedom hence, in some way the free movement of good has a small role in this thesis despite this delimitation. Free movement of goods is further an interesting field of law relating to business law and in many ways to indirect taxation and questions regarding excises duties and the WTO.

There is an interesting question regarding the view of the fundamental freedoms and what hierarchy and what level of protection they possess in terms of fundamental rights. This intriguing question is not to be developed in this thesis however, as of now, post acceptance of the Charter of Fundamental Rights I believe it is a highly adequate and intriguing issue.

Perhaps it is needless to say that this thesis is limited to discussing the proportionality assessment when domestic measures belonging to the field of direct taxation, are in question.

This master thesis is a part of my studies of law, hence the matter is not to be influenced by any political statements or values. The matter is simply, or maybe the word complicated is more suitable, to study EU law and its development in the chosen field during these last could of years.

[34] See inter alia, Zalansinski, *Proportionality of Anti-Avoidance and Anti-Abuse Measures in the ECJ's Direct Tax Case Law*, p 310-321 and Hilling, *Justifications and Proportionality: An Analysis of the ECJ's Assessment of National Rules for the Prevention of Tax Avoidance,* p 294-307.

1.6 Outline

This thesis contains three sections that have been presented previously in section 1.3 under "Method". The outline, of course follows this method but it is more precise. Chapter two concerns the normative framework and therefore presents the fundamental freedoms. This chapter addresses both the methods of interpretations used by the Court and the development of the methodology used by the Court when assessing the compatibility of domestic measures with the fundamental freedoms. Before the second chapter is commenced, a summary of the previous chapter is presented along with some conclusions.

Chapter three also belongs to the normative framework and discussed the notion of general principles of EU law. Following this are two chapters concerning the principle of proportionality and legal certainty both from the perspective of general principles of EU law. In the chapter regarding the principle of proportionality a more extensive description on the proportionality assessment is also discussed.

The sixth chapter is the possible ground for the *de lege ferenda* arguments made in the analysis. This chapter therefore concerns the recent case law of the Court and the possible additional requirement within the proportionality assessment.

The thesis is then completed with the final analysis and conclusions in chapter seven.

2 The Fundamental Freedoms

2.1 Introduction

The fundaments of the articles governing the fundamental freedoms can be traced all the way back to the Treaty of Rome, signed in 1957 and adopted in 1958. The Treaty of Rome established the aim of creating a common market and the fundamental freedoms provisions would allow the implementation of that objective. The fundamental freedoms were then referred to as the four freedoms and even though the articles themselves have existed for over 50 years, their scope of application has dramatically changed over the years by way of the Courts case law.[35]

This chapter serves as a brief introduction to the law governing the principle of free movement within the European Union as well as the methodology used by the Court when assessing the compatibility of domestic tax measures with that principle as expressed through the fundamental freedom provisions. However, firstly the methods of interpretation used by the Court are briefly presented.

2.2 The Methods of Interpretation Used by the Court

When the courts within the different Member States find themselves in a situation where they do not know the exact content of the Union law and how its should be interpreted, they may ask for preliminary ruling from the ECJ, in order to be able to apply and interpret the Union law as it is intended. In certain situations the courts may not have the possibility to choose, instead they may be obliged to ask for guidance from the Court. This system assures that the Union actions or measures are interpreted likewise by the different Member States and it assures a uniform interpretation of EU law. This is especially the case where the Union governs the competence to legislate. The Court has the authority, or the competence to deliver a preliminary ruling on the interpretation of the articles governed by the Treaty of Lisbon and legal documents enacted and adopted by the Union institutions.[36] The competence to *review the lawfulness* of Union measures is governed by article 263 TFEU and allows the Court to review measures taken by other Union institutions.

When the Court is asked to rule on the interpretation of the Union law there are plentiful of different methods of interpretation it may resort to. In this regard it shall be noted that one of these cannot be distinguished as the sole method of interpretation used by the Court, but commenting on the different methods here might perhaps shed some light on how the Court reaches the result in its judgments.[37]

Literal interpretation is conducted by searching for "the scope of the wordings and giving it a meaning based on a literal and logical interpretation".[38] This is rather tricky as there are several different languages accepted in the Union and so the literal

[35] Borchardt, p 12f.
[36] Article 267 TFEU.
[37] Ståhl et al., p 39-40.
[38] Joined Cases C-267/91 and C-268/91 *Keck,* see also Ståhl et al., p 41.

interpretation might force the Court to review different language versions of the same measures. This is perhaps more likely to be seen in the field of indirect taxation and in relation to the VAT Directive.[39] On the other hand **contextual interpretation** is performed when the literal interpretation may not give full precise guidance.[40] The **historical interpretation** refers to a method of interpretation where historical documents give objective and meaning to the legal acts. This is for example the situation when the preparatory documents are consulted to distinguish the meaning of the diffuse legislation in question. A parallel can be drawn with the Swedish legal system where the preparatory work is often considered a valuable source of law. The Court on the other hand is rather reluctant to review the preparatory work and is more likely to find the objectives of the law in the preambles etc. In this sense the Court does not search for the political intention behind the law but rather the objective one.[41] Finally, the **teleological method of interpretation**, perhaps the most commonly used by the Court, is a method where the purpose and the objective are given much importance. The legal act is then interpreted in the light of its aim, purpose and objective.[42]

2.3 Assessing Domestic Measures - The Methodology Used by the Court

There are common denominators between the methodology used by the Court when assessing the compatibility of domestic measures in general and when it assesses domestic measures belonging to the field of direct taxation. The actual methodology used by the Court is not set out in the Treaty itself. Apart from depending on the field of law in question, to some extent at least, the technique used has evolved over time and may be described in a three-step-analysis as follows:

1. What freedom is applicable?
2. Does the measure in question constitute an obstacle[43] to that freedom?
3. If so, can the measure be justified?

Occasionally a fourth step is mentioned independently, that being that the measure in question must be proportionate in a *sensu stricto* way. It could however be argued that the justification process mentioned as a third step governs the proportionality assessment.

[39] See, *inter alia,* Case 283/81 *CILFIT*.
[40] See, *inter alia*, Case 6/60 *Humblet v Belgium.*
[41] Ståhl et al., p 46.
[42] Ståhl et al., p 47-48 and Korling & Zamboni, p 122ff.
[43] The term *obstacle* is used as a broad term capturing both discrimination and restriction. See sections below for the discussion on discrimination/restriction.

2.3.1 Applicable Freedom and Economic Activity

Before the question of an applicable freedom arises, it needs to be established that an activity has been performed in order to fall into the material scope of application of the fundamental freedoms. However, it is often assessed at the same point and not exclusively separated. In order to determine what freedom is applicable the Court will, on a preliminary point, regard the objective of the freedom in question, the objective that it pursues corresponds with the freedom in question. Nevertheless there are situation where there is an overlap in the scope of application between two freedoms. This is for example the case with regard to the free movement of capital and the freedom of establishment. Arguably, the free movement of capital could be encapsulated within the freedom of establishment, as well as the free movement of services could have a scope of application overlapping with the freedom of establishment.[44] For that reason, the objective of the fundamental freedom in question may not always give enough guidance on which freedom is applicable in the current situation. More often it is relevant to consult the objectives behind the domestic measures in question in order to determine the applicable freedom.[45] Occasionally, even the factual circumstances of the case need to be consulted for a correct distinction.[46] The case law regarding what to consult in order to determine the applicable freedom can therefore be said not to be as precise and clear as is wished for. The case law regarding the importance of determining the applicable freedom has been somewhat ambiguous.[47] From a broader perspective the question of applicable freedom has been of greater importance as the freedoms have been referred to as being mutually exclusive.[48] For example, A.G. Léger held in the *Gebhard* case that:

> *"The conditions imposed on establishment in the Member State in which the activity is carried out are, of course, much stricter than those imposed on the mere provision of services."*[49] *and "[…]-, the distinction between the provision of services and establishment is genuinely important."*[50]

However, not implying that the following steps are any different. The question was recently placed on its tipping point in the case *Fidium Finanz*, which, however, did not concern domestic tax measures.[51] Following the *Fidium Finanz* case, the Court has now dealt with the question of priority within the fundamental freedoms in relation to third territories. Perhaps it is safe to say, in the light of that case law, that there is no order of priority and the distinction between the freedoms is, less relevant than before notwithstanding their mutual exclusivity.[52]

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[44] See for example the Case C-55/94 *Gebhard* and Case C-452/04 *Fidium Finanz* regarding the method for other fields of law but direct taxation and see for an example referring to domestic tax measures.

[45] See *inter alia,* Case C-251/98 *Baars* and Case C-196/04 *Cadbury Schweppes,* Case C-182/08 *Glaxo Wellcome,* where the Court made references to the aim of the domestic provisions in order to conclude the applicable freedom.

[46] See for example when the domestic measures in question are neutral on their application, in reference to whether the free movement of capital or the freedom of establishment shall be applicable.

[47] See for example in the field of direct taxation; Case C-204/90 *Bachmann*, Case C-302/97 *Konle* and for further reading Helminen, p 42.

[48] Case C-55/94 *Gebhard*, para 21.

[49] Case C-55/94 *Gebhard*, para 24.

[50] Case C-55/94 *Gebhard*, para 29.

[51] See for example the case law concerning the question of priority, which has now been slightly overruled by Case C-35/11 *FII (2).*

[52] The *Fidium Finanz* case concerned German provisions that had a hindering effect on services provided by establishments in *third territories*. The circumstances of the case were that the corporation in question was established in Switzerland and performed banking services to customers mostly established in Germany. The German legislation in question forced the Swiss undertaking to possess an authorization to be able to provide its credit services to consumers on the German market. *Fidium Finanz* supported their claim on the free movement of capital. The German court however was unsure whether it was the free movement of capital or the freedom to provide services that was applicable on the domestic provisions in question. The Court came to the conclusion that the applicability must be determined with reference to the objective of the domestic measures in question, and that it is necessary to determine

The need for an activity to have taken place is however, crucial in order to fit into the scope of application of the fundamental freedoms, and the Court has held that such activity must be of an economic nature.[53] This is however, not the case when domestic measures are being assessed in the light of article 18 TFEU; no economic nexus is then required.[54] The demand for the existence of an economic activity explains why there are academic professionals advocating for another terminology to be used, namely, that the fundamental freedoms instead are referred to as economic free movement rights.[55]

2.3.2 Cross Border Feature

The activity performed must have a cross-border feature, as EU law does not apply to what is commonly referred to in the literature and the case law as *wholly internal situations*. The cross-border element ensures that the Court stays within its competence according to the principle of conferral, hence, that it does not assess domestic measures only applicable to wholly internal situations.[56]

With this in mind, the Court may still assess the compatibility of measures, which have a hindering effect in the home state. An example would be where the domestic measures in question impose negative consequences when, *inter alia,* a corporation is to change its seat. Circumstances like this one might lead to the conclusion that the domestic measures in that state constitute an obstacle to the freedom of establishment, because the complainant in question has been hindered in making use of one of the fundamental freedoms. Those situations are commonly referred to as home-state obstacles. Although not having, *per se*, exercised any cross-border activity there has been an intention to do so. The opposite to the homes-state obstacle is the host-state obstacle, where contrary to the previous example, the object has made use of its freedoms and is therefore subject to a less advantageous regime in the host-state than that of a resident of the host-state.[57] This brings us to the issue of finding the proper objectively comparable situation and whether it is even required or not.

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the applicable fundamental freedom in cases like this one. In following case law the Court has also relied on the factual circumstances for determining the applicable freedom, especially in when the question concerns the free movement of capital and the freedom of establishment. Confusingly the Court was to rely on the factual circumstances in certain cases, and even the two together in other cases. The scope of application and the question of priority culminated in the *FII(2)* case, as mentioned above. The Court concluded that establishments in *third territories*, which receives dividends from an entity in within the geographical scope of the Union, can, irrespective of whether the domestic measures falls into the scope of application of the freedom of establishment or the free movement of capital argue their case on the basis of the latter. In more precise words, the freedom of establishment would not be applicable in such a case. Stipulating that the factual circumstances are determinative in a situation as such. See also Ståhl et al., p 137-140 and p 145-146, for the discussion on order of priority between free movement of capital and the freedom of establishment, see also Case C-35/11 *FII(2)* and Dahlberg, *Internationell Beskattning,* p 395-403.

[53] See for example Case 36/74 *Walrave* on the question of whether sports were activity of such nature, or Case C-159/90 *Grogan* on the question of abortion in relation to the free movement of services.

[54] Helminen, p 19.

[55] Rosas & Armati, p 181.

[56] See for example Hilling, 2013, p 295 and Helminen, p 19ff.

[57] It is in this regard debatable what is the perfect benchmark. See to this extent the next section and the sources cited therein.

2.3.3 Obstacle and Objectively Comparable Situation

After concluding that a cross-border element is present with regard to the relevant domestic measure and in the circumstances of the case, the Court will turn to the question of whether the domestic measures constitutes an obstacle[58] against the relevant freedom. The presence of an obstacle can be found with reference to two different approaches, either by the restrictions-approach or the discriminations-approach including both covert and overt discrimination.[59]

Discrimination is a concept which emanates from the principle of equality and may be described by the following statement[60]:

> *Discrimination arises through the application of different rules to the similar situations or through the application of the same rules being applied to different situations.*[61]

Consequently, in order to conclude the existence of discrimination the Court needs to search for the proper comparable situation, hence it needs to perform a comparability analysis. Only then, when the *objectively comparable situation* is confirmed, can the premise of discrimination, mentioned above, be true.

