



Lund University

School of Economics and Management
Department of Business Law

How the Concept of Fairness influences EU Law

by

Jessica Svensson

HARN60 Master Thesis

Master's Programme in European and International Tax Law

2017/2018

1 June 2018

Supervisor Cécile Brokelind

Examiner Sigrid Hemels

Author's contact information:

sjc.svensson@gmail.com

Words:15747

Contents

Abstract.....	3
1 Introduction	6
1.1 Background.....	6
1.2 Aim.....	8
1.3 Method and material	9
1.3.1 Method	9
1.3.2 Material	9
1.4 Delimitation	10
1.5 Outline	11
2 EU legislation, an allocation of competence	11
2.1 Allocation of legislative competence within the EU	11
2.2 Directives	13
2.2.1 Parent Subsidiary Directive	14
2.2.2 Anti-Tax Avoidance Directive – The Fair Directive	15
2.3 Summary	16
3 Principles.....	17
3.1 Principle of subsidiarity	17
3.2 Principle of proportionality.....	18
3.3 Principle of equality.....	19
4 Fairness.....	21
4.1 Primary law on fairness.....	21
4.2 Secondary law on fairness.....	22
4.3 Philosophic definition of fairness.....	22
4.4 Economic definition of fairness	23
4.5 Political definition of fairness.....	24

4.6	Juridical definition of fairness	25
5	The CJEU case law – Application of fairness	28
5.1	Fairness in the CJEU case law	28
5.2	C-336/96 Gilly	32
5.3	C-212/97 Centros	33
5.4	C-453/00 Kühne and Heitz.....	34
5.5	C-446/03 Marks & Spencer.....	35
5.6	C-196/04 Cadbury-Schweppes.....	36
5.7	C-318/10 SIAT	36
5.8	C-68/15 X.....	37
6	Findings and Conclusions	39
6.1	Who has the competence to legislate on direct taxes within the EU?.....	39
6.2	How has the concept of fairness been approached by scholars?	40
6.3	How is the CJEU currently applying fairness in taxation? ...	40
6.4	Discussion and future research	41
	Bibliography	44

Abstract

The thesis presents fairness as a concept that can be defined in several ways. The different definitions overlap and influence each other in a somewhat unexpected manner. The conclusion of this thesis is that the utilitarian approach first presented as a philosophical theory of fairness by Jeremy Bentham is so far clearly seen as the overriding basis for the CJEU judgements.¹ However, the adopted Anti-Tax Avoidance Directives (ATAD) provide a possibility for a change in application of fairness by moving away from strict a legal-philosophic utilitarian approach of fairness towards a more economical and political approach to fairness by the CJEU. To achieve trust in fair tax systems, however, the utilitarian legal fairness in terms of procedural rights must be regarded.

The ATAD's are an outcome of the shared legislative competence between the EU and the Member States since it is a matter concerning the single market. This has led to the fair allocation of taxing rights being a shared competence as the objective of the directive is to restore trust in fair tax systems by taxing where value is added. However, even if the allocation of taxing rights can be distributed in a fair manner among the Member States, the unharmonised tax rates will provide for a continuous unfair tax burden on the different tax contributors. This is because the Member States are still competing in 'the race to the bottom' in an eager attempt to attract multinational enterprises (MNE's). The MNE's aim is to attain the overall lowest possible corporate income tax within all jurisdiction, while not so mobile individuals and other companies only acting in a domestic market do not have the possibility to shift their taxable income to most favourable tax jurisdiction.

¹ Jorgensen, K., E., (edit.), *The Sage handbook of European foreign policy*, London, Sage Publications, 2015, p. 268.

Preface

Fair and fairness are a constant source for discussion. What appears as fair taxation to one party does not necessarily appear fair to another. But how can be decided what a fair tax is and who sets the framework of what is considered fair on a case by case basis? After reading doctrines made by legal, economic and philosophic tax scholars such as *Sigrid Hemels*, *Cécile Brokelind*, *John Rawles*, *Adam Smith*, *Åsa Gunnarsson*, *Jesper Johansson*, *João Dácio Rolim* and several others, a picture of different collaborating factors started to emerge. In society three tax contributors exist who consist of individuals, Small and Medium-sized Enterprises (SMEs) who are both acting in a domestic market, and thirdly Multi-National Enterprises (MNEs). A good functioning and trustworthy tax system relies on these three contributors' compliance with their tax obligations set by national legislation. None of the three contributors want to contribute more than necessary, unless it is essential for the functioning of society. Therefore, in order to ensure compliance, the balance between all tax contributors must be considered fair and equal. To ensure a balanced contribution, the tax contributors must be at the same point on the Pareto happiness scale. When they start to divert from the common Pareto equilibrium, the tax system starts to be perceived as unfair, or as unequal, between the contributors. How and to what extent the European Union (EU) has the competence to legislate on fairness and how the European Court of Justice (EU) currently applies fairness will be the objectives of this thesis.

My most sincere thank you, is to my class mates of the Master Programme in European and International Tax Law. The high study tempo made it clear "that no man is an Island".² Thank you, Cécile Brokelind for being my supervisor and endless source of knowledge and inspiration. Thanks to Sigrid Hemels for lightning up the ungraspable concept of fairness in taxation. I light my candle of gratitude to Oskar Henkow, who doped my DNA with VAT. My humble thanks go to Marta Papis-Almansa and Ben Terra for continuing making indirect taxation interesting and understandable. Finally, thanks to Cleo, Hannes and Per Davoust, for being a supportive family even though tax law seldom make sense to any of you. Nevertheless, you have a totally clear, precise and effective perception of the concept of fairness.

Helsingborg 2018-05-31

Jessica Svensson

² J., Donne, *Devotions upon Emergent Occasions*, (1623), Meditation XVII.

Abbreviation list

AG	General Advocate
ATAD	Anti-Tax Avoidance Directive
BEPS	Base erosion and profit shifting
CFC	Controlled Foreign Company
CJEU	The Court of Justice of the European Union
EU	European Union
EURODAD	The European Network on Debt and Development
IRD	Interest Royalty Directive
MD	Merger Directive
Member States	Member States of the European Union
NID	Notional Interest Deduction
OECD	Organisation for Economic Co-operation and Development
PE	Permanent establishment
PSD	Parent Subsidiary Directive
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
The Charter	The Charter of Fundamental rights of the European Union
TLCF	Tax Losses Carried Forward

1 Introduction

1.1 Background

In 2018, the EU single market celebrates 25 years of existence with the slogan that prioritizes “A deeper and fairer single market”.³ The single market has been beneficial to both companies and citizens. The economic growth and the creation of job opportunities have been successful due to common adopted rules that provide free movement of capital (Article 63 TFEU), goods (Article 28 TFEU), services (Article 56 TFEU), and workers (Article 45 TFEU) in conjunction with the freedom of establishment (Article 49 TFEU).⁴ Hence, a rapid development in opportunities to use of different domestic legislations for tax optimization has occurred.⁵ This has led to discrepancies between the different tax contributors and their contributions in relation to the benefits they receive from society.

For the last decade, after the financial crisis in 2008, the economic and political situations have changed and the need for juridical solutions to provide renewed trust in fairness to the tax systems has arisen. When the global economies started to recover after the crisis, the tax burden on individuals and SMEs on domestic markets had become disproportionately higher than the tax burden on MNEs, companies and wealth keepers with the capacity of tax planning.⁶ After the so-called LuxLeaks⁷, Panama⁸ and Paradise papers,⁹ the public demanded that something must be done to end the unfair opportunities that led to avoiding taxes and not providing society with its fair share. The public started demanding that MNEs and individual high net-worth individuals take on more social responsibility and refrain from their possibility to abuse their right of free movement of capital and from paying their taxes in the jurisdiction where the profits have been made.¹⁰ This has resulted in a shift in focus for the Commission to “restore trust in the fairness of tax systems”.¹¹ The different perspectives of fairness have resulted in political actions that attempt to regain trust, fairness and willingness to participate in the tax system. It is of utmost importance to re-establish the perception of fairness in the tax system, otherwise the losses of tax revenue will continue and everyone, individuals as well as companies, will ask

³ https://ec.europa.eu/commission/priorities/internal-market_en, [accessed 31.05.2018]

⁴ <http://www.europarl.europa.eu/resources/library/media/20180116RES91806/20180116RES91806.pdf>, [accessed 31.05.2018].

⁵ Judgment of the Court of 9 March 1999, *Centros*, C-212/97:EU:C:1999:126, is said to be the starting point for legal system shopping within the EU.

⁶ Gribnau, Hans, *The Integrity of the Tax System after BEPS: A Shared Responsibility*, ELR, August 2017, No. 1, p. 13.

⁷ <https://www.icij.org/investigations/luxembourg-leaks/>, [accessed 31.05.2018]

⁸ <https://www.icij.org/investigations/panama-papers/>, [accessed 31.05.2018].

⁹ <https://www.icij.org/investigations/paradise-papers/>, [accessed 31.05.2018].

¹⁰ <https://www.campaignlive.co.uk/article/starbucks-bows-pressure-uk-tax/1162471>, [accessed 31.05.2018].

¹¹ Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the single market (here after called ATAD 1), preamble, p. 1.

themselves, “What do I get for the taxes I pay?”¹² The political aims must be dealt with in a manner that ensures legal certainty. Therefore, to provide equal treatment, grounds for justification must be proportionate and reasonable to be considered fair.

The Council has adopted the Anti-Tax Avoidance Directive (ATAD 1) with amendments (ATAD 2).¹³ These Directives are designated to protect the EU Member States’ (Member States) tax basis and restore trust in a fair tax system. The idea stems from the proposed Directive on Common Consolidated Corporate Tax Base (CCCTB) that still has not been adopted and from the Organisation for Economic Co-operation and Development (OECD) Base Erosion and Profit Shift (BEPS) project. However, the ATAD goes beyond the OECD Action Plans by also including a regulation regarding exit taxation and inserting a general anti-avoidance regulation (GAAR).¹⁴ The ATAD 1 & 2 are designed as a *de minimis* regulation without any discretion left to Member States to legislate law. Hence, the ATADs require Member States to harmonise their legislation in order to prevent BEPS as a means to restore trust and fairness in the tax systems in the single market.¹⁵ The ATADs, therefore differ in respect of their objectives to other direct taxation Directives. Those other Directives are designed to encourage free movement and the freedom of establishment and to remove obstacles that might mitigate the creation of the single market. The Parent Subsidiary (PSD), the Interest Royalty (IRD) and the Merger Directives contain the legislative option to combat abuse without this being in contradiction to EU law.¹⁶ The PSD amendment addresses non-genuine arrangements, where as in the IRD and Merger Directives it is addressed for an “[...] operation [that] is not carried out for valid commercial reasons”.¹⁷ However, the Member States legislation, that is designed to combat abuse, must be justified and proportionate in order not to restrict fundamental freedoms.¹⁸ In the *SGI case*, the Court of Justice of the European Union (CJEU) found the Belgian arm’s

¹² <https://www.svt.se/nyheter/granskning/ug/svenskt-naringslivs-ordforande-har-formogenhet-utomlands>. The essence of the words of Leif Östling, former CEO of Svenskt Näringsliv, [accessed 31.05.2018].

¹³ ATAD 1 & Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries (hereafter called ATAD 2).

¹⁴ ATAD 1, article 5 & 6.

¹⁵ Brokelind, C, Wattel, P., J, *European Tax Law, Chapter 15, Free Movement and Tax Base Integrity*, p. 335.

¹⁶ Council Directive (EU) 2015/121 of 27 January 2015 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (hereafter called PSD), art. 1(4) & Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (hereafter called IRD), preamble (6) and art. 5 .

Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States (here after called MD), art. 15.

¹⁷ Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States, art. 15(1)(a).

¹⁸ Brokelind, C., Wattel, P., Chapter 15, in Terra, B., Wattel, P., (edit), *European Tax Law*, Alphen aan den Rijn, Kluwer Law, 2018 , p. 335.

length principle to be justified and proportionate.¹⁹ However, recently in the *Eqiom case*, the CJEU ruled that the French implementation of the PSD anti-abuse regulation is unjustified.²⁰ The conclusion of this thesis is that the utilitarian approach first presented as a philosophical theory of fairness by Jeremy Bentham is so far clearly seen as the overriding basis for the CJEU judgements.²¹ In addition, the utilitarian approach is also the guarantee for procedural rights presented as juridical fairness. However, it might be possible that the EU and CJEU will have to change the approach from a strict utilitarian method to a more political and juridical approach to fairness presented by John Rawles and Herbert Hart to restore trust in fair tax systems. The balance of fairness must however, provide clear and precise juridical procedural fairness.

The European Commission has also proposed a Directive of the European Parliament and of the Council on establishing a Common Consolidated Corporate Tax Base (CCCTB or CCTB without consolidation) with the purpose to harmonize the regulation on direct taxation and making the single market increasingly unified.²² The proposed CCCTB / CCTB is a two-step approach designed in-line with the Commission's goal to create fairer taxation rights between the Member States within the single market. For a corporation in scope of the CCCTB / CCTB would render lower costs and have more effective administration of tax handling. The Member States have had problems in reaching consensus in this matter. Therefore, it is still a working document waiting to be adopted.