With reference to the comparability analysis it shall be stressed that nationality is often the distinguishing factor regarding direct discrimination, whereas, as is often used within domestic tax provisions, residency is the distinguishing factor for indirect discrimination.[62] However, residency is sometimes an accepted ground for distinctions with reference to the tax system in question and a resident and a non-resident are arguably not, *per se* in a comparable situation.[63] Other factors may however, make the situations in question more comparable, and so the question of the comparable situation is not possible to answer in a straightforward manner.[64]

On the other hand, when a domestic measure is referred to as a restriction the Court tends to refer to a situation where the measure in question, renders cross-border engagement *less attractive*, or *likely to impair* the cross-border activity.[65] This implies that no objectively comparable situation is necessary in such case.[66] However, a measure cannot be characterized as restrictive if it is not put compared to another measure or, as in the case of the Court, between two situations. Consequently, two situations must

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[58] Here we shall remember that the term *obstacle* is used to refer to both discriminatory as well as restrictive measures, however the term itself has been part of the dispute regarding whether to use the restrictions approach or the discriminations approach.

[59] For the developments regarding direct and indirect discrimination in the field of direct taxation see Case 152/73 *Sotgiu*, para 11 then cited in Case C-175/88 *Biehl*, para 13. See also Case C-76/90 *Säger*, Case C-415/93 *Bosman.*

[60] See *inter alia* Påhlsson, C*onstructing Comparability: The Reasoning of the ECJ on Equality in Taxation* p 221f.

[61] See *inter alia* Helminen, p 20, Påhlsson, p 221f with reference to the Treaty provisions governing the principle of equality.

[62] See Case 152/73 *Sotgiu.*

[63] Helminen, p 21, and the Schumacker doctrine in Case C-279/93 *Schumacker*, see also Barnard, *The Substantive Law of the EU: the Four Freedoms,* p 286-287.

[64] With regard to free movement of workers see Helminen, p 26ff and to freedom of establishment Helminen, p 30ff as an example of situations where residents and non-residents may be in objectively comparable situations due to objective factors and not on the residency as a distinguishing factor.

[65] See E. Englmair, Lang et al., p 56 for the debate concerning tax law especially. See for example Case C-341/05 *Laval*, Case C-55/94 *Gebhard*, para 37 for an explicit restriction based approach.

[66] For the debate see for example Vanessa E. Englmair, in Lang et al. p 56f and Hohenwarter, in Lang et al., p 99ff, see also Barnard, p 597f for further discussion on the matter of whether it is more accurate to speak about a restriction based approached instead of a discrimination approach, in the light of recent case law such as: Case C-446/04 *FII Group Litigation* and Case C-374/04 *ACT Group Litigation*, see also Dahlberg, p 341-344 and, p 348-349 and p 352.

perhaps not be comparable to every extent, according to the reasoning of the Court at least, but perhaps may still be akin to each other.[67] It is possible that one could argue that the fundamental freedoms should instead be referred to as fundamental rights[68], which is also the heading of the chapter governing the freedom of establishment and the free movement of workers in the Treaty on the Functioning of the European Union.[69] Notwithstanding the final word of that discussion and presuming that they may be referred to as *rights*, they are nonetheless not absolute rights, which imply that it is possible to derogate from the freedoms under certain circumstances.

2.3.4 The Justification Process

The methodology of this section resembles the line of reasoning made by the Court in its judgments. At first we shall briefly regard the derogations states in the Treaty. Secondly, the mandatory requirements as a phenomenon shall be discussed with relation to the different justification grounds and in this regard it is also worth mentioning the rule of reason doctrine. Following, this, the *Gebhard* case shall be consulted, after which the last section touches upon the content of the proportionality assessment within the justification process, as it stands today.

2.3.4.1 Derogations Within the Treaty

When the Court comes to the conclusion that a Member State's domestic measure constitutes an obstacle[70] to the fundamental freedoms and is thus not compatible with the Treaty, the measures may nonetheless be justified and therefore declared compatible with the fundamental freedoms. The possibility to derogate from the fundamental freedoms is governed by various articles in the TFEU. Article 36 TFEU concerns the possibility to derogate from the free movement of goods, assumingly inspired by article XX in GATT[71].[72] Article 52 TFEU governs the possibility to derogate from the freedom of establishment including the free movement of workers. Art 52 TFEU also applies to the free movement of services found in chapter 3 of the TFEU, and finally article 65 TFEU regarding the free movement of capital. These articles ensure that the Member States may adopt legislation which is contrary to the aforementioned freedoms, if grounds provided for by the relevant articles justify it.[73] The common denominator for all of these derogations is that the measures in question should have objectives, qualifying as fundamental to the Member States such as; *public policy, public security and public health.*

Barnard expresses that, in the light of the recent development of research topics, maybe it is more accurate to discuss derogations based on the interests of individuals rather than of the Member States. Although this should be seen in the light of the free

[67] See some interesting case law on the matter Case C-293/06 *Deutsche Shell* and pending Case C-686/13, concerning, somewhat simplified capital losses due to exchange rates. No comparable situation could be found in such situation in the *Deutsche Shell* case.
[68] See for further reading Szudoczky, p 140, as she argues that the fundamental freedoms shall not be referred to as rights as they do not seek to attain the objective that rights, *sensu stricto*, do.
[69] See chapter 2 in the Treaty on the Functioning of the European Union.
[70] Here obstacle is used in *sensu latiore* including both discrimination and restriction.
[71] General Agreement on Tariffs and Trade, a multilateral agreement regulating international trade (now part of WTO).
[72] Barnard, p 39.
[73] Mark well that all grounds are not found in all articles mentioned above and are thus not to be referred to invariably, and that there are only the most relevant for direct tax law purposes which are mentioned here.

movement of goods and the derogations in article 36 TFEU supposedly inspired by GATT as mentioned above.[74]

Whilst the derogations explicitly provided by the Treaty may justify measures which are directly discriminatory, the rule of reason doctrine was elaborated to justify measures that were indirectly discriminatory.[75] Indirectly discriminatory measures are on the outset applicable without any distinction but evidentially have the equivalent effect of directly discriminatory measures.[76] The Court has recently been reluctant to make a distinct separation and more often refers to the restriction based approach on the free movement rather than indirect or direct discrimination approach, implying that the rule of reason doctrine may be used in order to justify even directly discriminatory measures.

2.3.4.2 Derogations Not Stated in the Treaty – the Rule of Reason Doctrine

Apart from the expressed derogations as mentioned above, the possibility to justify a measure constituting an obstacle to the fundamental freedoms remains through the possibility of relying on the *rule of reason* doctrine. The rule of reason doctrine has provided the Member States with a possibility to justify domestic measures constituting obstacles to various freedoms, on grounds not foreseen in the Treaty articles. The rule of reason doctrine first came to light in the *Cassis de Dijon*[77] case, a case regarding the free movement of goods, where the Court elaborated the rule of reason doctrine through referring to *mandatory requirements*[78]. Consequently, one could argue with reference to the *Cassis de Dijon* case that the Member States gained another path of remedy, which allows for a further disintegration within the Union. In theory this might be perceived as the possibility to justify domestic measures, constituting an obstacle to the free movement, however, in reality it depends on the attitude of the Court and its willingness to accept arguments advocating further justification grounds. In paragraph 8 of the judgment the Court made the intriguing statement, which turned the *Cassis de Dijon* case into a land-mark case.

Para 8:

> *"Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the product in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer."*[79]

The Court emphasised that disparities between the legislation in different Member States must be accepted when the legislation in question is necessary to satisfy

[74] Barnard, p 149 see also Petursson, p 70 for a cross-reference.
[75] Case C-55/94 *Gebhard.*
[76] See *inter alia,* Barnard, p 247, p 278-290 Even though the discussion is made within the context of the free movement of workers it is still generally relevant. See also the Gebhard case and the four criteria that can be deduced from that judgment. It supports the idea that the rule of reason doctrine may only be used in order to justify indirectly discriminatory measures. With that being said the Court has in recent years made less distinction on this matter is less reluctant to apply the rule of reason doctrine with regard to all obstacles. See following sections for references to the Gebhard case and the discussion on the applicability of the rule of reason doctrine.
[77] Case 120/78 *Rewe-Zentral v Bundesmonopolverwaltung fuer branntwein*, commonly referred to [*Cassis de Dijon*].
[78] Sometimes the rule of reason doctrine is referred to as "imperative requirements" or "overriding reasons in the public interest".
[79] Case 120/78 *Cassis de Dijon*, para 8.

mandatory requirements. The mandatory requirement is the foundation for which the grounds for justification elaborated by the case law are built upon. The Court clearly states a few examples of such mandatory requirements in the abovementioned paragraph, when it for example refers to *the effectiveness of fiscal supervision.* The Court has throughout the years following this judgment elaborated on the different grounds of justification and their scope of application.

The Court has in principle, accepted the following grounds of justification when the question have concerned domestic measures belonging to the field of direct taxation.[80]

- Cohesion or coherence of the tax system[81]
- Territoriality[82]
- Anti-abuse and anti avoidance[83]
- Effectiveness of fiscal supervision[84]
- Neutralization in the other state[85]
- Balanced allocation of taxing rights between the Member States[86]
- Promotion of national education and training[87]

The mandatory requirements statement has evolved through the case law of the Court and consists of a non-exhaustive list of grounds for justification. Due to the fact that the grounds for justification appearing on this list are arguments, put forward by the Member States, which have been accepted by the Court as valid for justifying derogative measures, it has not always been clear what nature and scope of application they possess. Hence, the constant development of the Union law and the continuing questions on the scope of application of the existing grounds for justification as well as questions regarding possible new justification grounds still arise.

[80] In the mid 1990s it may be understood by the Courts case law that the rule of reason doctrine was only applicable on measures which where indistinctly discriminatory, in other words, to measures constituting indirect discrimination. See for example Case C-311/97 *Royal Bank of Scotland*. This was however, overruled in the following case law and the rule of reason doctrines is not restricted only to act as a justification process for indirect discrimination, but also for indirectly discriminatory measures, and arguably also for "solely" restrictive measures as such. See for example Dahlberg, 350-353.

[81] Used for example in Case C-204/90 *Bachmann*, Case C-300/90 *Commission v Belgium*. It is noteworthy to mention that the Court have been continuously reluctant to accept this justification ground, and when it does accept it, it is based on the real existence of a direct link between a tax benefit and a tax burden.

[82] This ground for justification is in close connection to the cohesion or coherence of the tax system as Helminen explains, it is hard to argue that domestic tax provisions are justified on the ground of territoriality if the national tax system does not follow the territoriality principle in a consistent manner – see Helminen p 48. See also Case C-250/95 *Futura Participations SA and Singer v Administration des contributions*, however the perceptions seem to be diverse in the academia and it is factually so that the Court has only accepted this justification ground in the *Futura* case, if that was the reason for the justification that is – see Ståhl et al. p 161-162 for this argument and also E. Englmair p 74, and Dahlberg, 363.

[83] See for example Case C-255/02 *Halifax* case, which although it concerned VAT fraud, is still a landmark case for tax law in general. See also Case C-196/04 *Cadbury Schweppes*, Case C-446/03 *Marks & Spencer*, Case C-231/05 *Oy AA*.

[84] An example is the *Cassis de Dijon* case mentioned above.

[85] See for example Case C-170/05 *Denkavit*, which regarded withholding tax on outbound dividends and the possibility to neutralize such dividends in the receiving state. This justification ground regards questions on the relationship between the EU Law and Double Tax Conventions between states.

[86] This justification ground was used together with the anti-avoidance justification in Case C-446/03 *Marks & Spencer* even though an additional, not accepted justification ground also was opted for. The justification ground has further been used in, *inter alia,* the following cases: Case C-231/05 *Oy AA*, Case C-414/06 *Lidl*, Case C-182/08 *Glaxo Wellcome*, Case C-311/08 *SGI* and Case C-337/08 *X Holding.*

[87] *Inter alia* Case C-10/10 *Commission v Austria*, although this ground of justification was accepted in this case, the measure in question did not comply with the proportionality assessment.

2.3.4.3 The *Gebhard*-test

Stipulating that domestic measures could be justified by mandatory requirements they still need to fulfil the requirements, imposed by the principle of proportionality as the final test in the justification process.[88] With a broad perspective on the methodology, the final step of the justification process may be described with reference to the *Gebhard*[89] case which defines the criteria that domestic measures, justified by mandatory requirements, must fulfil in order to be fully justified. In should be stressed here that the *Gebhard* case may be referred to when presenting the justification process itself, as it only entails two requirements which symbolise the proportionality assessment. The remaining two concerns the relationship with the concept of mandatory requirements as have been discussed above.

The circumstance in the *Gebhard* case were that Mr Gebhard, a German national who was authorized to practice as a *Rechtsanwalt*[90] in Germany, moved to Italy with his family in 1978. He has since then pursued his professional activity in Italy in a set of chambers of lawyers practicing in association. Starting from 1989 he opened his own chambers were he pursued his professional activity with an Italian *avvocati* and *procuratori*. Complaints were lodged against Mr Gebhard and his chamber as he used the title *avoocati* in his letterhead etc. The complaints culminated in disciplinary proceedings after Mr Gebhard refused to follow the prohibition to use the title *avocati*. The national court in question, dealing with the disciplinary proceedings was unsure as how to interpret [then] Community law and so it stayed the proceedings and referred a question for preliminary ruling from the ECJ. It should be stressed here that the question did not solely concern the freedom of establishment but also Directive 89/48/EEC of 31 December 1988 *on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years*. The field of law was thus slightly harmonised by that directive.[91]

The Court concluded that while taking up and pursuing certain self-employed activities, one may have to comply with certain provisions laid down by that legal system in different ways. An example of that is where certain activities are restricted to holders of a diploma or similar evidence and the use of certain titles, as is the question is this case. In principle this means that a foreign national wishing to pursue such a professional activity must comply with the requirements stipulated by that legal system. However, the directive mentioned above clearly seeks to facilitate the fulfilment of such requirements by imposing on the Member States rules concerning mutual recognition of diplomas etc. Without clearly expressing that the measures in question constitute an obstacle against the freedom of establishment, the Court moved on to what may be described as the justification process and stipulates four criteria that must be fulfilled in order for the domestic measures to be justified.[92]

1. *The rules in question must be applied in a non-discriminatory manner;*
2. *The rules must be justified by imperative requirements in the general interest;*
3. *The rules must be suitable for securing the attainment of the objective which they pursue; and*
4. *The rules must not go beyond what is necessary in order to attain it.*[93]

[88] Dahlberg, p 353, see for reference to the case law for example Case C-446/03 *Marks & Spencer,* para 53.
[89] Case C-55/94 *Gebhard.*
[90] The term can be translated to lawyer, attorney, barrister, solicitor or a person of similar capacity.
[91] Case C-55/94 *Gebhard*, para 2-5,8, 32, 36.
[92] Case C-55/94 *Gebhard*, para 35-37.
[93] Case C-55/94 *Gebhard*, para 37 se also Barnard, p 528.