1.2 Aim

The aim of this thesis is to identify how the concept of fairness influences EU law and whether the EU has the competence to legislate on the restoration of trust in fair tax systems within the single market or if it is an infringement of the sovereignty of Member States. Furthermore, the aim is to analyse if, and in which manner, there can be different concepts and construction of fairness that provide trust in fair tax systems.

Questions to help identify the aim are:

- *Who has the competence to legislate direct taxes within the EU?*
- *How has the concept of fairness been approached by scholars?*
- *How is the CJEU currently applying fairness in taxation?*

¹⁹ Judgment of the Court (Third Chamber) of 21 January 2010, *SGI C-311/08*, EU:C:2010:26, paragraph 69.

²⁰ Judgment of the Court (Sixth Chamber) of 7 September 2017, *Eqiom Enka, C-6/16*, EU:C:2017:64, paragraph 65.

²¹ Jorgensen, K., E., (edit.), *The Sage handbook of European foreign policy*, London, Sage Publications, 2015, p. 268.

²² Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2016) 685 final, 2016/0337 (CNS).

1.3 Method and material

1.3.1 Method

For the purpose of legal research an internal perspective will be taken as the legal dogmatic method will be applied. To be able to conclude the aim of this thesis the law, as it currently stands, will be considered together with how the law is established by written and sometimes unwritten sources. The hierarchy between the sources is in descending order: The Law, Domestic, European and International law. Followed by principles and doctrines, jurisprudence and academic literature.²³ When the CJEU interprets EU primary and secondary law they as a rule interpret by systematically looking to the wording first and then only by the purpose of the law. Furthermore, the context in the case, for instance if there is good faith present or not, is of importance for the CJEU interpretation of the rules.²⁴ To understand how the CJEU interprets the Treaties and Directives, law elements of comparability methodology will be used to compare the objectives between the Directives and the Treaties.²⁵

1.3.2 Material

The material for this thesis has been gathered from scholars, legislators, general advocate (AG) opinions and judgements from the CJEU as well as from legislative EU acts in form of treaties and directives. João Dácio Rolim shed light on the connection between proportionality and fairness by way of his book *Proportionality and fair taxation*.²⁶ Irene Burger's and Irma Monsquera Valderrama's article *Fairness: A Dire International Tax Standard with No meaning?* was used as a raw model for the sorting of the principle of fairness into four different perspectives. Another doctoral thesis, referred to in this paper, is Åsa Gunnarsson's *Skatterättvisa* which explains the concept of tax justice. To get a legal-philosophic perspective on fairness the book *A theory of justice* by John Rawls was an inspiration. Other contributors have been Hans Gribnau with a perspective of reciprocity and neutrality to fairness, Cécile Brokelind with a principle perspective on EU law and Sigrid Hemels for the perspective of fairness as political defined and the transformation problem to legislation and juridical applied definitions.

²³ Douma, S, *Legal research in international and EU tax law*, Kluwer, 1994, p. 18.

²⁴ Ibid, p. 23.

²⁵ Ibid, p. 38.

²⁶ Rolim, J. D, *Proportionality and Fair Taxation*, Alphen aan den Rijn, Kluwer 2014.

1.4 Delimitation

Since the aim of the thesis is to scrutinize the competence on legislative powers regarding fairness within the EU, limitations to this thesis are required. The focus will be on understanding the legislative process, what fairness is and how the concept of fairness is expressed by the CJEU's current application of juridical fairness through the principle of proportionality.

Therefore, this thesis will not discuss the altruistic tax aspects of equality, equity and fairness in depth. A recent contribution in this field is made by Axel Hilling and Daniel T. Ostas in their book *Corporate taxation and social responsibility*.²⁷ The ability to pay principle will be briefly mentioned and the principle in general discussed by Joachim Englisch in *Principles of Law: Function, Status and Impact in EU Tax Law*.²⁸ How the CJEU applies the comparability test to set equal treatment in cross border situations is systematically explained by Jesper Johansson in his doctoral thesis *EU-domstolens restriktionsprövning mål om de grundläggande friheterna och direkta skatter* and will not be analyzed in this thesis.²⁹ Definitions and discussions regarding avoidance, evasion and abuse of law is not a part of the thesis either. Even though the OECD's influence on the EU and the Member States legislation is significant, the OECD and its BEPS project will be delimited in favor of focusing on EU legislation and its relation to the Member States' domestic legislation. One of the authors who has written about the BEPS influence on EU law is Cécile Brokelind with an article about the impact on the PSD, *Legal Issues in Respect of the Changes to the Parent-Subsidiary Directive as a Follow-Up of the BEPS Project*.³⁰ Brokelind's article will be used to present the result of the French implementation of the latest PSD amendments, however, the OECD influence on the amendments will not to be discussed. No reflection regarding fairness and human rights will be found in this thesis and finally, the thesis will not discuss the use of state aid as a means to create fairness. Instead the focus of this thesis will be to investigate and present different definitions of fairness, how they influence each other and how they are used by the CJEU.

²⁷ Hilling, A. & Daniel, T. *Corporate taxation and social responsibility*, Edition 1, Stockholm, 2017.

²⁸ Brokelind, C (red.), *Principles of Law: Function, Status and Impact in EU Tax Law*, IBFD, Amsterdam, 2014.

²⁹ Johansson, J, *EU-domstolens restriktionsprövning i mål om de grundläggande friheterna och direkta skatter*, Stockholm, Jure, 2016. Unfortunately, the book is only available in Swedish, but with an English summary, and Professor Cécile Brokelind has made a useful English review published in *Nordic Tax Journal*, 2016, 2, p. 130-132.

³⁰ Brokelind, C. *Legal Issues in Respect of the Changes to the Parent-Subsidiary Directive as a Follow-Up of the BEPS Project*, Intertax, 2015, p. 816-824.

1.5 Outline

Chapter 2 answers the first question: ‘*Who has the competence to legislate direct taxes within EU?*’ by describing how the legislative competence is divided between the EU and the Member States. The hierarchy between legal acts and descriptions of the PSD and ATAD is also to be found in Chapter 2. The adopted PSD and ATAD will be discussed clarify if and how the EU legislates on fairness. The principles of subsidiarity, proportionality and equality placed in Chapter 3, as these are closely connected with the contents of Chapter 4. Chapter 4 presents fair and fairness aiming to analyse the second question in this thesis: ‘*How has the concept of fairness been approached by scholars?*’. A more in-depth discussion on how fairness has been and is applied in CJEU case law is given in Chapter 5, answering the third question ‘*How is the CJEU currently applying fairness in taxation?*’. First Hemels categorisation of how the CJEU addresses fairness is analysed. After that the following part of Chapter 5, a selection of cases will be presented to underline that the CJEU addresses fairness in a political sense without expressing the words fair or fairness. Not all cases chosen are about taxation, eg.. the non-tax case *Centros*³¹ has been chosen due to its impact on how the CJEU interprets tax law. In Chapter 6 the findings, conclusions and an outlook to the future will be made.

2 EU legislation, an allocation of competence

In this Chapter the answer to question one ‘*Who has the competence to legislate direct taxes within the EU?*’ will be discussed. Hereafter, directives and their function will be presented followed by two directives, the PSD and the ATAD, as representing how different objectives can be defined.

2.1 Allocation of legislative competence within the EU

The EU has a supervising role in relation to national tax legislation to secure Member States’ compliance with EU policies.³² The main purpose of EU direct tax law is to remove obstacles from the single market.³³ For income and corporate tax there is an increased need for cooperation due to BEPS.

³¹ Judgment of the Court of 9 March 1999, *Centros*, C-212/97:EU:C:1999:126.

³² https://europa.eu/european-union/topics/taxation_en, [accessed 31.05.2018].

³³ Helminen, M. *EU tax law: direct taxation*. 4. ed. Amsterdam: IBFD, 2015, Chapter 1, p. 4.

This means that justified and proportional obstacles on the single market may be acceptable.³⁴

At first, it appears to be clear how the legislative competences are divided between the EU and the Member States. However, when starting to analyse the allocation it is more complex than what is first apparent. In the Treaty on the Function of the European Union (TFEU), three levels of legislative competences between the EU and the Member States are set out. In Articles 2 to 6 TFEU, the EU's exclusive competences can be found. Article 2(2) TFEU declares that Member States shall only exercise their competence to legislate to the extent that the EU has not exercised its competence. In direct taxation this has so far been the case with Member States having exercised their competence to legislate as the EU has not. Article 3 TFEU contains among others the Common Commercial Policy. Article 4 TFEU contains the shared competence rules, such as the single market. Article 6 TFEU accommodates ancillary competencies, including for instance social security rules.

The competence to legislate within the area of direct taxation is a shared competence, since it is considered an interest of the single market.³⁵ Therefore, the EU legislative process must follow the regulation set out in Article 5 TEU. This article clarifies that the EU competence is limited by the principle of conferral enshrined in Article 5(1) TEU. The shared competence is guarded by the principles of subsidiarity in Articles 10(3) and 5(3) TEU, as well as the principle of proportionality in Article 5(4) TEU.³⁶ This means that it is within the shared EU competence to harmonise direct tax systems of the Member States if it is considered necessary for the better functioning of the single market. For the single market to function, the EU must provide the legislative coordinating framework. In the field of direct taxation, harmonisation can only be accomplished through Directives as stated in Article 115 TFEU.³⁷

The need for harmonisation in the field of direct taxation has been highlighted in several cases by the CJEU. In the *Cadbury Schweppes case*, the CJEU expressed that since direct taxes were not harmonised, it was in the competence of the Member States to have their own laws that must be consistent with EU law. The CJEU reasoned,

“According to settled case-law, although direct taxation falls within their competence, Member States must none the less exercise that competence consistently with Community law.”³⁸

³⁴ https://europa.eu/european-union/topics/taxation_en. [accessed 31.05.18].

³⁵ Article 4 TFEU.

³⁶ For further discussion see Chapter 3.2.

³⁷ Remur, C, *Tax Policy in the EU: Issues and Challenges*, EPRS, p. 7.

³⁸ Judgment of the Court (Grand Chamber) of 12 September 2006, *Cadbury Schweppes*, C-196/04, EU:C:2006:544, paragraph 40.

The lack of law harmonisation has also been observed in the non-tax *Centros case* where the CJEU explained,

“[...] the fact that company law is not completely harmonised in the Community is of little consequence. Moreover, it is always open to the Council, based on the powers conferred upon it by Article 54(3)(g) of the EC Treaty, to achieve complete harmonisation.”³⁹ (now Article 7 TFEU).

The case law provided by the CJEU has resulted in several directives aiming for harmonisation of Member States’ legislation.⁴⁰ However, until the adoption of the ATAD, the Directive’s objective aimed to avoid obstacles on the single market and not to restore trust in fair tax systems. In the following section directives will be further discussed.

2.2 Directives

Directives can, according to Michael Lang *et al*, be divided into two categories with respect to their functions. The first category contains directives with the purpose to remove obstacles on the single market. The second category contains directives with the purpose of enhancing cooperation between the Member States’ tax authorities.⁴¹

This thesis discusses two directives in line with Lang’s first category of directives which are the implemented PSD as well as the adopted ATAD which both highlight the differences in the objectives of the Directives. The different objectives of the directives might result in a change of the CJEU’s utilitarian approach. Justification grounds that previously were deemed not to be proportionate, might in the future be regarded as acceptable due to the ATAD and its quest for political defined fairness.^{42,43}

³⁹ Judgment of the Court of 9 March 1999, *Centros*, C-212/97:EU:C:1999:126, paragraph 28.

⁴⁰ PSD, IRD & MD.

⁴¹ Lang, M., Pistone, P., Schuch, J. & Staringer, C., (ed.), *Introduction to European tax law on direct taxation*, p. 19.

⁴² Brokelind, C., Wattel, P., Chapter 15, in Terra, B., Wattel, P., (edit), *European Tax Law*, Alphen aan den Rijn, Kluwer Law, 2018, p. 331-352.

⁴³ See Chapter 4 for description of different definitions of fairness.

2.2.1 Parent Subsidiary Directive⁴⁴

The objective of the directive is to provide a framework for free movement of capital between parent companies and their subsidiaries by removing, or at least avoiding, the obstacles of double taxation that may occur when withholding tax is applied on dividend and other profit distributions.^{45,46} A parent company and its subsidiaries should not be treated unequally depending on where they are established in the single market. The aim is tax neutrality.⁴⁷ The amendment of the PSD contains an additional tax avoidance objective. Article 1(1) and 1(2) contains a general anti-abuse clause that states that, if arrangements are made for tax reasons, as one or one of the main purposes, it shall be regarded as non-genuine. Arrangements must be made for valid commercial reasons which reflect the economic reality. The “non-genuine” reasoning has its background in the CJEU case law. The series of arrangements in question must be regarded as non-genuine when scrutinised by a third party.⁴⁸ The amendment was made in line with the OECD BEPS project and the ATAD to reflect their aim, to restore trust and fairness in the tax systems. Cécile Brokelind raised the question in an article about the actual effect of the amendment. Brokelind concluded that there was most likely a lack of compatibility between the introduced amendments of the PSD and EU primary law, i.e. the freedom of establishment and free movement of capital.⁴⁹ Brokelind predicted the CJEU’s continuous repeating argument that lack of harmonisation cannot justify national legislation to restrict the fundamental freedoms.⁵⁰ After Brokelind’s article, the CJEU has ruled on the matter in the *Eqiom Enka case* regarding the French implementation of the amendment and as foreseen by Brokelind, the CJEU found the implementation not to be compatible with EU primary law.⁵¹

⁴⁴ PSD.

⁴⁵ PSD, preamble point 3.

⁴⁶ Lang, M., Pistone, P., Schuch, J. & Staringer, C., (red.), *Introduction to European tax law on direct taxation*, p. 19, 134.

⁴⁷ Judgment of the Court (Sixth Chamber) of 7 September 2017, *Eqiom Enka*, C-6/16, EU:C:2017:64, paragraph 20 and Judgment of the Court (Fifth Chamber) of 8 March 2017, *Wereldhave Belgium*, C-448/15 EU:C:2017:180, paragraph 25.

⁴⁸ Judgment of the Court (Grand Chamber) of 21 February 2006, *Halifax*, C-255/02, EU:C:2006:121, paragraph 81; Judgment of the Court (Grand Chamber) of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation*, C-524/04, EU:C:2007:161, paragraph 74; Judgment of the Court (Second Chamber) of 21 February 2008, *Part Service*, C-425/06, EU:C:2008:108, paragraph 45.

⁴⁹ Brokelind, C, *Legal Issues in Respect of the Changes to the Parent-Subsidiary Directive as a Follow-Up of the BEPS Project*, p. 816 & 824.

⁵⁰ *Ibid.*, p. 816.

⁵¹ Judgment of the Court (Sixth Chamber) of 7 September 2017, *Eqiom Enka*, C-6/16, EU:C:2017:64, paragraph 15-16.

2.2.2 Anti-Tax Avoidance Directive ⁵² – The Fair Directive

The ATAD is a *de minimis* directive enforcing *inter alia* minimum standards, meaning a higher level of corporate tax base protection is possible in the Member States' national legislations.⁵³ The objective of the ATAD is to restore trust in fair tax systems within the EU by taxing corporate income where value is added.⁵⁴ By implementation of this directive, adopted under Articles 4 TEU and 115 TFEU, the fair allocation of taxing rights have been introduced as an objective which must be observed by the CJEU. According to Daniel Smit, the objective of the ATAD differs from the PSD as its objective is not aiming to avoid double taxation. However, it can result in both requiring taxation or denying deduction.⁵⁵ Nowhere in the articles of the ATAD are there any restrictions on double taxation. Nevertheless, the non-binding preamble of the ATAD states that:

“[...] Thus, the rules should not only aim to counter tax avoidance practices but also avoid creating other obstacles to the market, such as double taxation.”⁵⁶

Smit believes the ATAD to be a directive whose objective is not to remove obstacles on the single market, but to protect the tax base of each Member State. Hence, it does not disregard the avoidance of double taxation even though it is only mentioned in the non-binding preamble.⁵⁷ Even though the objective of the directive is to restore trust in fair tax systems, the amount of implementation choices opens up the possibility of diverse Member State legislation.⁵⁸ Which other obstacles should be avoided is not mentioned in the ATAD. However, referring to other directives, for instance the PSD, it might mean obstacles on the single market that have a hampering effect on the fundamental freedoms. Smit argues that the financial crises and the leaks developed the political incentives for the Member States to adopt the ATAD. Smit believes that this would have been improbable in the pre-BEPS EU era. The wide range of implementation choices might result in continuous discrepancies between Member States' tax systems as well as continuing Member States' tax competition. According to Smit, the ATAD might just be a 'headache pill' that tries to treat the symptoms of BEPS instead of the actual

⁵² ATAD 1.

⁵³ Smit, D., Chapter 12, in Terra, B., Wattel, P., (edit), *European Tax Law*, Alphen aan den Rijn, Kluwer Law, 2018, p. 243.

⁵⁴ ATAD 1, preamble & art. 1.

⁵⁵ Smit, D., Chapter 12, in Terra, B., Wattel, P., (edit), *European Tax Law*, Alphen aan den Rijn, Kluwer Law, 2018, p. 244.

⁵⁶ ATAD 1, preamble point 5.

⁵⁷ *Ibid.*

⁵⁸ Smit, D., Chapter 12, in Terra, B., Wattel, P., (edit), *European Tax Law*, Alphen aan den Rijn, Kluwer Law, 2018, p. 244.

causes of BEPS. Whether the ATAD will restore trust in fair tax systems remains to be seen.⁵⁹

If the objective of the ATAD results in raised corporate tax revenues from MNEs, the discrepancy of Pareto unhappiness with the tax systems will most likely decrease. Even though it means increased unhappiness for the MNEs, the impression that everyone contributing their ‘fair share’ will appear. Nevertheless, the political definition of fairness must be in line with and acceptable to the juridical definitions of fairness. In addition, the Member States are still sovereign taxing territories, meaning they still decides on their on tax rates. By that Member States still compete in the ‘race to the bottom’ in order to provide the most favourable tax system for MNE’s. That will conserve the uneven tax burden between the tax contributors.

2.3 Summary

Findings to the first question ‘*Who has the competence to legislate direct taxes within EU?*’ are that the competence to legislate on direct taxes within the EU is shared between the EU and the Member States. This is an outcome of Article 115 TFEU in conjunction with Article 4 TFEU stating that direct taxes are a matter of the single market. The legislative acts regarding the single market must be adopted following the principles of subsidiarity and proportionality presented in the following Chapter 3. Chapter 3 also presents the principle of equality as an introduction to the concept of fairness.

⁵⁹ Smit, D., Chapter 12, in Terra, B., Wattel, P., (edit), *European Tax Law*, Alphen aan den Rijn, Kluwer Law, 2018, p. 271.

3 Principles

“All principles are equal, but some principles are more equal than others.”⁶⁰

This chapter presents and explains the principles behind the EU legislative process. The principles were chosen to demonstrate how they influence the rule of law. They are not necessary decisive in the juridical process’ however, they can provide guidance for the outcome.⁶¹ As mentioned in Chapter 2, the principles of subsidiarity and proportionality are parts of the legislative process procedure and stem from EU primary law.⁶² According to the TFEU Protocol (No 2) Article 1, all EU institutions must respect the principles of subsidiarity and proportionality. This results in an obligation for the EU Commission, the Parliament and the Council to safeguard legislative drafts in line with those principles when they are forwarding proposals to national Parliaments.⁶³ The principle of proportionality will also be discussed from an CJEU application perspective. Finally, the principle of equality will be discussed to describe why equals should be treated equally, which will introduce Chapter 4 concerning fairness.

3.1 Principle of subsidiarity

The principle of subsidiarity in Article 5(3) TEU is explained in Article 10(3) TEU as:

“Decisions shall be taken as openly and as closely as possible to the citizen.”

Legislation shall be made at national level, unless the equivalent result for the single market can only be achieved on EU level of competence.⁶⁴ Sweden and Malta claimed the ATAD infringed on the principle of subsidiarity during the legislative process of the directive, although on separate grounds. Sweden claimed that it should be in the competence of the Member States to legislate and harmonise on a national level. Malta on the other hand objected by

⁶⁰ Vanistendael, F. Chapter 3, in Brokelind, C. (edit.), *Principles of Law: Function, Status and Impact in EU Tax Law*, p. 29.

⁶¹ Pålsson, R., *Likhet inför skattelag: likhetsprincipen och konstruktionen av jämförbarhet i skatterätten*, Uppsala, Iustus, 2007 p. 28.

⁶² Article 5 TEU.

⁶³ Treaty on the Functioning of the European Union - Protocol (No 2) on the application of the Principle of Subsidiarity and Proportionality (2008). OJ C 326. Article 4-5.

⁶⁴ Lang, M., Pistone, P., Schuch, J. & Staringer, C., (red.), *Introduction to European tax law on direct taxation*, p. 30.

claiming that since they are not a member of OECD, the EU cannot impose a legislation based on OECD soft law.^{65,66,67,68}

3.2 Principle of proportionality

Proportionality in the legislative process acts in nexus with the principle of subsidiarity. According to Article 5(4) TEU proportionality means that a EU action

“[...] shall not exceed what is necessary to achieve the objectives of the Treaties.”

The principle of mutual recognition and obligation of sincere cooperation is also an aspect of proportionality recognised in Article 4(3) TEU.⁶⁹

For the CJEU there is a three-prong test to determine whether a justified measure is proportionate or not:

- Is the measure suitable to achieve the desired aim?
- Is the measure necessary to achieve the desired aim?
- Is the measure imposed on the person, an excessive burden in relation to the objective? (*stricto sensu* proportionality)⁷⁰

The test was further formulated in the *Gebhard*⁷¹ case where the CJEU stated that proportionality is an explicit requirement for any restriction on the fundamental freedoms:

“[...] national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions:

- They must be applied in a non-discriminatory manner;
- They must be justified by imperative requirements in the general interest;
- They must be suitable for securing the attainment of the objective which they pursue; and

⁶⁵ Yttrande från Regionkommittén om” En gemensam konsoliderad bolagsskattebas”, (2012/C 54/10), EUT C 54, 23.2.2012.

⁶⁶ Reasoned opinion of the house of representatives, parliament of Malta: Proposal for a council directive laying down rules against tax avoidance practices that directly affect the functioning of the single market (COM (2016) 26).

⁶⁷ For further reading in Swedish see the authors thesis; *Skatteflykt-Etableringsfrihet, missbruk eller verklig innebörd*, 2016, <https://lup.lub.lu.se/studentpapers/search/publication/8900235>, [accessed 31.05.18.]

In English; Maisuradze L. *The Anti-Tax Avoidance Directive and its Compatability with Primary EU Law*, 2017, <https://lup.lub.lu.se/student-papers/search/publication/8913909>, [accessed 31.05.18].

⁶⁸ Swedish Professor Anders Hultqvist has questioned whether it is in line with subsidiarity to implement the ATAD or not. Hultqvist, A. *Anti-Tax Avoidance Directive (ATAD) och subsidiaritetsprincipen - Svenska folkets urgamla rätt att sig beskatta eller EU:s rätt?* p. 862.

⁶⁹ Barnard, C. & Peers, S. (edit.), *European Union law*, Oxford, Oxford University press, 2014, p. 344.

⁷⁰ Rolim, J. D., *Proportionality and fair taxation*, Alphen aan den Rijn, Kluwer 2014, p. 122.

⁷¹ Judgment of the Court of 30 November 1995, *Gebhard*, C-55/94, EU C:1995:411.

- They must not go beyond what is necessary to attain it.”⁷²

The *Gebhard* test is cumulative in its application to assure that if a restriction on the fundamental freedoms result in discrimination, it must be justified and proportionate. The imperative requirements are fiscal coherence, effectiveness of fiscal supervision, balanced allocation of taxing power and tax avoidance.⁷³

According to João Dácio Rolim, the principle of proportionality works in conjunction with the rule of reason to strike the balance whether a restriction on the fundamental freedoms can be justified or not.⁷⁴ Rolim believes that the principle of proportionality not only has the ability to set a balance between conflicting rules, principles and interests, but also can also be used as a reconciling principle in search for fairness.⁷⁵ According to Rolim there is a pareto optimum for fairness provided by the function of proportionality in law expressed as maximum fairness in conjunction with minimum disorder. This would set the optimal circumstances and border to unfairness and disorder.⁷⁶

3.3 Principle of equality

According to Robert Pålsson, the principle of equality stems from a deep common understanding of how people can live together without too much friction.⁷⁷ He explains that equal cases should be treated equally which in summary is the idea of justice in nexus with the rule of law.⁷⁸ Article 2 TEU states that equality is one of the founding values of the EU:

“[...] society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

According to Article 4 TEU, the EU shall respect the equality between the Member States in relation to the TEU, TFEU and the Charter. The discrimination prohibition between nationalities is stated in Article 18 TFEU. Article 18 TFEU is the priority rule in relation to the fundamental freedoms, *leges speciales derogate* to Article 18 TFEU *as lex specialis derogate legi generali*.⁷⁹ In the preamble of Protocol No. 12 to the Charter it is clear that “all persons are equal before the law and are entitled to the equal protection of the law”. The Charter does not differentiate between legal and natural

⁷² Ibid., paragraph, 37.

⁷³ Rolim, J. D., *Proportionality and fair taxation*, Alphen aan den Rijn, Kluwer, 2014, p. 122.

⁷⁴ Ibid., p. 1.

⁷⁵ Ibid., p. 149, 196.

⁷⁶ Ibid., p. 196.

⁷⁷ Pålsson, R. Chapter 7, in Brokelind, C. (edit.), *Principles of Law: Function, Status and Impact in EU Tax Law*, IBFD, Amsterdam, 2014, p. 152.

⁷⁸ Ibid., p. 151.