The Court has referred to the *Gebhard* case and the test in following case law concerning the other freedoms, which stipulates that the test is applicable on the other freedoms as well as with regard to the assessment of compatibility of rules belonging to other fields of law.[94] Subsequently, the Court has referred to the four conditions from the *Gebhard* case as the *Gebhard-test*, when performing the justification process including the proportionality assessment. In this regard it shall be mentioned that the Court has not necessarily stated the four criteria as clearly as it did with concern to Mr Gebhard, sometimes the Court tends to refer to the proportionality assessment with reference solely to the wording of the *Cassis de Dijon* case.[95]

2.3.4.4 Proportionality – the Last Resort

In the *Rau*[96] case the Court established that the domestic measures in question had to fulfil the principle of proportionality in order to be fully justified. This was later transformed in the *Gebhard* case, which has been previously discussed. The principle of proportionality had however surfaced already in the 1970s in the context of [then] Community law and even earlier in other contexts of Community law.[97] The exact extent of what was intended with applying the principle of proportionality is however, expressed neither in the judgment the *Rau* case nor in the *Internationale Handelsgesellschaft* case. The *Gebhard* case did however, provide us with a somewhat strategy on how to apply the principle of proportionality as the last step of assessment within the justification process. In the *Gebhard* case the Court contemplated that *"the rules must be suitable for securing the objective which they pursue and that the rules must not go beyond what is necessary in order to attain that objective"*.[98] In essence this expression could be held to resemble the principle of proportionality itself, therefore it is possible to conclude that the principle of proportionality may constitute an independent step in the methodology used by the Court, it may however still form part of the justification process. Irrespective of the conclusion it may be stated that the principle of proportionality comes to expression in the assessment made by the Court. The remaining question is perhaps how the Court reasons with regard to whether the principle is fulfilled or not. This will be further discussed in chapter four.

[94] See for example Case C-367/98 *Commission v Portugal*, see also Barnard, who argues that the test is applicable in other fields of law with reference to the operative part of the judgment in para 6 of the judgment.
[95] See section 2.3.4.2.
[96] Case 261/81 *Rau.*
[97] Case 11/70 *Internationale Handelsgesellschaft*, see for example old employment cases.
[98] See previous with reference to Case C-55/94 *Gebhard,* para 37.

2.4 Summary and Conslusions

The methods of interpretation used by the Court are initially presented in this chapter. The importance of those methods is seldom explicitly presented they are however, of great importance for understanding the methodology used by the Court and for understanding why the Court reaches the judgements that it does. The methods of interpretation are therefore significantly more important than first thought of. Occasionally the Court uses different methods of interpretation, but most often it resorts to the teleological method. This allows the Court to conclude its judgment in relation to the objectives of the European Union, and it is also why we see such a great development in the methodology used by the Court in relation to the fundamental freedoms. A great example is the rule of reason doctrine and as we shall see in detail, the Gebhard test. The different methods of interpretation therefore allow the Court to work with expediency.

The methodology of the Court when assessing the compatibility of domestic measures, in general, with the fundamental freedoms can be summarized in the following steps. Firstly, an economic activity needs to have taken place in order for the fundamental freedoms to apply. This is exemplified with reference to the *Grogan* case, which concerned the right to abortion in relation to the fundamental freedoms. The economic nexus may be explained with reference to the objectives of the fundamental freedoms, since they constitute measures to achieve the implementation of the internal market. Secondly, the measures in question must possess a cross-border element and it must be classified as constituting an obstacle against the applicable freedom. The term obstacle is, in this context, referring to either restrictive or discriminatory measures. The question of the need for an objectively comparable situation is not the focus of this thesis, however, with reference to the criteria posed in the *Gebhard* case, some comments are necessary to be made in this regard. The Court has not abandoned the discriminations approach and the need for an objectively comparable situation by introducing the restrictions approach. It has however lowered the bar. The restrictions approach is not a recent phenomenon; rather it goes back to the early case law. Further conclusions concerning the change in approach by the Court cannot be made here. With that being stipulated the issues surrounding this matter are intriguing and should be further discussed in the legal debate.

When the Court concludes that the domestic measure in question constitutes an obstacle the Court has to assess whether the measures may, nonetheless, be justified. The justification process is often described with reference to the *Gebhard case* where the Court distinguished the following four criteria, which must be fulfilled in order for the measures to be justified.

1. *Be applied in a non-discriminatory manner;*
2. *Be justified by imperative requirements in the general interest;*
3. *Be suitable for securing the attainment of the objective which they pursue; and*
4. *Not go beyond what is necessary in order to attain it*

The first criterion must be read in coherence with the second criteria, and together they stipulate that the rule of reason doctrine is only applicable to indirectly discriminatory measures. With the evolvement regarding the restrictions-approach being favoured over the discriminations approach, the first two criteria are, in my opinion, becoming obsolete in this context.[99] My main argument is that measures constituting restrictions on the fundamental freedoms may nonetheless be applied in a

[99] See for example Ståhl et al., p 149-150.

non-discriminatory manner. That leaves us with the two last steps of the *Gebhard* test which mostly, as we shall see, resembles the application of the principle of proportionality. Now, the *Gebhard* case is perhaps more suitable to mention in the context of the proportionality assessment on its own. This shall be further discussed in chapter four, "Proportionality".

3 General Principles of EU Law

3.1 A Brief Introduction

This section will remain brief, as this thesis does not deal with questions related to the role and the place of general principles of EU law. It is however, crucial to understand the characteristics of the general principles of EU law in order to grasp the role of the principle of proportionality as is discussed in the following part of this thesis along with the principle of legal certainty.

3.1.1 Definition and Characteristics

Defining a general principle of law is not as straightforward as one might believe from first glance. Different scholars have different views on the notion and their utmost source varies, depending on a variety of factors including different philosophical views of the law. The general principles of law have been distinguished and put into different classifications by different scholars. This is especially the case in EU law where the term *general principles* is rather diverse.[100] Initially, it should be stated that the general principles of EU law, form part of the first segment of sources as has been mentioned in the introduction, which are commonly referred to as primary law.[101]

General principles must have certain denominators, which characterises them and qualifies them as general principles of law. When proceeding from the idea that a principle is a general proposition of law there are two characteristics that can be found within the general legal principles and which may then, function as the common denominators. Namely, the *general* feature and the *value* it carries.[102] Tridimas envisions the general feature by contemplating that a general principle operates on a different, abstract level, which makes it possible to distinguish it from a rule. He does not however, exclude the idea that *general* might be explained in another, perhaps more suitable sense with reference to the scope of application of the different principles. The *general* in general principles of law may then be described as a norm that transcends most fields of law and therefore have a large material scope of application.[103] The general feature allows the principles to exist without any written source and it makes their scope of application particularly great. It allows the principle to become very adaptable and perhaps not as foreseeable as is perhaps desired.

A general principle of law may therefore be described as a general legal proposition from which the norms of the legal system emanate.[104] Hence, a general legal principle of law can be defined as a value carrying proposition, from which rules may be derived and which is general enough for it to operate within different fields of law. The general legal principles need no anchoring in the written legal sources, and many

[100] See for example Tridimas, *General Principles of EU Law,* p 2ff.
[101] See for example Rosas & Armati, p 36-37.
[102] Tridimas, p 1.
[103] See Tridimas, p 1ff and p 25ff, Moëll, *Proportionalitetsprincipen i skatterätten,* p 18-19 and Harbo, *The Function of the Proportionality Principle in EU Law,* p158-185, [p 159].
[104] Tridimas, p 1.

attempts at codifying them have not been greatly successful. Thus, general legal principles need neither codification, nor an expression in the law, to be applicable.[105]

The material scope of application is not limited and the procedural scope of application is large, as it is possible to use the general principles of law for different procedural reasons. They are not solely used to invalidate norms but may also be used within the legislative process, which tells us that they may be expressed in the preparatory works of the legislative acts as well.[106]

There are different ways of categorising the general principles of law and their outmost source; however, many of the general principles of law derive from the rule of law. Hence, general principles of law may constitute a source of law in most legal systems which are based upon the principle of rule of law.[107] Consequently, the notion regarding the general legal principles of law is not as straightforward and easily perceived as one might believe at first glance. Therefore, it is interesting to regard the notion itself before plunging deeper into the principle of proportionality.

3.1.2 Creation and Beyond

General principles of EU law are, according to the former President of the European Court, the main tool for the judicial development of EU law.[108] Rosas and Armati stress that the *"development of the general principles of law through the case law has undoubtedly contributed to the dynamic nature of Union law"*[109].

Consequently, it is therefore not surprising that the general principles of EU law are used to "fill the gaps" of EU law, and that the question of activism occasionally surfaces.[110] Rosas and Armati suggest promptly that the development of the general principles of law by the ECJ is not as radical as we might think, and should not insinuate that the elaboration [of those principles] is to be referred to activism as mentioned above. They suggest another view to be taken on the matter, and claim that general principles, in general, are "*simply necessary ingredients in any legal order*" and that "*if the ECJ had not found them, they would have had to be found by someone else*".[111]

With this brief factual basis the principle of proportionality, as a general principle of EU law, shall now be further scrutinised.

[105] See for the description on the general principle also, Rodriguez, Iglesias, p 1-2 and his quotation of Sir Gerald Fitzmaurice, who proposes that a general principle answers the question "why?" as opposed to a rule which would only possibly be answering the question of "what?".
[106] Tridimas, p 1, p 29ff.
[107] Tridimas p 2, see to this extent also Rosas & Armati, p 36-37 and their discussion on the rule of law and its more predominant part in the Lisbon Treaty in relation to previous Treaties.
[108] Rodriguez, p 1-2.
[109] Rosas & Armati, p 37.
[110] See to this extent and for further reading concerning the matter of the general principles of EU law, Xavier Groussot, *General Principles of Community Law*, 2006.
[111] Rosas & Armati, p 38.

4 Proportionality

4.1 Introduction

In the previous section we find the substantial ground for the notion of general principles of EU law. It is therefore perhaps too facile to start off by concluding that the principle of proportionality may be described as a *general principle of law*[112] and that it is commonly referred to as one of the most important general principles of law.[113] Former AG Sir Francis G. Jacobs once said that; *"there are few areas of Community law, if any at all, where the principle of proportionality is not relevant."*[114].[115] The principle of proportionality is thus present within most fields of Union law in different legal contexts. Apart from its large material and procedural scope of application, it is also flexible in its requirements depending on the context in which it is used.[116]

This chapter provides an overview of the notion of proportionality and the principle of proportionality and its ground in the different European legal systems.

4.2 The Notion of Proportionality

The notion of proportionality is not an invention of the European Union; instead it probably descends from the ancient Greek philosophical society. Proportionality would then be expressed with the phrase, *all in moderation.*[117] From a literal point of view it is not unimaginable that proportionality would be explained in a similar way because a similar explanation is given when a dictionary is consulted. Therein proportionality is explained as *a mathematical expression that describes a connection between two greater things.*[118] From a legal perspective we view proportionality expressed through a general legal principle of law, which underpins every legal society based on the rule of law. In fact, when proportionality is viewed in the light of the rule of law we understand the explanation given by the dictionary, where proportionality would influence the relationship between the legal authority and the people submitted under the legal system. More precisely, we might describe the notion of proportionality as a balancing act between two interests, often protection of the rights of the individual in the society.[119] Thus, even in a legal context, it is possible to describe the notion of proportionality as something that regulates the relationship between two greater things. Two things that must be balanced in order to be proportionate, in other words, they must be in proportion to one another.[120] This argument is of course very technical as it does not tell us at what state two interests are in proportion to each other nor does it reveal what needs to be taken into account when proportionality is sought after. Reaching the state of balance where two interests are in proportion is perhaps not always the result when applying the principle of proportionality, at least not when it is used as a tool to achieve certain objectives. Proportion is not

[112] Moëll, p 15, Craig & de Búrca, *EU law: Text, Cases, and Materials,* p 109.
[113] Moëll, p 15, Craig & de Búrca, *EU law: Text, Cases, and Materials,* p 109.
[114] Case C-120/94 *Commission v Greece/FYROM.*
[115] Moëll, p 18.
[116] Moëll, p 18.
[117] Tridimas, p 136.
[118] Nationalencyklopedin, "proportionalitet" egen översättning.
[119] Moëll, p 35.
[120] Tridimas, p 136, Helminen, p 6.

determined in advance, it is a rather fluctuant state which depends on the *action* which is being undertaken, and which interests the action might jeopardise or compromise. The underlying *interest*, as Tridimas emphasises, which proportionality seeks to protect in different legal contexts varies diversely. Consequently, the methodology of the application of the principle of proportionality may vary depending on the contexts, and it may also vary depending on the relevant interests in question.[121]

4.3 Understanding the Principle of Porportionality

In order to properly understand the principle of proportionality as such and its developments in EU law, one needs to revisit the history of the Union as well as the heritage of the principle of proportionality. Following these sections the principle of proportionality will be discussed in the light of its characteristics as a general principle of EU law, as well as the expression of the principle in the justification process.
Firstly, the history of the European Union shall be revisited briefly to be able to put the evolution of the Union law into perspective.