⁷⁹ Lang, M., Pistone, P., Schuch, J. & Staringer, C., (edit.), *Introduction to European tax law on direct taxation*, p. 55.

persons and therefore is applicable to everyone within the EU. Pålsson believes that the provisions on free movement and establishment are the most important provisions for the principle of equality.⁸⁰ Legal equality also implies that taxpayers should be equally treated by non-corrupted tax authorities.⁸¹ In European tax law the principle of equality generally means that comparable cases should be treated equally which means that cross border situation should be treated in the same way as a domestic situation.^{82,83} How the CJEU establishes a comparable situation is described in-depth with three different approaches by Jesper Johansson.⁸⁴ There appears to be a consensus regarding equal treatment in comparable cases. However, the problem arises in defining comparable cases as the subjective criteria forming part of equality is seemingly problematic for comparability purposes.⁸⁵

Some scholars referred to by Rolim characterise equality as a vague principle that needs to be objectively ascertained and upheld by other principles such as proportionality and reasonableness. This to make equality a valuable a tool in achieving fairness and legal certainty.⁸⁶ Frans Vanistendael concludes that equality is very important since it is mentioned several times in Article 2 TEU However, he leaves it for others to discuss whether Article 2 TEU is meant to be a an ideal, value, concept or principle.⁸⁷

⁸⁰ Pålsson, R. Chapter 7, in Brokelind, C. (edit.), *Principles of Law: Function, Status and Impact in EU Tax Law*, IBFD, Amsterdam, 2014 p. 152.

⁸¹ Burgers, I. J. J. & Monsquera Valderrama, I. J., *Fairness: A Dire International Tax Standard with No Meaning?*, p. 771., refers to Alink, M. H. J & van Kommer, V, Chapter 1: Taxation in Handbook on Tax Administration.

⁸² Ibid.

⁸³ Johansson, Jesper. *EU-domstolens restriktionsprövning i mål om de grundläggande friheterna och direkta skatter*, Stockholm, Jure, 2016, p 149.

⁸⁴ Ibid., p. 285-298.

⁸⁵ Pålsson, R. Chapter 7, in Brokelind, C. (edit.), *Principles of Law: Function, Status and Impact in EU Tax Law*, IBFD, Amsterdam, 2014 p. 152.

⁸⁶ Rolim, J. D., *Proportionality and fair taxation*, Alphen aan den Rijn, Kluwer 2014, p. 20.

⁸⁷ Vanistendael, F. Chapter 3, in Brokelind, C. (edit.), *Principles of Law: Function, Status and Impact in EU Tax Law*, IBFD, Amsterdam, 2014 p. 34.

4 Fairness

Fairness may be defined as:

“the quality of treating people equally or in a way that is right or reasonable.”⁸⁸

This Chapter will discuss and address the research question ‘*How has the concept of fairness been approached by scholars?*’. Four different approaches to the principle of fairness will be presented. The discussion will show legal difficulties and possibilities that appear depending on how fairness is addressed. Vanistendael believes that fairness as a principle is a member of a group of principles that is rare to find in written positive law. Instead it appears in doctrine, jurisprudence and legal tradition together with, for example, *in dubio pro reo*, *ne bis in idem* and good faith.⁸⁹

4.1 Primary law on fairness

The Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) with its protocols together form the Treaties.⁹⁰ The Charter of Fundamental rights of the European Union (the Charter) is not a part of the Treaties but through Article 6(1) TEU it acquires the same legal status as the TEU and TFEU. Together with the Treaties and the Charter, the general principles of EU law form part of EU primary law.⁹¹ Nowhere in EU primary law are the words fair or fairness to be found in relation to taxation. Fair is used to describe the aim of the EU when it comes to trade (Article 3(5) TEU). Fair is also used in Article 39(1)(b) TFEU concerning agricultural objectives “to ensure a fair standard of living for the agricultural community”. In Article 67(2) TFEU, fair is also used in the provisos regarding external border control and solidarity between Member States in relation to persons from third countries. The fair treatment of persons from third countries that legally reside in the EU is stated in Article 79(1) TFEU. The responsibilities for border control, immigration and asylum is to be fairly shared as stated in Article 80 TFEU. Fairness in the Treaties is not explicitly expressed concerning taxes. Instead fairness is meant to be understood as fairness in trade, solidarity as mutual recognition among Member States and between the EU and the Member States’ relations to third countries.

⁸⁸ <https://dictionary.cambridge.org/dictionary/english/fairness>, [accessed 31.05.18].

⁸⁹ Vanistendael, F. Chapter 3, in Brokelind, C. (edit.), *Principles of Law: Function, Status and Impact in EU Tax Law*, IBFD, Amsterdam, 2014 p. 34.

⁹¹ http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.1.pdf, [accessed 31.05 18].

4.2 Secondary law on fairness

Secondary law is on a lower level in the EU legislation hierarchy and is provided with value through its consistency with the precedence of primary law. Secondary law has a hierarchy of rules in descending order as established by legislative acts, delegated acts and implemented acts in Articles 289, 290 and 291 TFEU. There is a variety of secondary legislation but the focus in this thesis will be on directives. The objectives of the directives are to harmonise the legislation within the EU in order to obtain a single market where flow of goods, services, workers and capital is without hindrance. Fair and fairness is only formulated as an objective of the ATAD and none of the other directives.⁹² For example, the PSD applies to companies' right to establishment, movement of capital or goods or the right to provide services without hindrance. Directives have created possibilities to optimize and plan taxation due to the fundamental freedoms.

4.3 Philosophic definition of fairness

The old Greeks such as Plato and Aristotle thought of fairness as justice.⁹³ For a person to get what they deserve is according to Aristotle justice and thereby fair.⁹⁴

More recent theories on fairness in taxation have been developed by Thomas Hobbes and John Locke. They consider fairness to be a social contract between the individual and the state. Taxes should be a voluntary contribution to the state made by individuals for the protection of property. A contradicting theory that may be used in the debate regarding harmonisation of direct tax law within the EU is made by the founder of utilitarianism, Jeremy Bentham. Bentham believes that there is no such thing as a social contract. Society has always consisted of man and therefore man is only obligated to contribute tax in accordance with the written law.^{95, 96}

⁹²ATAD 1.

⁹³ Burgers, I. J. J. & Monsquera Valderrama, I. J., *Fairness: A Dire International Tax Standard with No Meaning?*, p. 769.

⁹⁴ Jacob, B. E., *Aristotle and the Graces*, Hofstra University School of Law, Legal Studies Research Paper Series Research Paper No. 04-14, 2004, abstract.

⁹⁵ Burgers, I. J. J. & Monsquera Valderrama, I. J., *Fairness: A Dire International Tax Standard with No Meaning?*, p. 770.

⁹⁶ http://www.newworldencyclopedia.org/entry/Jeremy_Bentham, [accessed 31.05.18].

4.4 Economic definition of fairness

Adam Smith is still a recognised authority on economic fairness. He constructed four maxims explaining that in a fair tax system, taxation is a necessity.

The first maxim explains *equality* in the context of the ability to pay. All citizens of society should pay tax in proportion to the revenue enjoyed under the state's protection. An often-used quotation is,

“in the observation or neglect of this maxim consists what is called the equality or inequality of taxation”.⁹⁷

Åsa Gunnarsson discusses the meaning of equality and inequality in the world of Smith transposed to today's society as equity and inequity. Gunnarsson underlines that Smith addresses the ability to pay in proportion to the revenue enjoyed under the state. Gunnarsson concludes that this does not equate to proportion of income.⁹⁸

The second maxim concerns *certainty*. A tax must be foreseeable and not arbitrary. Time, manner and quantity of tax must be clear as well as easy to understand for all parties affected by the tax system.

The third maxim concerns *convenience*. Taxes should be levied when in time and manner it is most convenient. A problem arises as to who it should be convenient for. Tax contributors and tax authorities might not have the same view of what the most convenient time is to levy taxes.

The fourth maxim concerns *economy*. Smith presents a conflict between what is legally obligated and the temptation to avoid paying taxes due. Smith identifies problems with both tax avoiders / evaders and tax authorities. Avoiders / evaders find ways to avoid or abuse a tax system and tax authorities set penalties that could lead to excessive financial burdens or even bankruptcy if they catch the avoiders / evaders.⁹⁹

Vanistendael believes Smith's maxims can be the true principles of taxation since they provide tax legislative guidance, however, Vanistendael believes Smith's maxims lack the use for tax law interpretation.¹⁰⁰

Adam Rosenzweig evolves the economical definition of fairness in taxation between states. The fair division of taxing rights between states must be fulfilled, otherwise the criteria of equality according to Smith's first maxim

⁹⁷ Smith, A., *An Inquiry into the Nature and Causes of Wealth of Nations*, London, 1961, <http://www.econlib.org/library/Smith/smWN21.html>, [accessed 31.05.18].

⁹⁷ Gunnarsson, Å, *Skatterättvisa: [Tax Justice]*, Uppsala, 1995, p. 94-95

⁹⁸ *ibid.*

⁹⁹ Smith, A., *An Inquiry into the Nature and Causes of the Wealth of Nations*, <http://www.econlib.org/library/Smith/smWN21.html>, [accessed 31.05.18].

¹⁰⁰ Vanistendael, F. Chapter 3, in Brokelind, C. (edit.), *Principles of Law: Function, Status and Impact in EU Tax Law*, IBFD, Amsterdam, 2014 p. 37.

is not met. For there to be equality, the contribution must be made in accordance with the tax contributors' ability in respect to the proportion of revenue enjoyed under protection of the State.¹⁰¹

The CJEU's grounds for justifications are: allocation of taxing rights, balanced allocation of taxing power and/ or territorial cohesion. According to Peter Wattel, these justification grounds are elements forming the principle of fiscal territoriality and seem to be part of Rosenzweig's economical definition of fairness.

4.5 Political definition of fairness

A contribution to the political perspective of fairness is made by Thomas Nagel. Nagel claims that global justice needs to be created through unjust and illegitimate power structures. This should be in the interest of and tolerated by the nations that are currently most powerful. According to Nagel, creation of illegitimate but efficient application of standards will first increase injustice only to achieve justice in a later stage.¹⁰²

Tsilly Dagan challenges Nagel's idea of creating global tax justice through global injustice. Dagan argues that when completion erodes states cohesive power to tax, states will find it difficult to ensure fair taxation. The possibility for a state to uphold the principle of fairness will be questioned if the cooperation among states does not result in a fair allocation of taxing rights.¹⁰³

Dagan discusses the BEPS Project and the promotion of global justice deficits. In Dagan's opinion the BEPS Project is focusing on how to improve states ability to raise tax revenue when tax competition increases. Therefore, cooperation between states needs to be promoted in order to achieve balance and fair tax allocation rights.¹⁰⁴ The need and promotion of harmonised EU tax law seems to be reflected in Dagan's definition of political fairness.¹⁰⁵

John Rawls concluded that fairness in taxation has a political dimension to all citizens. They are obliged to contribute to society without moral reasoning.¹⁰⁶ To ensure that all citizens can enjoy the benefits of social wealth, common wealth needs to be reallocated from the most fortunate to the least fortunate. Rawles' ideas are shared by Herbert Hart. Hart has argued that free riding in the tax system is at the expense of others and should therefore be considered

¹⁰¹ Rosenzweig, A, *Definition of country's 'Fair Share' of Taxes*, Florida State University Law Review, Vol. 42, 2015 p. 396.

¹⁰² Nagel, T, *The Problem of Global Justice*,

¹⁰³ Dagan, T., *International Tax Policy: Between Competition and Cooperation*, 2017, p. 202.

¹⁰⁴ Ibid.

¹⁰⁵ Communication from the Commission to the European Parliament and Council A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action. COM(2015) 302 final.

¹⁰⁶ Rawls, J, *A Theory of Justice*, Cambridge Mass., Harvard University Press, 2005, p. 112-114.

as unfair.¹⁰⁷ Rawles' and Hart's definition of fairness can be summarised as citizens in relation to each other should pay their fair share of taxes.¹⁰⁸ The definitions of political fairness as defined by Rawles and Hart seem to have influenced the objective of ATAD.

George Klosko argues that fairness is the moral obligation on individuals that benefits from cooperative efforts and they should be obliged to obey the law.¹⁰⁹ David Mapel agrees with Klosko but adds that fairness is not an automatic outcome in cases of cross border situations. Political obligations still coincide within the territory of the state which is not the obligation of a non-citizen.¹¹⁰ Maple's arguments emphasize the BEPS objective that taxes should be paid where value is added.

4.6 Juridical definition of fairness

Fairness from a juridical perspective is not clear or distinguished from other definitions of fairness as discussed above. By supporting legal fairness with the principles of equality, certainty, legitimacy and the procedural rights, which are regulated in the Treaties, the principle of fairness appears to stand a bit stronger. Hans Gribnau believes the principles mentioned above are a checklist on how legislative powers should be used to protect the citizens from arbitrary restrictions on the citizens' freedoms.¹¹¹ Rolim defines fairness as a part of the principle of proportionality as supported by the ideological principle of reasonableness.^{112,113} Fair rules and decisions must, according to Rolim, stem from the fundamental rights of the parties concerned, be practical, enforceable, effective and based on objective factors.¹¹⁴

Sigrid Hemels has based a legal definition of fairness on Rawles and Harts political definitions of fairness. For tax justice, fairness is a behavioural restriction as it claims a moral duty and an obligation to pay the fair share to society for the benefits enjoyed and for being part of society. Hemels' arguments are based on Rawls approach. Hemels reiterates the idea of fairness imposing an obligation between tax contributors as those who are non-compliant enjoy the same benefits as those who are compliant making it

¹⁰⁷ Hart, H. L. A, *Are there Any Natural Rights?*, p. 185f.

¹⁰⁸ S. Hemels, Chapter 18, in Brokelind, C (edit.), *Principles of Law: Function, Status and Impact in EU Tax Law*, IBFD, Amsterdam, 2014

¹⁰⁹ Burgers, I. J. J. & Monsquera Valderrama, I. J, *Fairness: A Dire International Tax Standard with No Meaning?*, , p. 772 refers to Klosko, G, *The Principle of Fairness and Political Obligation*.

¹¹⁰ David R. Mapel, *Fairness, Political Obligation, and Benefits Across Borders*, p. 426-442.

¹¹¹ Gribnau, H., *Equality, Legal Certainty and Tax Legislation in the Netherlands – Fundamental Legal Principles as Checks on Legislative Power: A Case Study*.

¹¹² Rolim, J. D., *Proportionality and fair taxation* Alphen aan den Rijn, Kluwer, 2014.

¹¹³ Brokelind, C. (edit.), *Principles of Law: Function, Status and Impact in EU Tax Law*, IBFD, Amsterdam, 2014 p. 9.

¹¹⁴ Rolim, J. D., *Proportionality and fair taxation*, Alphen aan den Rijn, Kluwer, 2014, p. 17.

unfair should not everyone comply.¹¹⁵ Hemels also argues that the principle of fairness differs from other legal principles, such as equal treatment and legal certainty, as these impose obligations on the state towards its citizens. The principle of fairness from a tax perspective can be considered to impose obligations on the tax contributor's behaviour in relation to other tax contributors.¹¹⁶ Hemels juridical approach appears to link the political and juridical definitions and therefore will be further explored in Chapter 5.

The ambition to provide *legal certainty* is not clearly expressed in the Treaties. However, it is inherent in the legal systems and considered to be a general principle of EU primary law set out in Article 6(3) TEU as well as through CJEU case law.¹¹⁷ Dennis Weber explains the principle of legal certainty requires the law to be both stable and flexible, hence,

“clear easily accessible, comprehensible, prospective rather than retrospective, and relatively stable”.¹¹⁸

Legitimacy according to Max Weber has different forms and can be divided into:

- Traditional legitimacy stemming from social customs;
- Charismatic legitimacy stemming from leading personal charisma; and
- Rational-legal legitimacy stemming from institutional procedure.¹¹⁹

Vanistendael adds a critical perspective on the use of the principle of legitimacy described by M. Weber. Vanistendael argues that since EU tax law is approved in the form of directives by national parliaments, without any actual influence or debate on the content, there is no real legitimacy to the Directive. The substantive discussion that underlies the Directive is done behind closed doors of the Commission or the Council. The lack of public discussion undermines the principle of legitimacy according to Vanistendael.¹²⁰

Fritz Scharpf adds a two-fold perspective to legitimacy as fairness: input and output. Input fairness stems from participation in the decision-making process to create win-win situations. Output fairness will be the result if all parties have obtained beneficial solutions for all citizens.¹²¹ Scharpf concludes that input legitimacy is not currently possible within the EU due to the political

¹¹⁵ Hart, H. L. A, *Are there Any Natural Rights?*, p. 185f.

¹¹⁶ Hemels, S. Chapter 18, in Brokelind, C (edit.), *Principles of Law: Function, Status and Impact in EU Tax Law*, IBFD, Amsterdam, 2014p. 422.

¹¹⁷ Judgment of the Court (First Chamber) of 8 March 2017, *Euro Park Service C-14/16* ,EU:C:2017:177, paragraph 37, 38, 40, 42, 44, 46.

¹¹⁸ Weber, D., Sirithaporn, T. Chapter 11, in Brokelind, C. (edit.),*Principles of Law: Function, Status and Impact in EU Tax Law*, IBFD, Amsterdam, 2014 , p. 235.

¹¹⁹ Williams, D., *Max Weber: Traditional, Legal-Rational and Charismatic Authority*.

¹²⁰ Vanistendael, F. Chapter 3, in Brokelind, C. (edit.), *Principles of Law: Function, Status and Impact in EU Tax Law*, IBFD, Amsterdam, 2014 p. 32.

¹²¹ Scharpf, F, *Governing in Europe: Effective and Democratic*, p.7 & 11.

climate. EU lacks a collective identity, policy discourse and institutional infrastructure that would otherwise incentivise politicians to act according to their political responsibility.¹²²

Pasquale Pistone and Philip Baker defined legal fairness as ‘*fair to have procedural rights*’. According to Burgers and Monsquera Valderrama, they consider the best practice to be when a minimum standard of protection for tax contributors exist. Pistone and Baker argue that tax contributors must be entitled to efficient remedies, confidentiality, privacy and representation. The outcome of procedures must also be proportionate. A tax contributor must be presumed to be in good faith and honest until proven otherwise.¹²³ This means that the burden of proof (*onus probandi*) of an avoidance, circumvention, or artificial arrangement is justified as a restriction and is placed the on to part who claims the restriction, in tax cases it is the State through the tax authority.^{124, 125} Regarding fairness as juridical defined the CJEU applies an utilitarian perspective when applying procedural rights by interpreting the wording of the law.

¹²² Ibid., p 187-188.

¹²³ Burgers, I. J. J. & Monsquera Valderrama, I. J., *Fairness: A Dire International Tax Standard with No Meaning?*, , p. 772.

¹²⁴ Smit, D., Chapter 12, in Terra, B., Wattel, P., (edit), *European Tax Law*, Alphen aan den Rijn, Kluwer Law, 2018, p. 343.

¹²⁵ Judgment of the Court (First Chamber), 5 July 2012, *SIAT*, C-318/10, EU:2012:415.

5 The CJEU case law – Application of fairness

In this chapter the following research question will be addressed, “*How is the CJEU applying fairness in current case law?*”. To answer this question, a selection of CJEU cases will be presented. First, Hemels’ juridical approach will be discussed in search for tax law cases, which addresses the wording fair and fairness as political definitions of fairness. Thereafter, a selection of additional cases will be examined to show elements that underline how the CJEU has always applied fairness, but not necessarily according to political definitions.¹²⁶ The presentation of cases will also provide arguments that show a hierarchy between the different definitions of fairness. As a starting point for understanding how the CJEU has developed its case law regarding fairness, Hemels’ analysis of cases will be studied.¹²⁷

5.1 Fairness in the CJEU case law

Hemels found five categories of cases in which the CJEU addresses fairness. They are as follows:

1. *Fairness and good faith where fraudulent behaviour existed.*
2. *Fairness as justification ground for commercial transactions.*
3. *Fairness as unspecified justification ground.*
4. *Fairness as justification ground for not favouring a non-compliant company.*
5. *Fairness as a justification ground to different treatment of taxpayers according to their contribution to a problem.*¹²⁸

Hemels’ juridical analysis seeks arguments that the CJEU has applied the political definition of fairness as defined by Rawles and Hart (see Chapter 4.3).

In the first category of *good faith and fairness* cases, they could, if acting in good faith, result in repayment or exemptions from duties paid. The common ground of the cases was the use of the word fairness. Fairness was used to level out competition, for example, due to Sunday closings. In the *SEIM case*, fairness is used to protect a tax contributor from the authorities (*vertical fairness*) but the CJEU does not impose fairness between tax contributors

¹²⁶ See Chapter 4.

¹²⁷ Hemels, S., Chapter 18, in Brokelind, C. (edit.), *Principles of Law: Function, Status and Impact in EU Tax Law*, IBFD, Amsterdam, 2014, p. 413 ff.

¹²⁸ Hemels, S., Chapter 18, in Brokelind, C. (edit.), *Principles of Law: Function, Status and Impact in EU Tax Law*, IBFD, Amsterdam, 2014 p. 429.

(*horizontal fairness*).¹²⁹ In this first category of good faith there seems to be no relation to the political definition of fairness by Rawles and Hart since the concept of ‘fair share’ is not fulfilled. However, the juridical definition of fairness is fulfilled according to the definitions presented in Chapter 3.4. For instance, the CJEU applies procedural fairness by evaluating the supremacy of rules in the *SEIM case*. The CJEU concludes that question one is out of its scope because it was a matter of national law. However, after stating it, the CJEU continued, “[...] it has power to explain to the national court points of Community law which may help to solve the problem of jurisdiction with which that court is faced”¹³⁰ The conclusion of the case is that the juridical definition of fairness is considered to be good faith and therefore was found to be proportionate. According to Rolim, good faith in taxation may provide for a moral dimension of proportionality in conjunction with reasonableness. The proportionality test allows the principle of good faith to supersede other principles that may be more rigid, for example the principle that everyone is presumed to know the law, even when it comes to tax law.¹³¹

The second category presented by Hemels refers to *fairness of commercial transactions* as a justification ground that is epitomised by the early non-tax *Rewe-Zentral case*, also referred to as the *Cassis de Dijon case*.¹³² The case concerned German alcohol regulations that restricted sales and therefore imports of liquors with low content of alcohol as allowed by German regulation. Germany tried to justify their restriction on free movement of goods (Article 34 TFEU) by stating public health policy and protection of consumers as the reason. The restriction was non-discriminatory since no German liquor with such low alcohol content could be sold due to public health reasons. Nevertheless, the CJEU accepted the justifications:

“Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions maybe 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.”¹³³

However, the CJEU found the restrictions on the fundamental freedoms in the single market unjustified and disproportionate. Instead, the case became a starting point for the EU to remove obstacles hindering the fundamental freedoms on the single market through mutual recognition.¹³⁴ A Member

¹²⁹ Judgment of the Court (Third Chamber) of 18 January 1996, *SEIM*, C-446/93, EU:C:1996:10, paragraph 41.

¹³⁰ *Ibid.*, paragraph, 33.

¹³¹ Rolim, J. D., *Proportionality and fair taxation*, Alphen aan den Rijn, Kluwer, 2014, p.196.

¹³² Judgment of the Court of 20 February 1979, *Rewe-Zentral AG*, C-120/78, EU:C:1979:42 (*Cassis de Dijon*).

¹³³ *Ibid.*, paragraph, 8.

¹³⁴ Bergström, C, F. & Hettne, J., *Introduktion till EU-rätten*, Studentlitteratur, Lund, 2014, p. 208, 253, 317.

State of destination must recognize the regulations of the source Member State. This could result in positive discrimination when a producer or provider gets access to a market without complying with the local regulations unless the local regulations are necessary for public interest.¹³⁵

Hemels points out that even though the *Cassis de Dijon* case is not a tax case, *fairness of commercial transactions* might be justified in tax cases as well.¹³⁶ Hemels believes that *fairness of commercial transactions* can fit the principle of fairness as defined by Rawles and Hart. However, the CJEU appeared to have a different approach when not considering fairness between different entrepreneurs in the cross border situation (*horizontal fairness*).¹³⁷ Instead, Pålsson's argument for equality based on the fundamental freedoms seems to be applied in the case since the German rules were found unjustified by discriminating a product from France that has already been in circulation on the French market.¹³⁸ By that the CJEU provided legal fairness in *Cassis de Dijon* when they applied mutual recognition in the proportionality test.¹³⁹

In Hemels third category *fairness as non-specified concept* can be used. However, according to Hemels, fairness should be explained as it can be used in different ways. One case mentioned in this category is the not so well-known non-tax case *NV United Foods*.¹⁴⁰ It is a case about customs regulation regarding the import of fish. The 'fairness' criteria together with proportionality is mentioned as a must for justifying obstacles to the free movement of goods. In the case, the CJEU finds the national requirements for importation unjustified and unproportionate.¹⁴¹ Even though fairness is not explained, it is possible to argue that the CJEU has applied the economical and juridical definition of fairness when they made the justification and proportionality test.

In Hemels fourth category of *fairness as justification ground for not favouring a non-compliant company*, Rawls' and Hart's definition of political fairness is evident in the *Macchiorlati Dalmas* case.¹⁴² The case from 1964 dealt with surcharges due to delayed levy payments. The High Authority of the European Coal and Steel Community (The High Authority) stated that the surcharge should be regarded as interest. No reduction could be made without rendering in favour of the non-compliant company on behalf of the compliant

¹³⁵ Wattel, P., Chapter 14, in Terra, B., Wattel, P., (edit), *European Tax Law*, Alphen aan den Rijn, Kluwer Law, 2018, p. 323.

¹³⁶ Hemels, S., Chapter 18, in Brokelind, C. (edit.), *Principles of Law: Function, Status and Impact in EU Tax Law*, IBFD, Amsterdam, 2014, p. 432.

¹³⁷ *Ibid.*, p. 433.

¹³⁸ Pålsson, R. Chapter 7, in Brokelind, C. (edit.), *Principles of Law: Function, Status and Impact in EU Tax Law*, IBFD, Amsterdam, 2014, p. 152.

¹³⁹ Rolim, J. D., *Proportionality and fair taxation*, p. 126.