4.3.1 Historical Perspective on the Union

A contemporary analysis of the law of the European Union must be put into its historical background and context. The cradle of the European Union was created during the 1950s in a Europe that had been destroyed in many ways. In the aftermath of the Second World War the Europeans desired a change in the political climate and for nationalism to be forgotten. At this exact moment the world was about to change as the new political winds, influenced by the general political climate in the world was blowing also in Europe. America, a leading super nation announced its willingness to assist Europe with financial aid for a restoration through the Marshall Plan in 1947. During the same year, America had agreed to sign the General Agreement on Tariffs and Trade[122], with the intention being to make way for a more liberalised world trade. During the same period, the North Atlantic Treaty, Organisation for European Economic Development which was later to become the Organisation for Economic Co-operation and Development, the Western European Union and the Benelux Treaty were established within the geographical territory of Europe. Despite the constant threat of an out break of an additional world war breathing down the neck of Europe it was at this time that the cradle of what we today refer to as the European Union was established through the Euratom and the European Economic Community. Not long after that had the original Member States signed the Statue on the Council of Europe making way for a new political order. Finally, in 1950, the European Convention on Human Rights was signed and came into force in 1953. The Europe that had been destroyed in the Second World War was, along with the rest of the western world, entering a phase of development and recuperation.[123]

[121] Tridimas, p 137.
[122] GATT.
[123] Craig & de Búrca, p 4.

The establishment of the common market was one of the many objectives of the primary treaties[124] and the objective was to be established over a transitional period of several stages.[125] This thesis does not primarily focus on political theories but it needs to be emphasised that politics and different eras of the evolution of the European Union was and still is, affected by different political theories on integration which, is thus reflected in the political climate of our time.

It should also be stressed in this section, without any subjective political views steaming through, that the principle of proportionality has shown to be an effective tool for the economic integration in the Union.[126] As the field of direct taxation is adversely politically infected, legal questions and issues relating to the field of direct taxation can easily slide in to a question of the scope of application of the Court and it can be questioned whether case law of the Court is always separated from political views.[127]

4.3.2 Heritage in the European Legal Systems

The principle of proportionality is said to constitute a general principle of law underpinning most legal systems built on the premise of the rule of law. However, traces of proportionality as a notion may be traced further back in history than just the establishment of our, in this sense, rather modern legal systems. Proportionality may be said to have its roots in the ancient Greek dictum *pan metron ariston*, which has roughly been translated into "all in moderation".[128]

Proportionality, expressed through the principle of proportionality has a given place in most modern legal systems. It has been promptly advertised by German academics because the principle of proportionality has a given role in the German legal system. The notion governed by the principle of proportionality may be found in other European legal systems as well, notwithstanding that the name, content and application of it varies dramatically.[129] The reasons to the great variation of the aforesaid factors are to some extent obvious, as not all legal systems found in Europe rest on the same ground and therefore the constitutional law plays an important part in defining the principle or proportionality within each legal system.[130]

A lot of focus, when referring to the evolvement of the principle of proportionality within the different legal systems, is often placed on the structure of powers between the different administrative organs. When advocating for a structure where the power to legislate, execute and judge is separated on different institutions, it is not uncommon that one is less inclined to provide the judiciary power with the principle of proportionality as a tool to review the lawfulness of enacted legislative acts or reviewing the material content of an official decision and overruling it. This is for example the concern with the principle of proportionality in the French legal system.[131]

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[124] The Treaty of Rome adopted in 1958 establishes the common market as an objective of the Union [then the Community].
[125] Barnard, p 8ff.
[126] Moëll, p 110-111.
[127] Moëll, p 110-111.
[128] See Tridimas, p 136 and Petursson, p 132.
[129] Tridimas, p 136-137, Moëll, p 35, see for example the principle of unreasonableness as was established through the *Wednesbury* case in the UK.
[130] Moëll, p 23.
[131] Moëll, p 23.

Although the principle of proportionality is commonly referred to as existing, or having its heritage in different European legal orders, the principle has different status and characteristics within each of these legal orders. It has been argued that the principle of proportionality exists for example within the French legal system[132], although the principle is not regarded as a general principle of law, as that concept is unfamiliar to the French legal tradition. Nonetheless, the principle of proportionality can be distinguished in the complexity of the French law, although not accepted as a general principle of law *per se.*[133]

The German perception on the principle of proportionality is of intriguing value in this section as it is perhaps where the principle of proportionality we know as a general principle of EU law, has most of its heritage. Even though the principle had been applied in early employment cases[134] it was not until AG Dutheillet de Lamothe properly discussed it that the principle can be said to have rooted in the European legal order. However, traces of the principle of proportionality as a ground for review of measures can be traced back even further to the 1950s. It was not however, until the 1970s that the Court contemplated its role in this context.

In the case *Internationale Handelsgesellschaft* the Court was asked to deliver a preliminary ruling on the compatibility of a Community regulation concerning a system of deposits which formed part of the import and export licenses for agricultural products. The German corporation found these requirements, imposed by the regulation, to constitute an obstacle against the fundamental freedoms and it therefore challenged the decision in the national court. Unsure how to interpret this, and perhaps eager to receive an acknowledgment of the principle of proportionality, the German court stayed the proceeding and referred a question for preliminary ruling concerning the interpretation of Community law. At this time, two other, similar questions had been referred to the Court and AG Dutheillet de Lamothe gave a joined opinion on the matter.[135] The principle of proportionality, presented by the national court, was perceived as a fundamental right which, in this case did not result in a preclusion of the Community measures in question. The Court therefore found the Community regulation, laying down the system of deposits, to be an appropriate method for the objective that the regulation pursued.[136] The wording reveals that there was no explicit reference to the principle of proportionality in the judgement, however, AG Dutheillet de Lamothe had discussed it rather extensively in his opinion.[137]

The application of the principle in the context of review of domestic measures was not discovered until the 1980s where the litigation increased and the Member States had adapted to the new supranational order that the Union represents.[138]

It is not completely surprising that the first case where the principle of proportionality was discussed was in a case relating to Germany as the principle of proportionality already had a given role in the German legal system.[139] According to German law the principle of proportionality entails three criteria:

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[132] See for example Tridimas, *Proportionality in European Community Law: Searching for the Appropriate Standard of Scrutiny,* p 65-84 (ed.) Ellis, [p 65].
[133] van Gerven, *The Effect of Proportionality in the Actions of Member States of the European Community: National Viewpoints from Continental Europe,* p 37-63 [p 44-48], Moëll, p 26-30.
[134] See for example Tridimas, p 141 and the case law he refers to such as Case 18/63 *Wollast v EEC.*
[135] See AG Dutheillet de Lamothe, Opinion delivered on 2 December 1970.
[136] Case 11/70 *Internationale Handelsgesellshaft,* para 19-20 (IBFD), para 12 at page 1136.
[137] See Tridimas, p 136, Case 11/70 *Internationale Handelsgesellschaft*, para 12 at page 1136. It should however be mentioned here, that AG Dutheillet de Lamothe explicitly referred to the principle of proportionality.
[138] Tridimas, p 141-142.
[139] van Gerven, p 44-48.

1. Appropriate
2. Necessity
3. Proportionality (sensu stricto)

Although these exact criteria were not mentioned by the Court in the *Internationale Handelsgesellschaft* case they have since surfaced in plenty of the case law of the Court in recent years and it is possible to conclude that the German view on the principle of proportionality is the one which, has influenced the principle of proportionality found in the Union law.[140]

4.3.3 The Content of the Principle Itself

Regardless of the fact that the notion of proportionality may be deduced to a relationship between two greater things, which are balanced against each other, the principle of proportionality has many sides and depending on the action questioned, different factors and tests may be gathered from the principle.[141] Proportionality in relation to measures adopted by the different institutions of the Union often showcases the principle of proportionality in a different way. In such cases a measure is often[142] considered proportionate unless it is *manifestly unsuitable* or *inappropriate.*[143] However, when the principle of proportionality is referred to, in the context of whether domestic measures are compatible with the Treaty, the principle of proportionality is not always explicitly mentioned as such. More often the Court stipulates that *the measures in question must be appropriate and necessary to achieve its objectives*.[144]

Consequently, we understand that the principle of proportionality, as a general principle of EU law, may be explained as requiring that measures undertaken must be proportionate to their objectives. Here, the wording proportionality entails three, or sometimes only two, requirements. In accordance with the German understanding of the principle of proportionality, which has greatly influenced the reasoning of the Court[145], although that was not fully the case when the principle of proportionality first surfaced in the *Internationale Handelsgeselleshaft* case[146], proportionality consists of requirements which have to be evaluated, discussed and finally fulfilled in order for the measures in question to be proportionate to its objectives. Moreover, proportionality is an act of balancing the effect of the measures against the interests of, in this case, the Member States and their citizens.[147]

Tridimas explains the principle of proportionality, on the most abstract level, as a principle that requires that "*the actions undertaken must be proportionate to its objectives*"[148] and from this he deduces two tests in order to construct the principle of proportionality.

1. The test of suitability;
2. The test of necessity.

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[140] Moëll, p 108-109.
[141] See previous section for further reference.
[142] Note that this is not consistently used by the Court when Community measures are being questioned, see for example Case 114/76 *Bela-Mühle*, however, the case was not against the [then] Community in question.
[143] See to this extent Moëll, p 145 and therein quoted Case 59/83 *SA Biovilac.*
[144] Tridimas, p 139.
[145] Jacobs, *Recent Developments in the Principle of Proportionality in European Community Law,* p 1-21, [p 1ff].
[146] See earlier reference.
[147] Tridimas, (ed.) Ellis, p 65-66.
[148] Tridimas, (ed.) Ellis, p 65.

The *suitability test* is used in order to determine whether the measures in question are adequate to attain the aim of the measure. It has also been explained in the literature as the relationship between the means and the ends.[149] This test can be seen in the reasoning of the Court when it refers to *appropriate* within the justification process.

The second test is usually referred to as the *necessity test* and it constitutes the final balancing act between the two concerned interests as mentioned in the section above.[150] The Court performs the second test by weighing the competing interests against each other. Barnard explains the test with the following sentence;

> *"What consequences does the measure have on the interest worthy of protections and are those consequences justified in view of the importance of the objective pursued?"*[151]

The last part of the second test has sometimes been viewed as having two features. It may in this context also be put forth that the second test does often come to expression through the application of the phrase "whether less restrictive means could have been employed instead", which is why it is sometimes referred to as the "less restrictive means" test.[152]

4.3.4 Proportionality in the Legal Framework of the European Union

The principle of proportionality is despite the probable ancient reference, a principle which, have been influenced by the same ideas that have influenced the liberal democracy to flourish.[153] Bearing in mind what was discussed in the previous chapter regarding the characteristics of a general principle of law, those features shall now be discussed with reference to the principle of proportionality as a general principle of EU law, with the constant reminder of its heritage in the European legal orders.

The principle of proportionality is explicitly expressed in the Treaty of Lisbon, and traces of it go back to the time of the Treaty of Rome.[154]

> *"Art 5 TEU*
>
> *1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.*
>
> *[…]*
> *4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.*

[149] Barnard p 177f, p 534.
[150] See for reference Barnard p 177, p 534.
[151] Barnard, p 177.
[152] Barnard, p 178, Helminen, p 44.
[153] Tridimas, p 136.
[154] See also the AG opinion in Case 11/70 *Internationale Handelsgesellschaft*, as the principle is therein referred to by the AG as a principle of Community, emanating from the rule of law, p 1146.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality."

These two paragraphs both express the need to consult the principle of proportionality. Firstly, the powers conferred upon the Union (principle of conferral) must be exercised in a way that is consistent with the principle of proportionality and the principle of subsidiarity. Hence, these two principles are in this context what is commonly referred to as a corollary to the principle of conferral. The principle of conferral is the legal principle on which the competence of the Union is based and the principles of proportionality and subsidiarity tell us to what extent these powers given by virtue of the principle of conferral may be utilized by the Union. The last paragraph mentions the *Protocol on the application of the principle of subsidiarity and proportionality*.[155]

The principle of proportionality ensures that the Union exercises its legislative competence correctly, expressed as mentioned above in art 5 of the Lisbon Treaty. The boundaries are however, not outset within the Treaty and the competence basically, as can be seen in the field of direct taxation, extends to what is necessary in order to achieve the objectives and missions of the European Union. Consequently, the competence of the Union is rather functional.[156]

Additionally, the principle of proportionality has two other primary functions within Union law, which are not explicitly expressed in the Treaty. The principle is used as a ground for review of measures taken by the institutions of the Union, as well as for review of measures taken by the Member States which impacts the fundamental freedoms.[157] Rosas and Armati stress that the principle of proportionality constitutes a judge-made principle entailing the purpose of protecting the fundamental rights [or as is referred to in this thesis "freedoms"], and the principle of proportionality, as a general principle of EU law, will, in the context of the compatibility assessment, constitute a tool for regulating the right proportions of the relationship between the Union and its citizens.[158]

4.4 The Proportionality Assessment Found in the Reasoning of the Court

The following section is primarily focused on the principle of proportionality used when assessing the compatibility of domestic measures with the fundamental freedoms.