¹⁴⁰ Judgment of the Court of 7 April 1981, *United Foods*, C-132/80, EU:C:1981:87.

¹⁴¹ *Ibid.*, paragraph.28.

¹⁴² Judgment of the Court of 31 March 1965, *Macchiorlati Dalmas*, C-21/64, EU:C:1965:30.

companies. The High Authority, the defendant in the case, concludes its arguments as follows:

“[...] the principle of equality of treatment and the general principle of fairness should prevail over the generic and subjective considerations of the company.”¹⁴³

However, the CJEU safeguarded the principle of fairness by imposing the surcharge since it was not regarded as excessive. Unfortunately, according to Hemels, the principle of fairness as defined by Rawles and Hart was not applied in the judgement since only the circumstances of the non-compliant company, and not the rights of the complainant, were considered.¹⁴⁴ However, economical and juridical definitions of fairness were present in the case in shape of Smith’s first maxim: economic equality and juridical as legality and proportionality.

The fifth category of Hemels concerns fairness according to Rawles and Hart as a reason to differentiate between taxpayers based on their contribution to a problem. In the *Piercarlo Bozzetti case*¹⁴⁵ the issue concerned responsibility for the growing stock of butter within the EU. All producers adding fat to the butter mountain were required to pay a levy for the contribution. However, the Italian Court doubted the fairness of the levy since the same rate of levy applied to the milk regardless of the fat content.¹⁴⁶ The CJEU concluded that the Italian Supreme Court had misunderstood the aim of the measure, which was to restore the equilibrium of the milk market in the EU without any qualitative requirements for the fat content of the milk.¹⁴⁷ In this case the political and the economical fairness is apparent by taking mutual responsibility for the single market and the protection it provides. Mapels’ conclusion that fairness is not an automatic outcome in cross border situations can be argued from an Italian farmer’s perspective.

According to Hemels, there is no tradition in the case law of the CJEU that refers to the wording of fair or fairness as politically defined, therefore, the outcome of the political objective to restore trust in fair tax systems is unpredictable. Nevertheless, in the following part of Chapter 5, a selection of cases will be presented to underline that the CJEU addresses fairness in a political sense without expressing the words fair or fairness.

¹⁴³ Judgment of the Court of 31 March 1965, *Macchiorlati Dalmas*, C-21/64, EU:C:1965:30.

¹⁴⁴ Hemels, S., Chapter 18, in Brokelind, C (edit.), *Principles of Law: Function, Status and Impact in EU Tax Law*, IBFD, Amsterdam, 2014.

¹⁴⁵ Judgment of the Court of 9 July 1985, *Piercarlo Bozzetti*, C-179/84 EU:C:1985:306.

¹⁴⁶ *Ibid.*, paragraph 10.

¹⁴⁷ *Ibid.*, paragraph 31 & 32.

5.2 C-336/96 Gilly

In the *Gilly case*, a German teacher who lived and was married in France worked in Germany. As she was working in a public school in Germany, she did not benefit from the same tax deduction available to teachers who worked in a private school.¹⁴⁸ This was the outcome of the double tax treaty between Germany and France. From a state perspective, the result fulfils Smith's maxim regarding economical fairness as equality and could also be tied to Rosenzweig's economic fairness perspective regarding fair allocation of taxing rights between states. The use of legislation follows the hierarchy of laws available to the Court that starts with the domestic legislation. The CJEU then interprets whether it is a cross-border situation that should be solved at EU level, or if it is a cross-border issue that lies within the Member States competence of double tax treaties. In the *Gilly case* the CJEU concluded it to be a tax treaty issue between Germany and France to settle Mrs. Gilly's tax obligations and connecting factors for tax allocation between the States since direct taxes are unharmonized in the EU.¹⁴⁹ Arguments that support Mapel's political definition on fairness, as not an automatic outcome in cross-border situations is to be found from Mrs. Gilly's perspective.¹⁵⁰ From an individual teacher's perspective, it might appear unfair that an obstacle to the fundamental freedoms for workers when a teachers tax deduction right is depending on the employee status as public or private. It was Mr. and Mrs. Gilly's choice to live in France that rendered the tax obligation that "may be good luck or bad luck for the taxpayer".¹⁵¹ On the other hand, the CJEU's judgement is fair from a Member State tax treaty perspective and its relation to EU law. It is in the Member States competence to allocate their taxing rights which provides for economical fairness between the states. The *Gilly case* fulfils the juridical definition on fairness according to the rights to remedies. However, juridical double taxation due to tax treaties is not in the competence of EU law.^{152,153} By that conclusion, the CJEU never came to make a proportionality test in the *Gilly case*. Therefore, the question of proportionality is an issue for the national Court to decide.

¹⁴⁸ Judgment of the Court of 12 May 1998, *Gilly*, C-336/96, C:1998:221, paragraph, 24.

¹⁴⁹ *Ibid.*

¹⁵⁰ David R. Mapel, *Fairness, Political Obligation, and Benefits Across Borders*, p. 426-442.

¹⁵¹ Smit, D., Chapter 12, in Terra, B., Wattel, P., (edit), *European Tax Law*, Alphen aan den Rijn, Kluwer Law, 2018, p 262.

¹⁵² Brokelind, C., Axmin, M., *Migrant pensioners – Taxation and health care issues in the EU*, p. 15.

¹⁵³ Judgment of the Court of 12 May 1998, *Gilly*, C-336/96, C:1998:221.

5.3 C-212/97 Centros

In the non-tax case *Centros*, the CJEU made it clear that measures cannot be justified

by another country's legislation even though it seems clear that circumvention of national law is at stake.^{154,155} In the *Centros case* the Danish legislation regarding capital requirements for companies were avoided by establishing a company in the United Kingdom (UK) and simultaneously having a branch registered in Denmark. Danish authorities refused the branch registration as they argued that *Centros* never had conducted any trade in the UK and the branch should therefore be considered a company according to Danish law. Denmark claimed two grounds for justification, first, they claimed minimum standard of capital is needed to protect public creditors from the risk of irrecoverable debts. Secondly, they claimed protection of creditors from the risk of bankruptcy due to inadequate capitalization of companies. The first ground was found to be irrelevant due to inconsistencies with the branch's registration refusal ground was a lack of trade in the UK, but a branch in Denmark would not have been better off even though trade had been conducted in UK.¹⁵⁶ The second ground for justification was based on the presence abuse but added that to justify such measures fraudulent behaviour must be established. The refusal to register the branch was also found disproportionate. The CJEU meant that Danish authorities could adapt less restrictive measures to secure public creditors' necessary guarantees. Furthermore, *Centros* was registered in the UK as *Centros Ltd* with the consequence that *Centros* was not governed by Danish law which should result in mutual recognition according to Article 4(3) TFEU.¹⁵⁷ The CJEU clarified that EU nationals have the right to freely establish within the EU including for tax reasons.¹⁵⁸ The case is considered to be the starting point of the "race to the bottom".¹⁵⁹ Through the proportionality test the CJEU provided legal fairness and mutual recognition of each other's company law. This should also provide economical fairness as defined by Rosenzweig. The CJEU clarified that EU law prevails domestic law in cross-border situations. By doing so they also provided legal certainty to tax contributors, which is legally fair. However, the CJEU also opened up for tax competition and BEPS. Meaning that the use of different national company law and tax law became a tool to countries to attract investments and capital. Additionally, the

¹⁵⁴ Helminen, M. *EU tax law: direct taxation*, 4. ed. Amsterdam: IBFD, 2015, p. 44.

¹⁵⁵ Judgment of the Court of 9 March 1999, *Centros*, C-212/97:EU:C:1999:126, paragraph, 28.

¹⁵⁶ Judgment of the Court of 12 May 1998, *Gilly*, C-336/96, C:1998:221, paragraph, 32.

¹⁵⁷ Judgment of the Court of 9 March 1999, *Centros*, C-212/97:EU:C:1999:126, paragraph, 2.

¹⁵⁸ Helminen, M. *EU tax law: direct taxation*, 4. ed. Amsterdam: IBFD, 2015, Chapter 2, p. 47-48.

¹⁵⁹ Schram, S. *After welfare: the culture of postindustrial social policy*, p. 91.

CJEU pointed out that it is in the competence of the Member States to harmonize its legislation.¹⁶⁰

5.4 C-453/00 Kühne and Heitz

In the *Kühne and Heitz case*, the CJEU deals with legal remedies and how far they can be extended. In 1987 *Kühne and Heitz* exported chicken meat to countries outside the single market. According to the customs definition *Kühne and Heitz* exported 'legs and cuts of legs of other poultry' and received export refunds corresponding to that definition. A product check made by the authorities led to the reclassification to just 'other meat', and a claim to reimbursement of the export refunds. *Kühne and Heitz* unsuccessfully appealed the decision to the administrative authority and thereafter claimed no further remedies. In 1991 in another Dutch case, the national court concluded that the type of poultry meat exported by *Kühne and Heitz* could be defined according to the original customs classification.¹⁶¹ This led to the claim of reopening the national administrative decision of *Kühne and Heitz* and the Dutch Court asked the CJEU for a preliminary ruling regarding legal certainty and remedies. The CJEU concludes that remedies must be effective, practically possible and not excessively difficult when they concern exercising the conferred rights by EU law.^{162,163} The CJEU's preliminary ruling settled that it was possible to reopen and change the administrative decision due to national provisions if following criteria are fulfilled;¹⁶⁴

- When national legislation provides the possibility to re-open a closed case.
- When based on a decision of a judgment of a national court ruling at final instance.
- When the original decision was based on misinterpretation of EU law.¹⁶⁵
- If compliments regarding the decision is made instantly when becoming aware of the decision opposite of the closed case.

The *Kühne and Heitz case* fulfils the legal procedural definition of fairness regarding remedies. However, the ruling has also created turbulence and uncertainty regarding final administrative decisions and the effectiveness and hierarchy of EU law. As a consequence of this insecurity National Courts have felt obliged to ask the CJEU for clarifications regarding the principle of *res iudicata* in relation to EU law

¹⁶⁰ Judgment of the Court of 9 March 1999, *Centros*, C-212/97:EU:C:1999:126, paragraph, 28.

¹⁶¹ Judgment of the Court (First Chamber) of 5 October 1994, *Voogd Vleesimporten-export*, C-151/93, EU:C:1994:365.

¹⁶² Helminen, M. *EU tax law: direct taxation*, 4. ed. Amsterdam: IBFD, 2015, Chapter 7, p. 1.

¹⁶³ Judgment of the Court of 13 January 2004, *Kühne and Heitz*, C-453/00, EU:C:2004:17, paragraph, 24-26.

¹⁶⁴ Helminen, M. *EU tax law: direct taxation*, 4. ed. Amsterdam: IBFD, 2015, Chapter 7, p. 1-2.

¹⁶⁵ *Ibid.*

to establish how far remedies can reach.¹⁶⁶ From an individual's perspective, however, the case established certainty by clarifying that wrongly paid reimbursements can be repaid even though the administrative decision was final.

5.5 C-446/03 Marks & Spencer

In the *Marks & Spencer case* the economic definition of fairness is represented through the CJEU judgement when restricting the fundamental freedom of establishment (Article 49 TFEU). The *Marks & Spencer case* concerns the right to deduct losses made by a subsidiary in a source state (France) by the parent company (UK) in the resident state. The company income tax rate was higher in the UK than in France. The CJEU referred to anti-avoidance as a justification ground, even though the situation did not involve a wholly artificial arrangement. The restriction on the freedom of establishment was considered to be justified as the risk of tax avoidance was proven as well as the risk of double deduction of losses were apparent. The balanced allocation of taxing rights was found proportionate to the extent that final losses can be transferred from the subsidiary state to the parent resident state within the EU. In the *Marks & Spencer case* the economical definition of fairness as allocation of taxing rights was found to be justified and proportionate. The juridical fairness as proportionality was however not without restriction. The infringement of the freedom of establishment was only considered proportionate as long as it is possible to transfer final losses from a subsidiary to a parent company in cross-border situations. To conclude, the economical definition of fairness provided legally defined fairness with restrictions to the tax contributor.

Maybe in the future, it will be possible to transfer losses that are not final, if the EU adopts the CCCTB.

¹⁶⁶ Lang, M., Pistone, P., Schuch, J. & Staringer, C.,(edit.), *Introduction to European tax law on direct taxation*, p. 10.

5.6 C-196/04 Cadbury-Schweppes

The *Cadbury-Schweppes case* is also a judgement that falls under the procedural definition when the CJEU found the British CFC-rules being obstructive to the fundamental freedoms. In the *Cadbury-Schweppes case* the CJEU further defines what can constitute a “wholly artificial arrangement”.¹⁶⁷ The British CFC-rules did not meet the conditions aiming for such arrangements, therefore the Irish establishment fulfilled the conditions of performing economic activities and by that the British CFC-rules were considered to be obstructive to the fundamental freedom of establishment. The British rules could only be justified out of public interest and be proportionate by “[...] not go beyond what is necessary to attain it”.¹⁶⁸ This was necessary even though the Irish-British tax treaty provided deductions for the Irish tax paid by the subsidiary. The total taxes paid would not be higher than if it would have been a domestic subsidiary. However, since there is no harmonisation of direct taxes, an establishment of a subsidiary in another Member State for tax reasons is not *per se* abuse. It was said to be business optimisation and tax planning by using the different tax legislations on the single market. In this case the economical definitions of fairness were found unjustified by legal definitions of fairness through the principle of proportionality. The case also provided more legal certainty in direct tax cases by defining “wholly artificial arrangements”, hence, it extended business security and foreseeability by legally defining fairness as the principle of legal certainty.

5.7 C-318/10 SIAT

In *SIAT* it was claimed that the Belgian General Anti Abuse Rule (GAAR), which reversed the burden of proof to tax contributors, was infringing the fundamental freedom to provide services (Article 56 TFEU). The GAAR would come into force if deductions of expenses were claimed when the recipients of the payment fell under, “a tax regime which is appreciably more advantageous than the applicable regime in Belgium”.¹⁶⁹ It is on the tax authority to provide the *prima facie* proof of abuse. A restriction on individual EU rights must rely on a proportionate abuse presumption and the tax contributor must be given a fair opportunity to provide evidence that there is a genuine business reason for the cross-border arrangement that appears

¹⁶⁷ Judgment of the Court (Grand Chamber) of 12 September 2006, *Cadbury Schweppes*, C-196/04, EU:C:2006:544, paragraph 68.

¹⁶⁸ *Ibid.*, paragraph 47.

¹⁶⁹ Judgment of the Court (First Chamber), 5 July 2012, *SIAT*, C-318/10, EU:2012:415, paragraph 25 & 26.

artificial.¹⁷⁰ The CJEU found the national legislation to be justified on the grounds of preservation of allocation of taxing rights and prevention of abusive and fraudulent behaviour, however, the legislation was beyond what was considered necessary to achieve the aim of the legislation.¹⁷¹ In the *SIAT case* the CJEU justifies the economical definition of fairness. However, when applying the legal definition of fairness to analyse the risk of BEPS, the Belgian law did not according to the CJEU fulfil the requirements of the principle of proportionality or legal certainty. Therefore, the Belgian GAAR was judged to be unfair for the tax contributor. In a nutshell, the court found the national legislation justified but disproportionate.¹⁷² Hence, according to the CJEU, the economical definition of fairness could not provide legal fairness to the tax contributor.

D. Weber adds a perspective to the CJEU's reasoning in the case. D. Weber highlights that the use of a tax regime with more advantages than the Belgian tax legislation is a proof of abuse in itself and by that it is on the tax contributor to provide proof of the opposite.¹⁷³ Applying D. Weber's reasoning to the case could provide not only a justified economic definition of fairness, but might also be found proportionate and legally fair in line with Smith's fourth maxim as well as with Rosenzweig's conclusion of economical fairness between States.

5.8 C-68/15 X

The recent *X case* deals with the Belgian 'Fair tax' legislation and the question of whether it is in line with the freedom of establishment (Article 49 TFEU) and the PSD (Article 4(1) & (3) And Article 5). The aim of the 'Fair tax' rule is to tax cross-border dividends from a Belgian subsidiary or a permanent establishment (PE) to a parent company in another Member State in order to prevent abuse of notional interest deduction (NID) and the deduction of tax losses carried forward (TLCF). Two cumulative conditions should be met in order for the 'Fair tax' rule to come into force:

- I. The dividend has been distributed during the taxable period, and
- II. The company's taxable profit has been fully or partly offset against NID or TLCF.

The calculation method used to determine the tax base in the 'Fair tax' rule was complex and the tax rate was questionable at a rate of 5,15 %.

¹⁷⁰ Brokelind, C., Wattel, P., Chapter 15, in Terra, B., Wattel, P., (edit) *European Tax Law*, Alphen aan den Rijn, Kluwer Law, 2018, p. 343.

¹⁷¹ Judgment of the Court (First Chamber), 5 July 2012, *SIAT*, C-318/10, EU:2012:415, paragraph 47.

¹⁷² *Ibid.*, paragraph. 59.

¹⁷³ Weber, D., *Abuse of Law in European Tax Law: An Overview and Some Recent Trends in the Direct and Indirect Tax Case Law of the ECJ—Part 2*, p. 316.

The CJEU answered three questions regarding the Belgian ‘Fair tax’.

1. Is the ‘Fair tax’ infringing the freedom of establishment?

The CJEU answered that ‘Fair tax’ does not *per se* result in discrimination since both resident and non-resident companies were both in the scope of the ‘Fair tax’ rule. However, if the non-resident company operates through a PE, the ‘Fair tax’ rule might result in discrimination. A non-resident company who distributes dividends from a non-Belgian origin would enforce the ‘Fair tax’ rule even though a Belgian profit is not distributed. If such a situation would exist, the CJEU would leave it to the Belgian Court to establish it. The CJEU further addressed that the Belgian Court has to examine the purpose of the legislation with a reminder that a discriminatory treatment of non-resident companies established as a PE in Belgium cannot be justified by the need of balanced allocation of taxing rights or the tackling of tax abuse. This means that the ‘Fair tax’ rule must be justified by public interest and be proportionate.¹⁷⁴

2. Is the ‘Fair tax’ rule infringing PSD (Article 5) regarding dividends from subsidiary to parent company should not be taxed?

The answer from the CJEU was based on three cumulative criteria to establish a withholding tax according to Article 5 of the PSD. The criteria are, “[first,] the tax must be levied in the State in which the dividends are distributed and its chargeable event must be the payment of dividends or of any other income from shares; second, the taxable amount is the income from those shares; and third, the taxable person is the holder of the shares”.¹⁷⁵ In the *X case* only the two first criteria were met and by that the ‘Fair tax’ rule was not considered a withholding tax according to Article 5 of the PSD. Therefore, the ‘Fair tax’ rule did not infringe on Article 5 of the PSD.

3. Is the ‘Fair tax’ rule infringing Article 4(1) & (3) of the PSD?

The implementation of the Article 4(3) of the PSD in Belgian law means that 95% of a qualified received dividend is exempt from non-resident corporate income tax. Hence, the remaining 5% is subject to income tax. However, in situations with intermediary holding companies, the complexity of calculating the tax base might result in higher taxation than 5% of qualified dividends received and redistributed. In those cases, the CJEU consider the ‘Fair tax’ rule to constitute an infringement of the Article 4 of the PSD. The *X case* provides for juridical fairness through evaluating the justification of economical fairness and constituting restrictive conditions for when the ‘Fair

¹⁷⁴ Judgment of the Court (First Chamber) of 17 May 2017, *X*, C-68/15, EU:C:2017:379, paragraph 54-58.

¹⁷⁵ *Ibid.*, paragraph 63.

tax' rule can be triggered and be considered proportionate. By addressing the Belgian Court to evaluate the possible infringement of freedom of establishment, legal certainty is still uncertain. However, according to articles published by EY and PWC, the 'Fair tax' rule is to a large extent an infringement on the freedom of establishment.^{176,177}

6 Findings and Conclusions

In this Chapter the thesis questions and findings will be presented individually. In addition, conclusions to these findings will be discussed and points for future research will be proposed.

6.1 Who has the competence to legislate on direct taxes within the EU?

The right to legislate in the field of direct taxation is a shared competence between the EU and the Member States. This is evident since direct taxes are a concern of the single market according to Article 4 TEU in conjunction with Article 115 TFEU. Vanistendael believes there can be a lack of legitimacy in the legislative process. This is because the debates and negotiations that proceed the adoption of Directives take place behind closed doors. In substance, Vanistendael and Scharpf seem to agree on the EU's problematic relation to legitimacy even though they address the problem in different ways. Vanistendael's perspective is on the adoption of directives and Scharpf's perspective is on the lack of trust between Member States that causes long legislative processes that lead to continuous unharmonized tax law. Both Vanistendael's and Scharpf's arguments are of concern, however, there are ways to influence the EU legislative process through elections to both national and EU parliaments. Nevertheless, the process is slow and mistrust towards and among politicians is an obstacle in the legislative process. The proposed CCCTB appears to be a directive in line with the EU objective to create fairness on the single market, however, it seems hard to reach consensus in adopting the directive. Which confirms both Vanistendael's and Scharpf's conclusions regarding legitimacy.

¹⁷⁶ <http://www.ey.com/be/en/newsroom/news-releases/tax-alert---fairness-tax>, [accessed 31.05.18].

¹⁷⁷ <https://www.pwc.com/gx/en/tax/newsletters/eu-direct-tax-newsalerts/eudtg/pwc-eudtg-cieu-judgment-in-belgian-fairness-tax.pdf>, [accessed 31.05.18].

6.2 How has the concept of fairness been approached by scholars?

In Chapter 3 it is argued that fair and fairness is a principle that can be defined and divided into different categories. Fair and fairness seem to constitute a part of every principle in society and for tax law it appears in at least fifty shades of grey. The answer to “*How has the concept fairness been approached by scholars?*” seems not to be a clear, precise or easily accessible answer to give. The answer will depend on what perspective is taken. Perspectives to consider is authority, tax contributor and the different types of contributors. Cultural and national background and the legal system in where a person has been brought up. And last but not least, it also depends on your economical status. All scholars who contributed with material for this thesis have expressed fairness in different and overlapping definitions. However, overall it comes down to perception and a given context. Fairness is a concept in constant development and it is not possible to provide a clear and precise answer to what fairness is. However, it is of importance to be open minded about the principle of fairness and how a person addresses fairness. Political incitements aiming to provide a fairer distribution of tax burdens between different tax contributors must not only regard economical and moral definitions of fairness in conjunction with political fairness, but the political incitements must also safeguard the juridical definitions of fairness. That would in turn create an improved discussion regarding fairness and restoring trust in fair tax systems.

6.3 How is the CJEU currently applying fairness in taxation?

The CJEU balances the fiscal sovereignty of the obligation to comply with EU law with the fundamental freedoms which is underlined in Pålsson’s conclusion on equality.¹⁷⁸ The Member States are obliged to treat different nationals exercising their fundamental freedoms in a non-discriminatory manner.¹⁷⁹ The treatment should be tax neutral according to the rule of reason in order to justify and be proportional in restricting the fundamental freedoms. Although fairness has not been clearly expressed in written tax law up until the ATAD, it has been present in the CJEU judgements since the beginning. The CJEU has applied a utilitarian approach when the legal definitions of fairness are applied. Cases of non-tax character have had an impact on how the CJEU has developed the avoiding of obstacles on the single market that have led to impacting tax law.

Even when a Member State imposes a ‘Fair tax’ in line with the PSD, the scope of that ‘Fair tax’ is limited and narrowed down by restrictions based on

¹⁷⁸ See Chapter 3.3.

¹⁷⁹ Article 4 TFEU.

the proportionality test.¹⁸⁰ The complexity, technical conditions and legal restrictions make the rule difficult to apply from a tax contributors point of view. The *X case* expresses how complex a rule such as the ‘Fair tax’ rule can be even though it is an outcome of an implemented article of a directive such as the PSD

According to D. Weber’s definition of the legal certainty requirements, it seems to be a lack of the requisites (clear, easily accessible and comprehensible).¹⁸¹ Hence, such a rule can result in unfairness and mistrust. The question arises whether such a ‘Fair tax’ rule based on the ATADs with the objective to restore trust in fair tax would be found to be more justified and proportionate.

. Maybe the parties in the juridical process have not always found a judgement fair from a personal point of view, but from an EU legal and CJEU system perspective, a judgement is fair by legal definition described above in Chapter 3.4. I agree with Vanistendael in his conclusion that Smith’s maxims can provide tax legislative guidance. However, economical definitions of fairness resulting in political objectives and definitions of fairness must be justified and proportionate according to juridical definitions of fairness because that is how the CJEU applies fairness in current case law in general as well as in tax cases.

After having read old and new CJEU case law there seems to be a hierarchy between the different definitions of fairness. Economical definitions of fairness are used to justify the political definitions of fairness and finally the juridical definitions of fairness strike the balance of what is considered a ‘fair share’ today. The philosophical definitions, especially the utilitarian definition by Bentham, of fairness together with equality are like a red thread running through the reasonings of the CJEU.

6.4 Discussion and future research

The ATAD will for sure draw more attention to fairness, however, not necessarily referring to juridical fairness. Since the objective of the ATAD is to restore trust in fair tax systems and not mainly to avoid obstacles on the single market, the CJEU will probably justify and find both political and economic definitions of fairness more proportionate as they currently do. All parts of the principle of fiscal territoriality including the allocation of taxing rights, balanced allocation of taxing power and territorial cohesion, will most likely have a greater impact on future judgements due to the ATADs

¹⁸⁰ Judgment of the Court (First Chamber) of 17 May 2017, *X*, C-68/15, EU:C:2017:379.

¹⁸¹ Weber, D., Sirithaporn, T. Chapter 11, in Brokelind, C. (edit.), *Principles of Law: Function, Status and Impact in EU Tax Law*, IBFD, Amsterdam, 2014, p. 235.

objective.¹⁸² Nonetheless, even though political definitions may be justified and found proportionate to a larger extent than in current case law. However, national legislators must implement the political definition of fairness based on economical definitions and make sure they can be justified and found legally defined as fair. An implementation that results in complex and incomprehensible legislation will most likely result in increased legal uncertainty and thereby lessening the trust in fair tax systems.