The content of the principle of proportionality as such have been discussed above. This section is for obvious reasons intertwined with the content of the principle of proportionality. Therefore, we shall remember the issues discussed above when pursuing this section.

[155] The Protocol no (2) on the on the application of the principle of subsidiarity and proportionality, Official Journal of the European Union, C 83/206 30.3.2010, annexed to the TFEU and the TEU, first introduced with the Treaty of Amsterdam.
[156] Rosas & Armati, p 17.
[157] Tridimas, p 137, Moëll, p 128.
[158] Rosas & Armati, p 38.

Historically we understand from previous discussions that the principle of proportionality, used in the final step of the justification process, has been greatly influenced by the German perception on the principle of proportionality.[159] As the internal market was one of the many first economic objectives established by the Union it is not unimaginable that the fundamental freedoms where initially used to assess the compatibility of rules belonging to the agricultural field of law. As a harmonised field of law, it is neither surprising that the development of the principle of proportionality mostly occurred when assessing Community measures. However, today the number of cases relating to the field of agricultural law has diminished and instead we see an increasing amount of case law relating to other fields of law, and primarily regarding the question of compatibility of domestic measures.

The status quo of the evolution of the principle of proportionality, in a general EU law context, may be referred to as the following: A measure must be appropriate and necessary in order to achieve its objectives. This is frequently reiterated in the case law of the Court concerning the last step in the assessment of a potential breach of the fundamental freedoms.[160]

The assessment made by the Court may be described with reference to Tridimas explanation on the content of the principle of proportionality. Commonly, the Court refers to the *Gebhard* case or test which have been discussed in previous sections. In order for domestic measures to be proportionate they have to fulfil the substantive requirements imposed by the principle of proportionality. This is expressed in the two last steps of the justification process provided by the *Gebhard* case:

1. *The rules must be suitable for securing the attainment of the objective which they pursue; and*
2. *The rules must not go beyond what is necessary in order to attain it.*[161]

In similarity with Tridimas, the Court tends to discuss the appropriateness or suitability of the measures in question in relation to the objectives they pursue. Secondly the domestic measures must not go beyond what is necessary in order to attain those objectives. Occasionally this step is referred to the "the least restrictive test" as seen above. The court would therefore in this regard perform a balancing act of the relevant interests.[162]

Perhaps it could be contemplated that the last step entails a proportionality assessment *sensu stricto* as is seen in the German perception on the principle of proportionality. It may however, be concluded that whether the proportionality assessment is regarded as a step on its own or not does not matter. The content within is what is relevant and when the proportionality assessment is stripped down, all the Court has to do, is to rely on the substantive part of the principle of proportionality expressed in a balancing act.

[159] See section above 4.3.2.
[160] See section 2.3.4.3 and 2.3.4.4 above and Case C-55/94 *Gebhard*.
[161] Case C-55/94 *Gebhard*, para 37 se also Barnard, p 528.
[162] Barnard, p 177-178.

4.5 Other Expressions of Proportionality – Additional Steps to Fulfill?

Previously the substantive side and the content of the principle of proportionality have been discussed. This section is dedicated to the procedural side of the principle of proportionality.

4.5.1 Procedural Requirements and Beyond

Within Union law there are a number of principles that may be referred to as having a procedural feature. That is for example the case with *inter alia* the principle of good governance[163], the principle of the protection of good faith, the principle of effectiveness and the principle of legal certainty.[164] Sporadically, these principles surface within the proportionality assessment comprising of what may be referred to as the procedural requirements of proportionality, or the proceduralization of the principle of proportionality.[165]

Prechal[166] has identified that the principle of proportionality might entail more than just a substantive content. With that being said it might be more accurate to describe this part of the principle of proportionality as part of the material content of the principle itself, but with the distinction that this material content concerns procedural requirements posed by the principle of proportionality. In this regard Prechal distinguishes two additional sides of the proportionality test that need to be fulfilled in order for the proportionality test to be fulfilled. She characterises them as *procedural guarantees* which are then divided into two groups. The first group concerns *judicial review* and the second *administrative procedures*. Consequently, in comparison to the previous section where, what is commonly referred to as the substantive part of the principle of proportionality, this represents the procedural part of that principle.[167] The case law where the Court has upheld additional procedural requirements in order for the measures in question to be proportionate is rich and is not restricted to one type of measure or to one field of law.

In the *Muller*[168] and the *German Beer*[169] cases, which both concerned the free movement of goods, the Court imposed additional requirements linked to the principle of good governance. The Court concluded that the principle of proportionality requires that the procedure in question, which according to the domestic measures must be undertaken, have to be easily accessible and concluded within a reasonable time. Following this the Court elaborated on the conditions that *good governance*, as an additional requirement to proportionality, imposes on the domestic measure, and additional developments may be seen in *Greenham & Abel*[170].

[163] Commonly used within the proportionality assessment in previous case law. See to this extent for example, Case C-124/97 *Läärä and Others*, Case C-344/90 *Commission v France.*
[164] Helminen, p 7.
[165] S. Prechal, *Topic One: National Applications of the Proportionality Principle – Free Movement and Procedural requirements: proportionality Reconsidered,* p 201-216 and Hettne, *Rättsprinciper som styrmedel: allmänna rättsprinciper i EU:s domstol*, p 121-143.
[166] Prechal, p 201-216.
[167] Prechal, p 201-202.
[168] Case 304/84 *Muller.*
[169] Case 178/84 *German Beer.*
[170] Case C-95/01 *Greenham & Abel.*

To conclude, Prechal argues her point with reference to a number of different procedural guarantees which must be met in order for the measures in question to comply with the articles of the Treaty. Mostly, in this regard with relation to rules governed by an authorisation procedure. The main point that she concludes in this regard is the need to establish and be aware of the exercise of the national authorities' discretion.[171] Also further, she advocates for the principle of proportionality as not amounting to the adequate tool to govern the requirements of procedural guarantees, and admittedly, she contemplates how these procedures fit into the substantive principle of proportionality, as we have seen expressed above.[172] Similarly, de Vries contemplates that the procedural requirements might be an alternative tool or procedure to the balancing act that the Court uses when dealing with conflicting interests.[173]

The conclusion that the principle of proportionality imposes additional requirements in certain situations is not unfamiliar. Hettne[174] also puts forth additional requirements in order for the principle of proportionality to be fulfilled within the justification process. He puts forth a list of requirements, which includes for example legal certainty, he is however reluctant to believe that creating a list of procedural requirements of proportionality is desirable.[175] Petursson also makes the discovery regarding the procedural requirements as Prechal does, although he contemplates that the procedural requirements constitute one additional element to the principle of proportionality, whereas he refers to the second requirement as the *consistency* test.[176]

The argument regarding the importance of the discretionary power used by the authorities and the characteristics of the measures or actions is advocated *inter alia,* van Gerven and Moëll.[177] van Gerven further stresses, with regard to the principle of proportionality in general that, even the Court itself has the impression that, even thought the principle of proportionality has explicitly been acknowledged as a general principle of EU law, its content is versatile and more often than not, does the Court give the principle a different meaning.

It must however, in this regard be mentioned that most of these arguments have been put forward by EU law scholars, whose primary focus on EU law in general, and not with a focus on measures relating to direct taxation. The obvious question to ask oneself in this regard is perhaps whether these requirements can be said to form part of the principle of proportionality when the Court, through a preliminary ruling is evaluating measures belonging to the field of direct taxation?

[171] Prechal, p 201-202, 208.
[172] Prechal, p 214-216.
[173] de Vries, *Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice,* Utrecht Law Review, p 169-192, [p 170-172].
[174] Hettne, p 121-143.
[175] Hettne, p 142 see also p, 136-137 with regard to the *golden shares* case.
[176] Petursson, p 161-162
[177] van Gerven, p 61, Moëll, p 122-127.

4.6 Summary and Conclusions

With the foregoing section still in mind, it is with no doubt that I draw the conclusion that the principle of proportionality is more complex, flexible and vague, than how it first may be perceived.[178] Even the Court tends to draw the same conclusion, at least according to van Gerven. The principle of proportionality may be seen as a tool, offered to the Court in order to achieve the objectives outset in the Treaty. Indeed it offers the Court a possibility to be extremely flexible in its judgment and therefore it may be concluded that the Court is armed with a discretionary power that it perhaps should not have access to.[179] This is best perceived from a historical perspective as the principle of proportionality has different roles within different European legal systems. Therefore the concerns regarding the principle of proportionality as a tool are not few.

The principle of proportionality and the proportionality assessment are intertwined to the extent that one could conclude that the latter one is a pure expression of the first one. In the most facile expression, proportionality may be expressed as a balance between two conflicting interests. Perhaps, this is just as Tridimas explains it, proportionality on its most abstract level. He explains the principle of proportionality as a balance in the relationship between the measures and the objectives that those measures pursue (the suitability test). Secondly, he contemplates that there should be a balance between the conflicting interests, could less restrictive means have been adopted? (The necessity test or "the least restrictive means test"). Occasionally it has been held that there is more to the proportionality assessment. A final assessment of all the circumstances of the case which culminates in a giant balancing act. There are no doubts that these arguments have some rooting in the case law as well. However, it may also be viewed as an indication of the issues the Court itself has with understanding the content of the principle of proportionality. The heritage of the principle of proportionality does not facilitate the question of its content in this regard.

The procedural side to the principle of proportionality is also found in the case law of the Court. Undoubted these procedural requirements have been used occasionally as additional requirements to proportionality, but perhaps they shall not be viewed as additional requirements but merely as a different expression of proportionality. This is the explanation Prechal and de Vries put forth. Perhaps the procedural requirements is an alternative to the balancing act that we are so familiar, but yet so unfamiliar with. The concern I have with the balancing act is how to we know when all things [read: interests] are in moderation, and more important, who decides what makes the scales tip?

Perhaps, we should rethink the, as Prechal expresses it, "strained construction" that the principle constitutes within the justification process. Perhaps we should not try to force further requirements into the proportionality assessment, as they do not fit naturally within the principle of proportionality, perhaps they should instead be the procedural principles that they are. This might make us question proportionality in general, what does it really entail? This further supports the counter argument to the point made earlier. Because even EU law and the European Court of Justice have to be somewhat foreseeable, right?

[178] See support for the vagueness, by van Gerven, p 60.
[179] See previous chapter on activism etc.

5 What is Legal Certainty?

Perhaps the caption of this chapter is suitable for a master's thesis itself I shall however, briefly touch upon the matter of legal certainty before culminating this thesis in an analysis.

5.1 Legal Certainty as a General Principle of Law

The principle of legal certainty is often expressed through the corollary, the protection of legitimate expectations. The primary premise of the principle of legal certainty may be described in the following way:

> *the person subject to the law shall know the law, so that he or she may plan his or her actions accordingly.*[180]

Tridimas argues that the principle of legal certainty might be even more important than the principle of equality, as legal certainty offers the possibility to plan your actions in advance, and be certain of the outcome. Therefore he further contemplates that the principle of legal certainty has a strong importance within economic law, such a tax law.[181] Just as the principle of proportionality, previously discussed, the principle of legal certainty has a natural relationship with the rule of law and, applying a broader perspective we notice its existence within other legal systems as well.[182] The principle of legal certainty has been given a greater role within the French legal system than the principle of proportionality. In Germany it has been developed within the case law, and in England it has made way for a prosperous academic discussion.

The content of the principle of legal certainty has been considered to be rather vague and when invoked within different contexts it tends to entail a diverse spread of substantive and procedural criteria.[183] Thus, perhaps with regard to the close affinity with the rule of law it is with little hesitance that the principle of legal certainty may be classified as a general principle of law.[184] Tridimas explains the content of the principle with reference to a number of case law and summarises the content of the principle by distinguishing five general criteria that the principle entails.[185] The case law scrutinised by Tridimas concerns the issue of where Union measures are in breach of legal certainty, consequently, the case law and the criteria does not fully relate to the issues when the domestic measures of the Member States are in breach of legal certainty. Nonetheless, the criteria may be put forth as an indication on what the principle of legal certainty entails.

- Clarity of [then] Community measures[186]
- Full enforcement of [then] Community law[187]

[180] Tridimas, p 242.
[181] Tridimas, p 242.
[182] Tridimas, p 242.
[183] See for example Peters, p 112-114.
[184] Tridimas, p 242-244, Groussot, p 38.
[185] Tridimas, p 244.
[186] Tridimas, p 244-246.
[187] Tridimas, p 246-248.

- Unity and coherence of the [then] Community legal order[188]
- Protection of Member States[189]
- Procedural exclusivity[190]

In the context of lawfulness of domestic measures in the Member States the principle of legal certainty is perhaps more abstract and mostly utilised in its most basic description. That basic description being as Peters[191] explains it:

> *"Legal certainty presupposes indeed that the legal subject must (be able to) have certainty about the legislation that should be applicable to him, or in other terms, that he must be able to foresee beforehand that the intended legal act will not give rise to disputes in court."*[192]

His expression encompasses indeed how the principle of legal certainty may be described on a general level, indeed perhaps suitable for a *general* principle of EU law. Peters argues that the concept of legal certainty is too vague in itself, and that there is a fine line between flexibility and precision. Legal certainty requires, from his perspective that a legal rule must be enough flexible to leave room for future circumstances, and even though there is a requirement of precision, this should not, in Peters' view, be perceived in a too strict sense.[193]
Consequently, legal certainty, as a general principle of EU law, does not therefore impose a requirement on domestic measures to be utterly strict and unbendable. Instead it allows for certain amount of flexibility, and the usage of less precise wordings and definitions within the domestic measures.[194]

5.2 Legal Certainty Takes Presence in the Case Law of the Court

Following the *ITELCAR* case the case law of the Court relating to the field of direct taxation has not touched upon the matter of legal certainty as a requirement for proportionality yet. However, in the case C-362/12 *Test Claimants in the Franked Investment Income Group Litigation*, the Court spoke of legal certainty and what it encompasses. The case in question concerned remedies, and more specifically restitutions of sums paid but not due, in the light of the previous FII Cases.[195] Consequently the case did not directly touch upon the matter of legal certainty as an additional requirement for proportionality with regard to measures belonging to the field of direct taxation, nevertheless, the Court held that;

> *"the principle of legal certainty […] requires that rules involving negative consequences for individuals should be predictable for those subject to them."*[196]

[188] Tridimas, p 248.
[189] Tridimas, p 248-249.
[190] Tridimas, p 249.
[191] B. Peters, *European Supervision on the Use of Vague and Undetermined Concepts in Tax Laws*, EC Tax Review, p 112-114.
[192] Peters, p 113.
[193] Peters, p 112.
[194] Peters, p 112-113.
[195] See previously mentioned cases Case C-35/11 *Test Claimants in the FII Group Litigation* and Case C-446/04 *Test Claimants in the FII Group Litigation*.
[196] Case C-362/12 *Test Claimants in the FII Group Litigation*, para 44.