Even if the ATAD will result in increased trust in fair tax systems, the problem still remains with the unharmonized tax systems within the EU. The tax rate is still a matter of Member State sovereignty and the Member States' are still racing towards the bottom in competition to attract MNEs taxable income. Sweden has announced its intention to adjust the corporate income tax rate gradually from today's level of 22% to 20,6 % until 2021.¹⁸³ Thus, the question remains unclear on how the ATAD will create trust in fair tax systems remains unclear. The balance between the three different tax contributors contribution to the state revenue will most likely still be considered unfair. Individuals will most probably still contribute a larger extent, as percentage of income, to social welfare and social common needs than both companies acting on a domestic market and MNE's. But the allocation of taxing rights might be fairer from a State perspective when the CJEU will have a new objective to consider. Thus, it shall not result in obstacles such as double taxation.

The company taxes where value is added, will probably make the corporations refine their arguments on what value is and where it is really created. How this value will be addressed and how the court will provide for legal fairness of these values is a topic for future research. I agree with Smit in his doubtfulness that ATAD might just be an antiretroviral treatment that slows the BEPS down while waiting for a harmonised EU direct tax system.

Topics of future research in the field of direct taxation can be:

- *How is the CJEU developing the application of legal fairness in the light of ATAD?*
- *Is fairness balancing the allocation of taxing rights?*
- *Is trust in fair tax systems providing for less obstacles within the single market?*

For indirect taxes the proposed changes in the VAT directive will also provide for future research questions regarding fairness. In the next issue of the EC Tax Review, Rita de la Feria will publish an article that discusses the new VAT as a way to create a fairer and more effective tax base within the EU.¹⁸⁴

¹⁸² Brokelind, C., Wattel, P., Chapter 15, in Terra, B., Wattel, P., (edit), *European Tax Law*, Alphen aan den Rijn, Kluwer Law, 2018, p. 347.

¹⁸³ Lagrådsremiss, *Nya skatteregler för företagssektorn*, Stockholm, 21 Mars 2018.

¹⁸⁴ De la Feria, R. *The definitive VAT System: Breaking the transition*.

The transformation of political objectives into legally certain and fair legislation will be a topic concerning all different areas of taxation, direct as well as indirect. Will the CJEU utilitarian approach interpreting the wording of the law change into a more teleologic interpretation by taking unwritten or, soft law economic and political definitions of fairness under consideration for the interpretation of future case law?

Bibliography

Books

Badisco, Jo, Peeters, Bruno, Gribnau Hans, *Building Trust in Taxation*, Intersentia, 2018.

Barnard, Catherine & Peers, Steve (red.) (2014). *European Union law*. Oxford: Oxford University Press.

Bergström, Carl Fredrik & Hettne, Jörgen, *Introduktion till EU-rätten*, 1. uppl., Studentlitteratur, Lund, 2014.

Brokelind, Cécile (edit.), *Principles of Law: Function, Status and Impact in EU Tax Law*, IBFD, Amsterdam, 2014.

Dagan, Tsilly, *International Tax Policy: Between Competition and Cooperation*, 2017.

Donne, John, *Devotions upon Emergent Occasions* (1623), Meditation XVII.

Douma, Sjoered, *Legal research in international and EU tax law*, Kluwer, 1994.

Dworkin, Ronald, *Taking rights seriously*, Cambridge, Massachusetts, Harvard University Press 1977.

Helminen, Marjaana. *EU tax law: direct taxation*. 4. ed. Amsterdam: IBFD, 2015.

Gunnarsson, Åsa, *Skatterättvisa: [Tax justice]*. Diss. Umeå: Univ., Uppsala, 1995.

Hilling, Axel. & Daniel, T. *Corporate taxation and social responsibility*, Edition 1, Stockholm, 2017.

Jorgensen, Knud Erik. (red.), *The Sage handbook of European foreign policy [Elektronisk resurs]*, Sage Publications, London, 2015.

Johansson, Jesper. *EU-domstolens restriktionsprövning i mål om de grundläggande friheterna och direkta skatter*, Jure, Diss. Stockholm: Stockholms universitet, 2016, Stockholm, 2016.

Lang, Michael, Pistone, Pasquale, Schuch, Josef & Staringer, Claus (red.), *Introduction to European tax law on direct taxation*, 4. ed., Linde, Wien, 2016.

Musgrave, Richard Abel, *The theory of public finance: a study in public economy*, McGraw-Hill, New York, 1959.

Påhlsson, Robert, *Likhet inför skattelag: likhetsprincipen och konstruktionen av jämförbarhet i skatterätten*, Iustus, Uppsala, 2007.

Rawls, John, *A Theory of Justice*, Harvard University Press, Cambridge, Mass., 2005[1971].

Rolim, João Dácio, *Proportionality and fair taxation*, Kluwer, Alphen aan den Rijn, 2014.

Smith, Adam. *An inquiry into the nature and causes of the wealth of nations*. Vol. 2. Methuen, London, 1961.

Terra, Ben, J.M, Wattel, Peter, J. *European Tax Law*, Kluwer Law, Alphen aan den Rijn, 2018.

Schram, Sanford, *After welfare: the culture of postindustrial social policy*, New York University Press, New York, 2000.

Articles

Brokelind, Cécile, *Legal Issues in Respect of the Changes to the Parent-Subsidiary Directive as a Follow-Up of the BEPS Project*, Intertax, 2015.

Brokelind, Cécile & Axmin Martina, *Migrant pensioners – Taxation and health care issues in the EU*.

Burgers, I. J. J. & Monsquera Valderrama, Irma. J, *Fairness: A Dire International Tax Standard with No Meaning?*, Intertax, 2017, p. 767-783.

Englisch, Joachim, *Taxation of Cross-Border Dividends and EC Fundamental Freedoms*, Intertax, 2010, p. 197-221.

Gribnau, Hans, *The Integrity of the Tax System after BEPS: A Shared Responsibility*, ELR, August 2017, No. 1.

Gribnau, Hans, *Taxation, Reciprocity and Communicative Regulation*, Tillburg Law Review 20, 2015.

Gribnau, H, *Equality, Legal Certainty and Tax Legislation in the Netherlands – Fundamental Legal Principles as Checks on Legislative Power: A Case Study*, Utrecht L. Rev. Mar. 2013, p. 52-74.

Hart, Herbert, L. A, *The Concept of Law*, Oxford University Press, 1961.

Hart, Herbert, L. A, *Are there Any Natural Rights?*, Philosophical Review, vol. 64, 1955.

Hultqvist, Anders, *Anti-Tax Avoidance Directive (ATAD) och subsidiaritetsprincipen - Svenska folkets urgamla rätt att sig beskatta eller EU:s rätt?* SN, 2016, p. 853-863.

Jacob, Bernard, E, *Aristotle and the Graces*, Hofstra University School of Law, Legal Studies Research Paper Series, Research Paper No. 04-14, 2004.

Kaplow, L, *Horizontal Equity: Measures in Search of a Principle*, Harvard Law School, Discussion Paper No. 8, 5/85.

Kofler, George W. & Manson Ruth, *Double taxation: A European “Switch in Time”*, Columbia Journal of European Law, 2007, p. 63-98.

Manson, Ruth, Knoll, Michael S, *What is Tax Discrimination*, 121 Yale Law Journal, 2012, p. 1014-1116.

Manson, Ruth, *Made in America for European Tax: The Internal Consistency Test*, Boston College Law Review, 2008, p. 1277-1326.

Mapel, David R, Fairness, *Political Obligation, and Benefits Across Borders*, Polity 37, no. 4, October 2005, p. 426-442.

Michael J. Graetz; Alvin C. Jr. Warren, *Income Tax Discrimination: Still Stuck in the Labyrinth of Impossibility*, 121 Yale Law Journal. 2012, p 1118-1167.

Ramos, Gabriella, *New approaches to economic challenges: towards a new narrative*,

Remur, Cécile, *Tax Policy in the EU: Issues and Challenges*, European Parliamentary Research Service, 2015.

Repetti,, James & McDaniel, Paul, *Horizontal and Vertical Equity: The Musgrave/Kaplow Exchange*, Florida Tax Review, Volume 1, Number 10, 1993, p. 607-622.

Rosenzweig, Adam, *Definition of country's `Fair Share` of Taxes*, Florida State University Law Review, Vol. 42, 2015.

Weber, Dennis, *Abuse of Law in European Tax Law: An Overview and Some Recent Trends in the Direct and Indirect Tax Case Law of the CJEU—Part 2*, IBFD, European Taxation, July 2013, p. 313-328.

Legislative acts

Treaty on the European Union, Journal of the European Union, 2012/10/26.

The Treaty on the Functioning of the European Union, Journal of the European Union, 2012/10/26.

Treaty on the Functioning of the European Union - Protocol (No 2) on the application of the Principle of Subsidiarity and Proportionality 2008, OJ C 326.

Directives

Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries. (ATAD 2)

Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the single market. (ATAD 1)

Council Directive (EU) 2015/121 of 27 January 2015 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States.

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States.

Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office, of an SE or SCE, between Member States.

Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax.

Council Proposals

Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence, COM(2018) 147 final, 2018/0072 (CNS).

Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2016) 685 final, 2016/0337 (CNS).

Commission Communications

Communication from the Commission to the European Parliament and Council A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action. COM(2015) 302 final.

Yttrande från Regionkommittén om ”En gemensam konsoliderad bolagsskattebas”, (2012/C 54/10), EUT C 54, 23.2.2012.

Reasoned opinion of the house of representatives, parliament of Malta: Proposal for a council directive laying down rules against tax avoidance practices that directly affect the functioning of the single market (COM (2016) 26).

Swedish legislative Communications

Lagrådsremiss, *Nya skatteregler för företagssektorn*, Stockholm, 21 Mars 2018.

Available at:

<https://www.regeringen.se/49550b/contentassets/e2c0b5d85e4c4efe80ecfb66268f580c/nya-skatteregler-for-foretagssektorn.pdf>

Internet sources (all internet sources accessed 31.05.18)

<http://www.europarl.europa.eu/resources/library/media/20180116RES91806/20180116RES91806.pdf>

<http://www.econlib.org/library/Smith/smWN21.html>

http://www.newworldencyclopedia.org/entry/Jeremy_Bentham.

<https://eur-lex.europa.eu/legalcontent/EN/TXT/>

<https://www.campaignlive.co.uk/article/starbucks-bows-pressure-uk-tax/1162471>

https://ec.europa.eu/taxation_customs/business/company-tax/common-consolidated-corporate-tax-base-ccctb_en

https://ec.europa.eu/commission/priorities/internal-market_en

http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_1.2.2.html

http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.1.pdf

<https://dictionary.cambridge.org/dictionary/english/fairness>

<https://lup.lub.lu.se/studentpapers/search/publication/8900235>

<https://lup.lub.lu.se/student-papers/search/publication/8913909>

https://europa.eu/european-union/topics/taxation_en

<http://www.ey.com/be/en/newsroom/news-releases/tax-alert---fairness-tax-court-of-justice-of-the-eu-finds-fairness-tax-incompatible-with-eu-law>

<https://www.pwc.com/gx/en/tax/newsletters/eu-direct-tax-newsalerts/eudtg/pwc-eudtg-cjeu-judgment-in-belgian-fairnes-tax.pdf>

<https://www.icij.org/investigations/paradise-papers/>

<https://www.icij.org/investigations/panama-papers/>

<https://www.icij.org/investigations/luxembourg-leaks/>

Table of Cases

- C-21/64 *Macchiorlati Dalmas*, ECLI:EU:C:1965:30.
C-120/78 *Rewe-Zentral AG*, ECLI:EU:C:1979:42. (Cassis de Dijon)
C-132/80 *United Foods*, ECLI:EU:C :1981:87.
C-179/84 *Piercarlo Bozzetti*, ECLI:EU:C:1985:306.
C-151/93 *Voogd Vleesimporten-export*, ECLI:EU:C:1994:365.
C-446/93 *SEIM*, ECLI:EU:C:1996:10.
C-55/94 *Gebhard*, ECLI:EU:C:1995:411.
C-336/96 *Gilly*, ECLI:EU:C1998:221.
C-212/97 *Centros*, ECLI:EU:C:1999:126.
C-453/00 *Kühne and Heitz*, ECLI:EU:C:2004:17.
C-255/02 *Halifax*, ECLI:EU:C:2006:121.
C-196/04 *Cadbury Schweppes*, ECLI:EU:C:2006:544.
C-524/04 *Test Claimants in the Thin Cap Group Litigation*, ECLI:EU:C:2007:161.
C-425/06, *Part Service*, ECLI: EU:C:2008:108.
C-311/08 *SIG*, ECLI:EU:C:2010:26.
C-318/10 *SIAT*, ECLI:EU:2012:415.
C-68/15 X, ECLI:EU:C:2017:379.
C-448/15 *Wereldhave Belgium*, ECLI:EU:C:2017:180.
C-6/16 *Eqiom Enka*, ECLI:EU:C:2017:64.
C-14/16 *Euro Park Service*, ECLI:EU:C:2017:177.