In this context the Court referred to case C-17/03 *VEMW and others*, a case, which concerned questions relating to the internal market in electricity concerning a directive issued on the matter and not the fundamental freedoms.

Legal certainty has, according to *Hettne*,[197] a prominent role in the case law of the Court. Although he makes plenty of references to where the principle of legal certainty has been used within other legal contexts rather than seen as an additional step within the proportionality assessment, his findings are indeed relevant.[198] He, alongside Prechal, discussed above, mentions the *golden shares* case and the *Church of Scientology* case. In both cases the principle of legal certainty was given a determinative role in the question on whether the measures in question were justifiable.

In the *Church of Scientology*[199] case the question concerned French rules which imposed an authorisation prior to certain type of direct foreign investment. The rules in question stipulated that the Government of France could, with a view of ensuring the *defence of national interests* make certain direct investments subject to a declaration prior to an authorisation or a control. The Court however, concluded the following:

Para 21-22:

> *"[…]the essence of the system in question is that prior authorisation is required for every direct foreign investment which is such as to represent a threat to public policy [and] public security, without any more detailed definition. Thus, the investors concerned are given no indication whatever as to the specific circumstances in which prior authorisation is required.*
>
> *Such lack of precision does not enable individuals to be apprised of the extent of their rights and obligations deriving from Article 73b of the Treaty. That being so, the system established is contrary to the principle of legal certainty."*[200]

The domestic measures lacked precision, not in itself by because there was no clarity in the expression "*threat to public policy and security*". Hence, they were not sufficiently precise and did therefore not fulfil the principle of legal certainty. The measures could not be considered proportionate by virtue of not fulfilling the principle of legal certainty. Consequently, the proportionality test was used in this regard, with relation to the justification grounds provided by the Treaty.[201]

The *golden shares*[202] case concerned a similar legislation. France had adopted rules concerning its "golden shares" in *Société Nationale Elf-Aquitaine*, a petroleum corporation. The measures under review in this case imposed an authorisation in advance by the Minister of Economic Affairs if the total holdings of a shareholder reached a predefined ceiling. The Court came to the conclusion that these rules where liable to restrict the free movement of capital, however, the rules could be justified with reference to the public security. (Because these rules governed the safeguarding of supplies of petroleum products in situation of crisis.) Although the justification ground is explicitly expressed in the Treaty, the proportionality assessment within the justification process still has to be satisfied. The issue that the Court found was that

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[197] Hettne, p 127-128.
[198] See for example cases relating to the obligations imposed on the Member States to fulfil its obligations, Case C-363/85 *Commission v Italy*, Case C-59/89 *Commission v Germany.*
[199] Case C-54/99 *Church of Scientology.*
[200] See Case C-54/99 *Church of Scientology*, para 21-22.
[201] Case C-54/99 *Church of Scientology*, para 19 with references made to Case C-358/93 and C-419/93 *Bordessa and Others*, and Case C-302/97 *Konle v Austria.*
[202] Case C-483/99 *golden shares.*

the rules governing the authorisation procedure where vague and no indications on when an authorisation would be granted or refused were stipulated in the rules. Therefore, with reference to the vagueness of those rules, the Court concluded the following:

"*Such lack of precision does not enable individuals to be apprised of the extent of their rights and obligations […] That being so, such a system must be regarded as contrary to the principle of legal certainty[…]*"[203]

Hence, there was no legal certainty within the application of those rules and therefore they did not fulfil the proportionality assessment within the justification process. [204]
To conclude, the principle of legal certainty has an important role within the justification process. Following this section the *Laval* case shall be presented.

5.3 Legal Certainty as an Additional Requirement for Proportionality

Legal certainty as a requirement for proportionality within the proportionality assessment has been found in other fields of law besides tax law. This section therefore seeks to broaden the view of the reader with the previous section in mind.

5.3.1 The *Laval*-case

In the *Laval*[205] case the Court was asked to rule on the interpretation of the general prohibition of discrimination, now found in article 18, the free movement of services, art 56 and Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services. Laval, a Latvian corporation had posed workers to perform services on a building site lead by a Swedish corporation called Baltic Bygg AB. Due to a number of reasons, the trade union took collective action against Laval for not signing collective agreements proposed by the trade unions. The unions persisted Laval to sign the agreement before the negotiations on wages begun.[206] Collective sympathy actions where then taken by other trade unions since no agreement had been made during the negotiations and the building company in Sweden, Baltic Bygg AB, was declared bankrupt.

Laval brought the actions to the Swedish labour law court and asked for the collective actions taken against it to be declared unlawful and additionally for damages from the trade unions in question. The court however, was unsure as how to interpret the above mentioned articles and referred a question for a preliminary ruling at the ECJ.

The issue at hand concerns *lex Britannia*[207], three article in the Swedish law limiting the rights for syndicates and trade unions to take collective action against their employer

[203] Case C-483/99 *golden shares*, para 50.
[204] Case C-483/99 *golden shares*, para 49-50.
[205] Case C-341/05 *Laval.*
[206] The Swedish labour law system is mainly built on the collective agreements and precedence; hence it concerns the agreement between the trade unions, or syndicates and the employer. The law therefore establishes no minimum wage but it is however, reinforced by the collective agreements.
[207] See Articles 25a, 31a and the third paragraph of Article 42 MBL, Lex Britannia is the effect of another ruling.

in order to have a collective agreement between other parties be set aside or amended. Such prohibition against collective action is, according to the ruling in the Britannia case, enforceable also against foreign employers if the legislation where they are established also prohibits such collective action.

After dealing with questions concerning admissibility and the rules governed by the directive as mentioned above, the Court concludes that the rules governing the right for the trade unions to take collective actions by which they may force the employer, established in another Member State, to sign collective agreements containing more favourable terms or terms departing from what is established by the relevant directive, is liable to make it less attractive or more difficult for foreign establishments to pursue such construction work in Sweden.[208]

Consequently, the Court moves on to state the following with reference to case law of the Court, as for example the *avoir fiscal* case.

Para 101:

> *"It is clear from the case-law of the Court that, since the freedom to provide services is one of the fundamental principles of the Community […], a restriction on that freedom is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest; if that is the case, it must be suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary in order to attain it.[…]"*

The domestic measures in question in this case have the objective of protecting the right of the workers in order for them to protect their work environment from possible social dumping. Such an objective may, with reference to the Court's case law, constitute an overriding reason of public interest.

The Court concluded the following:

Para 110:

> *"However, collective action such as that at issue in the main proceedings cannot be justified in the light of the public interest objective referred to in paragraph 102 of the present judgment, where the negotiations on pay, which that action seeks to require an undertaking established in another Member State to enter into, form part of a national context characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay (see, to that effect, Arblade and Others, paragraph 43)."*[209]

Consequently, such actions, as governed by lex Britannia, were considered precluded by the fundamental freedoms and the Directive mentioned earlier. Although the Court does not explicitly mention the principle of legal certainty as such they refer to the requirement that the rules must be sufficiently precise, a wording, which can be recognised in a context of notion, guarded by the principle of legal certainty.[210]

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[208] Case C-341/05 *Laval*, para 99.
[209] Case C-341/05 *Laval*, para 110.
[210] Case C-341/05 *Laval*, para 110 of the case, see also the section above, regarding the notion of legal certainty.

5.4 Some Conslusions on Legal Certainty

The principle of legal certainty may in many ways be said to constitute a general principle of EU law. The most valid argument for making that conclusion is perhaps the close relationship between the principle of legal certainty and the rule of law. Legal certainty and proportionality may be said to have a few procedural similarities, they are however, of different character as regards their roles within the different legal systems, and above all within the European Union legal order. However, legal certainty may also be alleged of being flexible and hence to take part in the legal system in different ways, similar to the principle of proportionality. Evidentially, one could come to the conclusion that legal certainty is to be regard as a general principle of EU law. Nonetheless, or perhaps thanks to, its flexibility which allows for a diverse scope of utilisation, it may be concluded that legal certainty forms part of the proportionality assessment. However, in comparison to the other procedural requirements mentioned earlier, the role of legal certainty is, as an additional requirement, perhaps not as given, as one would first believe. The reason being that legal certainty entails more than just a requirement within the principle of proportionality. I am convinced that legal certainty stands out from the other procedural requirements with regard to its broad scope of application and because of its close relationship with the rule of law. It must be a general condition imposed on an entire legal system built on the premise of the rule of law. However, in the light of the general case law, legal certainty has become a premise for proportionality. This arguably supports the idea of classifying the principle of legal certainty as a general principle of law alongside with the principle of proportionality and the rule of law.

6 Developing the Proportionality Assessment

6.1 Recent Case Law – Direct Taxation

6.1.1 The SIAT-case

The *SIAT*[211] case concerned Belgian tax provisions which disallowed payments for services, which were rendered directly or indirectly to a foreign establishment, which was either not subject to income tax [at all] or was subject to a notably more advantageous tax regime in its home State rather than the tax regime within Belgian territory. If however, the taxpayer could prove, by all juridical means, that the payments correspond to real and sincere transactions and that those transactions were concluded at arm's length terms, the deductibility of such payments would then be allowed for the purpose of Belgian income taxation.[212]

During 1991 the Belgian company SIAT entered into a joint venture with the Nigerian company PINL. PINL was owned by a holding company established in Luxembourg called MISA. Later on the joint venture between the two companies dissolved as there was a dispute regarding the amount of commission which SIAT had to transfer to MISA. SIAT entered the service payments to MISA as business expenses but was refused deduction on the grounds of Belgian domestic law. The reason for this being that MISA, the receiving company, was established in a jurisdiction falling into the category of low-tax-jurisdiction under the Belgian law, as mentioned above. As SIAT was rejected the deduction, they brought proceedings before the Belgian court who decided to stay the proceedings and refer a question to the ECJ for a preliminary ruling on the compatibility of the Belgian law with the fundamental freedoms.[213]

The questioned domestic measure constituted an exception to the general rule found in art 49 of 1992 Income Tax Code, which said that expenditure is to be regarded as deductible business expenses if it is necessary for acquiring or retaining taxable income and if the taxpayer demonstrates the authenticity and amount of that expenditure. The exception laid down in art 54 of the same Income Tax Code excluded business expenses relating to services provided by an entity established in another Member State but, which, was subject to none or very low income tax.[214]

The Court followed its methodology as discussed in chapter 3 of this thesis, as it started of with the question of whether the domestic measures constituted a restriction on the free movement of services. In consistency with previous case law the Court referred to the restriction as a domestic measure, which prohibit, impede or render less attractive the exercise of that freedom.[215]

The burden of proof rests with the taxpayer both when the general rule and the specific rule are applicable. However, the specific rule stipulates a presumption that is harder to breach than that of the general rule. Accordingly, the Court concludes that

[211] Case C-318/10 *SIAT*.
[212] European Taxation January 2012-01.
[213] Case C-318/10 *SIAT*, para 8-14.
[214] Case C-318/10 *SIAT*, para 15-17.
[215] Case C-318/10 *SIAT*, para 18.

the special rule in article 54 of the Income Tax Code of 1992, "*[…]is liable to both dissuade Belgian taxpayers from exercising their right to the freedom to provide services and from making use of the services of providers established in another Member State and dissuade those providers from offering their services to the recipients established in Belgium.*"[216]

Moving onto the justification process the Court reiterates the settled-case law that a restriction may be justified if it *"pursues a legitimate objective compatible with the [EC now TFEU] Treaty and is justified by overriding reasons relating to the public interest, in which case it must be suitable for securing the attainment of that objective and must not go beyond what is necessary in order to do so"*.[217]

The Belgian government argued that the domestic measures in question where justified on the basis of the need to combat tax avoidance and evasion, the need to preserve the balanced allocation between Member States of the power to impose taxes, and, which was added by supportive governments, the need to ensure the effectiveness of fiscal supervision.[218] These grounds of justification were all dealt with by the Court in an argumentation underbuilt by a valid reasoning and the Court came to the conclusion that the legislation in question could be justified on the two latter grounds, under the presumption that the measures also fulfilled the proportionality test.[219] However, when discussing the question of proportionality the Court does so in the light of the first ground of justification. With this being said it possible to stipulate that the Court does not always discuss each ground of justification on its own, rather that it merely makes a summary assessment collectively.[220]

6.1.2 The ITELCAR-case

In the *ITELCAR*[221] case the Court was asked to give a preliminary ruling on the compatibility of Portuguese domestic tax measures relating to thin capitalisation rules. According to the domestic measures, interest in excessive debt paid to an associated entity, not established within the Union, was not a deductible expense for the purpose of determining the taxable profit. However, such interest would have been considered a deductible expense for the purpose of determining the taxable profit if the associated entity had been established in Portugal. Hence, the distinguishing factor was that of place of establishment. The factual circumstances in this case are not relevant for the purpose of this thesis, but rather the characteristics of the domestic measures and the judgment of the Court.

In its judgment the Court follows the methodology discussed in the chapter above and starts off with the applicable freedom and reiterates the judgment of *Fidium Finanz* and the following case law[222] thereof.[223] The Court then comes to the conclusion that the fact that a resident company contracting its overall debts in excess with a company established in a non-Member State is subject to a less favourable tax

[216] Case C-318/10 *SIAT*, para 28.
[217] Case C-318/10 *SIAT*, para 34.
[218] Case C-318/10 *SIAT*, para 36.
[219] See para 38-42 for the need to combat/prevent tax avoidance and evasion, para 43-44 regarding the need to ensure effectiveness of fiscal supervision, and para 45-46 regarding the balanced allocation between Member States of the power to tax. See para 49 for the proportionality reference.
[220] Case C-318/10 *SIAT*, para 50, see Hilling, 2013, p 296.
[221] Case C-282/12 *ITELCAR*.
[222] Consult for example the following case law for the discussion on applicable freedom; Case C-452/04 *Fidium Finanz*, Case C-492/04 *Lasertec*, Case C157/05 *Holböck*, Case C-31/11 *Scheunemann*, Case C-35/*11 Test Claimants in the FII Group Litigation*, but see also the rules deduced from previous case law such as Case C-208/00 *Überseering* and Case C-251/98 *Baars*.
[223] See chapter 2 above.

treatment than a resident company contracting such debts with a company resident in the same, or in another Member State. Hence, the Court concludes that the measures in question are liable to deter a resident company from entering into a credit arrangement with excessive debt with a company established in a non-Member State; hence, the domestic measure constitutes a restriction on the free movement of capital.[224]

The Court goes on to state that it is settled case law that a measure constituting a restriction, may be justified by an overriding reason in the public interest, if it is *appropriate* for ensuring the objective attained, and if it does not go beyond what is *necessary*.[225]

Clearly it may be argued that the Court is expressing the fact that the principle of proportionality should be consulted when determining if the restriction may be justified. As far as this is concerned, it is settled case law of the Court and as we have seen above it is part of the methodology of the Court, nonetheless, sometimes expressed differently.

As the Portuguese government has, in case where the Courts decision results in a restriction, based its argumentation for justification on the argument that the domestic measures in question have been adopted in order to combat tax evasion and avoidance. The ground for justification finds its source in the domestic measures as it is applicable in a way that it prohibits thin capitalisation, which consist in eroding the Portuguese tax base. However, the Court has only accepted this ground for justification when the questioned legislation specifically targets wholly artificial arrangements.[226] The domestic measures in question target situations where an excessive debt is paid to a company not residing within the Union, whereas such legislation is not applicable on a situation where the receiving company was to be residing within the Union. Consequently, the Portuguese thin capitalisation rules only apply in cross-border situations, making the distinction based on the place of residency of the receiving company. The Court concludes that the measures are indeed possible to justify on the basis of the ground for justification as chosen by the Portuguese government, hence they meet the requirement of appropriateness; however, they move on to review the necessity of such measures. When determining the necessity the Court states that domestic measures targeting wholly artificial arrangements may be the necessary mean if "[…O] n each occasion on which the existence of such arrangement cannot be ruled out, those rules gives the tax payer an opportunity, without subjecting him to undue administrative constraints, to provide evidence on any commercial justification that there may have been for that transaction."[227] Consequently, the Court admits that as the domestic measures in question give that possibility to the taxpayer, they should be regarded as necessary in order to attain their objective. Nevertheless, the Court concludes that such measures are not proportionate.[228]

Before the judgment in the SIAT-case it was possible to believe that the Court would have stopped here and concluded the rules were not compatible with the free

[224] Case C-282/12 *ITELCAR*, para 30-31.
[225] Case C-282/12 *ITELCAR*, para 32 and para 36, see also the section on the fundamental freedoms above as the Court uses the phrase the overriding reason in the public interest here. It would be equal to imperative reason as mentioned above.
[226] Case C-282/12 *Itelcar*, para 33-35 see also Case C-196/04 *Cadbury Schweppes* where the Court established the idea of wholly artificial arrangements when the need to prevent tax avoidance is used as a ground for justification. See also further case law on this matter; Case C-182/08 *Glaxo Wellcome*, Case C-524/04 *Thin Cap Group Litigation*, and the Case C-255/02 *Halifax*, which concerned indirect taxation but nonetheless early addressed the question of wholly artificial arrangements.
[227] Case C-282/14 *ITELCAR*, para 38.
[228] Case C-282/12 *ITELCAR*, para 38-49.

movement of capital. However, for some reason the Court adds an additional requirement after, or as a part of, the justification process, namely that of legal certainty of the rules, and refers to its judgement in the SIAT-case as mentioned above.

Para 44:

> *"That being so, the rules in question do not make it possible, at the outset, to determine their scope with sufficient precision. Accordingly, they do not meet the requirement of legal certainty, in accordance with which rules of law must be clear, précises and predictable as regards their effects, especially where they may have unfavourable consequences for individuals and companies. As it is, rules which do not meet the requirement of the principle of legal certainty cannot be considered to be proportionate to the objectives pursued."*[229]

Consequently, the Court makes the presumption that legal certainty is a *requirement* for the fulfilment of the principle of proportionality expressed in the proportionality assessment.

6.1.3 Is the Outcome Circumstantial?

One question that could be posed in this context is whether the outcome, and the reference to legal certainty as another requirement for proportionality, is circumstantial? Moreover, there are a few circumstances, or factors that need to be discussed in this section, in relation to the cases describe in the section above.

6.1.3.1 Characteristics of the Domestic Measures

The domestic measures challenged in the *SIAT*-case had the objective of hindering practices resulting in tax avoidance. The special rule in the *SIAT*-case was applicable in two situations, either when the payment was made from a Belgian tax payer to a non-Belgian recipient in another Member State, which was subject to a more advantageous tax regime, or when the recipient was not subject to any income taxation. The issue in the Belgian legislation concerned the wording of the measures as they stipulated "a tax regime which is appreciably more advantageous than the applicable regime in Belgium". As there were no administrative instructions on how to interpret the wording of the rules, the question of the applicability of the rules would have to be determined on a pure case-by-case basis. Also the fact that the rules could be applied, in case the taxpayer could not provide sufficient evidence verified by a third party, adhered to the situation. As we have seen the Court concluded, within the proportionality assessment, that the scope of the special rule could not possibly be determined with sufficient precision and therefore its applicability remained a matter of uncertainty.

The measures in question in the *ITELCAR*-case concerned the right to deduct excessive interest, when the lender had a special relationship with the recipient of the loan, not implying a shareholding relation. It was the wording of these thin capitalisation rules that ended up being the key point in the case. Therefore, just as in the *SIAT*-case, the Court focused on the justification process and on the wording of

[229] Case C-282/12 *ITELCAR*, para 44.

the legislation. The "*special relations*" concept established a presumption that when a lender, residing in what is referred to as third territory, entered into a loan agreement with a Portuguese taxpayer, that, according to the Portuguese law in question, constituted a special relation which formed part of a design to avoid taxation. The presumption of the intention of the "*special relation*" did thus, not fulfil the test established by the principle of proportionality.

Even though the different domestic measures of these cases did not concern the same type of situations, they had at least one thing in common; they where far too ambiguous and general in their wording.

6.1.3.2 Comments in the Literature

Hilling[230] argues that the requirement of legal certainty as an additional step within the proportionality assessment may be explained with reference to what she refers to as "the proceduralization of proportionality". The proceduralization of proportionality relates to the situation where the Court has added additional requirements, besides the substantive test, in order for rules to be considered proportional, where legal certainty and transparency are examples of such requirements. The proceduralization of the principle of proportionality may also be referred to in situations where the Court has put the principles of good governance forth as an additional obligation for the Member States to fulfil in order to pass the test of the principle of proportionality. Hilling refers to this within her article discussing whether it is possible to design EU-compatible tax avoidance rules. With regard to this article, in can be concluded that general tax avoidance rules may have an additional requirement imposed on them.

Peters provides us with arguments not related to whether the principle of legal certainty is an additional requirement within the justification process, instead his analysis on the matter concerns the attitude of the Court towards why they did not accept the domestic measures in the *SIAT* case. He argues that the Court did not declare the rules incompatible with the fundamental freedoms on the basis of the *usage* of the vague term in the rules in question.[231] Remember the exception to the general rule was worded:

> "*[…] subject to a tax regime which is appreciable more advantageous than the applicable regime in Belgium*."[232]

Instead Peters is convinced that it was the lack of a statutory definition or administrative instruction on how to understand the wording that the Court based its judgment on. Hence also the reason why the domestic measures did not fulfil the principle of legal certainty.[233]

[230] Hilling, 2013, p 303-304.
[231] Peters, p 114.
[232] Case C-318/10 *SIAT*.
[233] Peters, p 114.

6.2 The Aftermath in Case Law Concerning Direct Taxation

This section will touch upon the case law delivered between the *SIAT* and the *Itelcar*-cases, concerning measures related to direct taxation and the fundamental freedoms. The case law will be discussed in chronological order. Cases related to individual taxation have been left outside the scope of this section.

6.2.1 After SIAT, Before ITELCAR

In *Commission v. Spain*[234] the issue concerned exit tax provisions and their compatibility with, *inter alia,* the fundamental freedoms. In its findings the Court referred to previous case law[235] on the matter and concluded that the domestic measures in question constituted a restriction against the fundamental freedoms.[236] The Court concludes that, after discussing the different justification grounds on which Spain supported their position, although it does not accept the justification grounds, nonetheless, the rules cannot be considered to be proportionate as they go beyond what is necessary for attaining the objectives.[237] Hence, no question of legal certainty was raised; however, it is perhaps no surprise as the Court did not accept the grounds of justification on which Spain claimed their case. Nevertheless, it is interesting that the Court, however, mentioned the question of proportionality when it had already dismissed the justification grounds.

Commission v. Portugal[238] also concerned the question of exit taxation. The Court concluded, with reference to *National Grid Indus*[239]*,* that the fundamental freedom in question "[…]*precludes domestic measures which prescribe the immediate recovery of tax on unrealised capital gains relating to assets of a company transferring its place of effective management to another Member State at the very time of the transfer.*"[240] No further question regarding justification and proportionality was raised.

The *Philips Electronics*[241] case concerned legislation which hindered the transfer of losses incurred by a non-resident branch of an establishment located in another Member State. The Court discussed the previous case law[242] on the matter, and concluded that the domestic measures in question constituted a restriction on the freedom of establishment, in this case regarding the right to a secondary establishment, such as a non-resident branch.[243] The Court reiterates that in order for such a restriction to be justified it needs to pursue an overriding reason in the public interest, further that it needs to be appropriate to ensure that objective and that it does not go beyond what is necessary.[244] The Court then reaches the conclusion that the

[234] Case C-269/09 *Commission v Spain.*
[235] Case law concerning exit taxation is *inter alia,* Case C-470/04 *N*, Case C-9/02 *Lasteyrie du Saillant*, Case C-371/10 *National Grid Indus.*
[236] Case C-269/09 *Commission v Spain*, para 61.
[237] Case C-269/09 *Commission v Spain*, para 90.
[238] Case C-38/10 *Commission v Portugal.*
[239] Case C-371/10 *National Grid Indus.*
[240] Case C-38/10 *Commission v Portugal*, para 31.
[241] Case C-18/11 *Philips Electronics.*
[242] Such as, Case 270/83 *Commission v France [Avoir Fiscal]* Case C-446/03 *Marks & Spencer*, Case C-307/97 *Saint-Gobain*
[243] Case C-18/11 *Philips Electronics*, para 20, see also Case C-253/03 *CLT-UFA* for this analysis of the secondary establishment of a non-resident branch.
[244] Case C-18/11 *Philips Electronics*, para 22, here it is also interesting to regard that the Court only puts forth two criteria in order for the proportionality assessment, within the justification process, to be fulfilled.

rules cannot be justified with reference to the objective of preventing a double use of losses and/or the objective of preserving a balanced allocation of the power to impose taxes between member States. Hence, the question of proportionality was never discussed as the Court dismissed the justification grounds put forth by the UK.[245]

In the *DIVI*[246]case the question concerned wealth tax. DAVD, the establishment incorporated in Luxembourg, transferred its seat from Luxembourg to Italy and was no longer able to benefit from the capital tax reduction imposed by Luxembourgish law. The Court concluded that the domestic measures in question were liable to deter establishments incorporated in Luxembourg to transfer its seat to another Member State.[247] With regard to the question of whether the measure in question could be justified the Court held the same as it did in *Commission v Portugal* with reference to *National Grid Indus* mentioned above.[248] Likewise, as was held in the *Commission v. Portugal* and *Philips Electronics* cases the Court concluded that the rules could not be justified on the basis of the justification grounds provided by Luxembourg.[249] Hence, the proportionality assessment was not made.

In *Commission v. Belgium*[250] the disputed domestic measures entailed a different treatment between investment corporations established in Belgium and non-resident branches not established in Belgium. Those rules were not justified on the basis of the grounds put forth by the Belgian Government. The question of proportionality was thus not assessed within the justification process, it was however, mentioned similarly to the cases mentioned above.[251] The same result can be seen in *Commission v. Finland*[252], which concerned rules differentiating between dividends paid to domestic pension funds and non-resident pension funds.[253] In *Test Claimants in the FII Group Litigation II*[254], also referred to as *FII(2),* the Court concluded that the legislation in question constituted a restriction on the fundamental freedoms.[255] The rules in question imposed for the credit method to be used in cases of foreign-sourced dividends, whilst the exemption method applied in relation to domestically-sourced dividends. The Court accepted the differentiation on the basis of the justification ground of the need to preserve the cohesion of the tax system, however, it did not find the domestic measure in question necessary in order to preserve the cohesion of the tax system. Nor did it find the domestic measures necessary in relation to its objectives, namely to avoid a double taxation.[256] This argumentation seems to have been turned around as opposed to the commonly known methodology of the Court.

In the *Commission v. Belgium*[257] case, the Commission initiated infringement proceedings against Belgium due to the fact that the Belgian legislation allowed a tax reduction on pension payments solely when the financial institution to which the depositions where made resided within Belgian territory. Consequently, the Court concluded that the measures in question constituted a restriction and moved onto the question of whether it can be justified with reference to imperative reasons.[258] Nevertheless, the Court concluded, *inter alia,* that the justification grounds relied on,

[245] Case C-18/11 *Philips Electronics*, para 35.
[246] Case C-380/11 *DIVI.*
[247] Case C-380/11 *DIVI*, para 40.
[248] See further up on this page, see also case C-380/11 *DIVI*, para 41.
[249] Case C-380/11 *DIVI*, para 51.
[250] Case C-387/11 *Commission v Belgium.*
[251] Case C-387/11 *Commission v Belgium*, para 83, 87, for the justification grounds consult para 74-81 Interestingly the Court applied both article 63 TFEU and article 49 TFEU in this case.
[252] Case C-342/10 *Commission v Finland.*
[253] Case C-342/10 *Commission v Finland*, para 45, 48 and 54.
[254] Case C-35/11 *Test Claimants in the FII Group Litigation* (II).
[255] Case C-35/11 *Test Claimants in the FII Group Litigation* (II), para 54.
[256] Case C-35/11 *Test Claimants in the FII Group Litigation* (II), para 59-64.
[257] Case C-383/10 *Commission v Belgium.*
[258] Case C-383/10 *Commission v Belgium*, para 49.

namely the need to prevent tax avoidance and evasion in the context of guaranteeing the effectiveness of fiscal supervision cannot be used in order to justify the measures since the Belgian government could have adopted less restrictive measures.[259]

In *Argenta Spaarbank*[260] the Court ruled on the compatibility of Belgian tax rules, which offered a tax benefit where risk capital was invested in permanent establishments located in Belgium whereas such a benefit was not grated when the investment was put into a permanent establishment located in another Member State. The advantage was in the form of a deduction of the risk capital from the basis of assessment for corporate income taxation. This case has been largely criticised by Wattel[261] as regards, *inter alia,* the comparability analysis performed by the Court.[262] Moreover the Court continues with its methodology and reiterates that in order for the measures to be justified they need to pursue an overriding interest in the public interest and nonetheless, constitute an appropriate measure in order to ensure the attainment of the objective in question. Further it shall not go beyond what is necessary to attain that objective.[263] The Court does not reach the proportionality assessment within the justification process before reaching the finish line. It concludes that the measures cannot be justified with relation to the justification grounds on which Belgium based its defence.[264]

6.2.2 After SIAT and ITELCAR

The third case in the series concerning the *Text Claimants in the FII Group Litigation* has been mentioned above but shall be recalled in this section as is qualifies as case law to be mentioned in this chapter as it was delivered after both the Itelcar case and the SIAT-case. The case concerned the remedies available for sums paid but not due. Legal certainty was mentioned in the case, although the questions did not concern the compatibility of the English legislation with the fundamental freedoms, hence legal certainty was not mentioned in the context as an additional requirement within the proportionality assessment.

6.2.3 Summary

Interestingly, none of the case law concerning direct taxation, in between the two judgments mentioned legal certainty as an additional criterion within the proportionality assessment. The obvious reason perhaps being that the Court did not reach the question of proportionality before concluding that the measures where not justifiable. Also perhaps because none of the case law concerns domestic measures containing the characteristics that the domestic measures in the *SIAT* and the *ITELCAR* cases did. In this regard it is however possible to conclude that the Court have used the principle of legal certainty as a premise for proportionality now also with regard to domestic measures belonging to the field of direct taxation.

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[259] Case C-383/10 *Commission v Belgium*, para 65-66.
[260] Case C-350/11 *Argenta Spaarbank*.
[261] Wattel, *Argenta Spaarbank. Notional Interest Deduction Regime. Treatment of foreign permanent establishment is a restriction on the freedom of establishment* Court of Justice Comments by Peter Wattel, H&I 2013/140 p 23-34.
[262] The Court took the view of the parent company when determining whether the rules in question constituted a restriction on the fundamental freedoms.
[263] Case C-350/11 *Argenta Spaarbank*, para 35.
[264] Case C-350/11 *Argenta Spaarbank*, para.

7 Summary and Conclusions

7.1 Introduction

This chapter is the beginning and the end of the last section of this thesis. Initially I asked you to keep a few issues in mind while reading this thesis. We shall remember those issues here together with the legal questions posed under "purpose" in chapter one.

The legal questions posed earlier:

Has legal certainty become an additional step of assessment within the principle of proportionality applied with regard to the fundamental freedoms?

Does the requirement of a rule to fulfil the principle of legal certainty appear in certain situations or may it be applied on all domestic measures relating to direct taxation?

7.2 Summarising Conclusions

Proportionality a multifaceted general principle of law

Most general principles of law stem from the different constitutional orders of the different Member States. They form part of a separate source of law, which can be said to form part of the primary law of the Union together with the Treaties. Their existence is probably not debatable but how and why they come to existence is undoubtedly a more intriguing concern. The principle of proportionality forms part of that source and, just as general principles of law, it has the characteristic of being extremely veritable, flexible and perhaps vague. It is not hard to form the opinion that the principle of proportionality constitutes a general principle of law, judge-made or not, it is still a general principle of law. However, concluding that the principle of proportionality qualifies, as a general principle of EU law may perhaps not answer all the questions initially posed.

The principle of proportionality can be said to entail a core often referred to as the substantive part of the principle. Occasionally even the principle itself is referred to as being a substantive principle. However, the substantive part of the principle may be described as a tool containing a balancing act, firstly, between the measures imposed an the objectives they pursue, often expressed in terms of *appropriateness* or *suitability* (the balancing of the relationship between the measures undertaken and the objectives that those measures pursue). Secondly, between the conflicting interests (the relationship between the conflicting interests). The procedure of applying the principle of proportionality can therefore be concluded as the search for the perfect equilibrium. Occasionally the proportionality assessment is accused of having three steps as inspired by the German perception on the principle of proportionality. Instead, the application of the principle itself should be seen as a balancing act and in my opinion balancing issues that have already been balanced will perhaps only increase the formalistic view of the principle of proportionality. The reason for the diverse perception is perhaps the vague definition of proportionality itself. van Gerven

upholds this thought as well as he contemplates that perhaps the Court itself is not as familiar with the exact content of the principle of proportionality used within the proportionality assessment. Perhaps it is time to get straight about proportionality, especially with the growing importance of that principle in an increasing global context. The growing importance can partly be blamed on the mounting importance and perception of human rights, fundamental rights and economic rights.

The proceduralization of the principle of proportionality is an intriguing issue. The perceptions on whether the procedural requirements occasionally imposed on the domestic measures shall be seen as forming part of the principle of proportionality are shattered. Perchal does not want us to force, the already burdened principle, with additional requirements. Based on the same line of arguing de Vries contemplates that the proceduralization may be an alternative to the balancing act that the substantive part of the principle of proportionality boils down to. In their view procedural requirements attached to the principle of proportionality constitutes a forced concept. In my opinion the procedural requirements should be viewed as forming part of (at least) the second test mentioned above (necessity). When the court determines whether less restrictive means could have been implemented instead it searches for the flaws of the domestic measures accused of constituting an obstacle to the fundamental freedoms. Where else but not there, could the Court conclude that the domestic measures in question do not fulfil certain procedural requirements? Let us use an example, the *SIAT* case. The domestic measures in question where considered disproportionate as they included a terminology which was vague and lacked a statutory definition. Concluding that it was not the rules themselves that did not fulfil the principle of legal certainty is was the lack of a statutory definition that did not fulfil that requirement. Implying that the principle of legal certainty is not an additional procedural requirement, rather it is a requirement for the legal system in general to fulfil. In this regard it must be stressed that the Court has made proportionality dependent on legal certainty. However, the concerns to be raised in this regard are perhaps what effects this might have on the content of the principle of proportionality. What does proportionality really entail then and what role does it really pursue in the context of the European legal order. Where is the legal certainty in the principle of proportionality itself, or may we perhaps not impose that requirement on another general principle of law *per se*. This argumentation would the constitute of circles and perhaps grasping the content of the principle of proportionality is a harder task than first believed.

The obsolete Gebhard test and the increasing importance of the grounds of justification

The Court made a statement with the *Gebhard* case when it addressed the issues concerning the methodology used by the Court. The *Gebhard* case provided us with a guide on how to determine whether domestic measures may be justified or not according to the rule of reason doctrine. According to the *Gebhard* test the domestic measures in question had to fulfil four criteria in order to be justified. In the view of the change in approach of the Court it could arguably be concluded that the two first steps of the *Gebhard* case are somewhat obsolete.

Firstly, it could be argued that the Court is moving towards a greater acceptance of the restriction approach on the benefit of the discriminations approach. Without discussing the meaning of the different terminology it may still be concluded that restriction is a larger term encompassing the idea of the restrictions approach. With that being said, the discriminations approach is still alive and kicking it is just not the focus of the Court when assessing the compatibility of domestic measures with the

fundamental freedoms. Indeed there is the question of the comparable situation and whether it is necessary or not, it shall unfortunately not be discussed further in this thesis. Nevertheless, the acceptance of the restrictions approach allows us to draw the conclusion that more domestic measure qualifies as restrictions to the free movement under this approach, and so the real assessment is tilted over on the justification process, which I shall soon get to. Based on the premise that the restrictions approach is increasingly accepted, the tilt may be viewed as a necessary effect of accepting the restrictions approach. In this regard a reference to the case law previously presented should be made. It can be deduced from that case law that more and more so is the Court focused on whether the objectives that the domestic measures in question pursue, can be said to qualify as an imperative interest in the public interest. In the case law delivered between the *SIAT* case and the *ITELCAR* case it is obviously so that the Court often reaches the question of whether the measures in question are justifiable in relation to the objectives they pursue. It is rather seldom that the Court moves on to the proportionality assessment as it did in the *SIAT* case and the *ITELCAR* case.[265]

Consequently, in my opinion the proportionality assessment should just be referred to as the application of the principle of proportionality because that is in my view what it consists of. Hence, the proportionality assessment is tantamount to the application of the substantive part of the principle.

A change of focus

As has been held previously, there has been a change in the methodology of the Court. If one was to compare the early case law on the free movement in general, with the recently delivered case law, one may come to the conclusion that the importance of the assessment has shifted. In the present we can distinguish a tendency in the case law, were an increasing number of measures are considered to constitute obstacles to the free movement in question. Where as instead the emphasis and the importance of the assessment lies within the question of proportionality. A possible explanation is the broad scope of application through the restriction based approach rather than solely the discrimination approach.

The argument that there is a change in tendency by the focus of the Court is supported by the doctrinal debate, and with reference to the case law presented it can be concluded that there is a broad perception that the focus of the Court is now days, mainly on the justification process and the proportionality assessment therein.[266] That being said it does not necessarily mean that measures are more often considered compatible or the opposite. In fact as we have seen just with reference to the case law delivered by the Court after the *SIAT* case but before the *ITELCAR* case, there are few cases where the Court even have to assess whether the measures in question are proportionate.

Legal certainty as a new requirement for proportionality

Firstly, legal certainty is, as has also been held with regard to the principle of proportionality, a general principle of [EU] law, or at least it may be classified as such a principle. Both these principles impose obligations on the legislation, which must be fulfilled in order for the principles to be satisfied. The principle of proportionality

[265] See especially section 7.2.1 in this regard.
[266] See sections above and references cited therein.

imposes the obligation that actions undertaken must be appropriate, necessary and not be disproportionate. Previously expressed in the two test presented by Tridimas. Proportionality may even be more abstractly expressed in the phrase: actions undertaken must be in proportion to their objectives.

Legal certainty on the other hand, may be explained with reference to the case law above, as imposing the obligation on the Member States' legislation, to be clear, precise and predicable in relation to its effects. This is especially wanted for in the field of economical law such as tax law. The persons within the Union must be able to foresee the effects of the legislation. Formerly the content of legal certainty has been discussed and I believe it is relevant in this regard to remember what Peters argued in his article. He stipulated that legal certainty does not require for domestic measures to be stiff and detailed, he raised the importance of the flexibility of the different legislation within the different Member States, and he concluded that the key to fulfil the principle of legal certainty is to find the equilibrium between precision and flexibility. The requirements that the principle of legal certainty imposes on the legislation of the Member States are foremost that the rules must be sufficiently precise in order to understand the outcome of the application of them. The principle of legal certainty also comes to expression through the corollary of legitimate expectations and it also has a close relationship with the idea of foreseeability. My concerns regarding fitting legal certainty into the proportionality assessment have been discussed above, and consequently, even though the principle of legal certainty may be viewed as an additional requirement for proportionality, it does not necessarily have to be given that role. The principle of legal certainty should be a cornerstone of each legal system built on the premise of the rule of law. Nevertheless, the Court has evidentially concluded that fulfilling the principle of legal certainty may constitute a requirement for fulfilling the principle of proportionality expressed in the proportionality assessment; therefore it is not inconceivable that this premise constitutes a true and valid argument.

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