

The Status of the Harmonization of Tax Enforcement within the European Union

This article applies a part of the findings of the author's doctoral thesis on the protection of the taxpayer's fundamental rights in situations of cross-border tax enforcement within the European Union, which was awarded the International Fiscal Association's 2025 Mitchell B. Carroll Prize, and examines the evolving interplay between national and EU tax procedural law, highlighting the need for effective fundamental rights protection amid expanding EU administrative cooperation and increasing individual reporting obligations.

1. Introduction

Within the European internal market, the right to freedom of movement and the fundamental freedoms allow taxpayers a high degree of mobility. This poses particular challenges for tax enforcement. In cross-border cases, the administrative mandate (i.e. taxation based on worldwide income) and the administrative capacity (i.e. the limited ability of the tax authorities to investigate only within their own territory) regularly diverge. This enforcement deficit in cross-border situations is sometimes referred to as the “Achilles heel” of international taxation.¹ Against this backdrop, it is not surprising that the European Union plays a pioneering role in the cross-border exchange of information between tax authorities.² In particular, the EU directive on administrative cooperation (DAC),³ which was fundamentally revised in 2011 and has been continuously expanded since then, represents this pioneering role.⁴ However, the DAC is no longer limited to regulations on cross-border cooperation between tax authorities. Instead, notification and reporting obligations are increasingly being introduced, leading to fundamental rights being infringed for the individuals concerned. The best-known example of this is the intro-

duction of a notification obligation for cross-border tax arrangements by DAC6.⁵ In view of these developments, the question of effective protection of fundamental rights arises. As the protective effect of national fundamental rights is limited within the scope of application of EU law, effective protection of fundamental rights is required at the European level.

Section 2. first provides a brief overview of the extent to which EU institutions and Member States are bound by the fundamental rights of the European Union. Particularly in the case of measures taken by the Member States, the applicable fundamental rights standard of control depends on whether they implement EU law and, if so, the extent to which this law is harmonized. To determine the applicable fundamental rights standard of control, it is essential to examine the status of the harmonization of tax enforcement within the European Union. Sections 3. and 4. are dedicated to this question. To this end, the criteria for determining the degree of harmonization are first presented in abstract terms in section 3. These criteria are then applied specifically to tax enforcement within the European Union (see section 4.). The article ends with a brief conclusion and outlook (see section 5.).

2. The Importance of the European Union's Fundamental Rights in Tax Enforcement

2.1. Introductory remarks

With increasing harmonization of tax enforcement within the Union, the protection of fundamental rights is also shifting from the Member State level to the European level. Thus, the Union's fundamental rights are coming into focus as a standard of control for the Union legislator (see section 2.2.) and – when implementing EU law – for the Member States (see section 2.3.).

2.2. Binding EU institutions to the fundamental rights of the European Union

The comprehensive obligation of the institutions and bodies of the Union to the fundamental rights of the Union pursuant to article 51, paragraph 1, sentence 1 of the Charter of Fundamental Rights of the European Union (CFR) is uncontroversial. The European Union's commitment to fundamental rights is the necessary correlate to directly applicable EU law, which has primacy of

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1. M.T. Soler Roch, *Tax Administration Versus Taxpayer - A New Deal?*, 4 World Tax J. 3, p. 290 (2012), Journal Articles & Opinion Pieces IBFD.
2. X. Oberson, *International Exchange of Information in Tax Matters*, para. 8.03 (2018); see also J. Kokott & P. Pistone, *Taxpayers in International Law*, p. 271 (2022).
3. Council Directive 2011/16/EU of 15.2.2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, OJ EU L64, p. 1 (11 Mar. 2011).
4. G. Kofler, *Entwicklungslinien und Zukunftsfragen des Europäischen Steuerrechts*, in *100 Jahre Steuerrechtsprechung in Deutschland 1918-2018 – Festschrift für den Bundesfinanzhof*, p. 721 (K.-D. Drüen, J. Hey & R. Mellinshoff eds., Otto Schmidt 2018) correctly states that events in the field of administrative cooperation have “virtually come thick and fast” in the recent past.

5. Council Directive (EU) 2018/822 of 25.5.2018 amending Directive 2011/16/EU regarding mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, OJ L139, p. 1 [hereinafter DAC6].

application.⁶ Since EU law cannot be reviewed based on national fundamental rights due to the need for uniform application,⁷ an independent standard of control under EU law is required.⁸ EU institutions are bound comprehensively by EU fundamental rights. Of particular importance in tax enforcement is the Council's obligation to respect fundamental rights, since the Council is the main legislative body (article 16 of the TEU in conjunction with articles 113 and 115 of the TFEU). In this respect, the fundamental rights of the European Union, as part of the primary law, represent the standard of review for secondary law.⁹ Accordingly, the ECJ reviews the validity of directives¹⁰ and regulations¹¹ against the standard of the European Union's fundamental rights. This also applies to the DAC.¹²

2.3. The fundamental rights obligation of the Member States

In tax enforcement, the Member States' obligation to respect fundamental rights is of even greater importance. First, secondary law concerning tax enforcement is still the exception, apart from Regulation (EU) No. 904/2010 in VAT law and the DAC in direct tax law. Second, the enforcement of EU tax law is the sole responsibility of the Member States. Only when Member States take action does the question arise as to whether (i) the Union fundamental rights, (ii) the respective national fundamental rights or (iii) even both fundamental rights systems cumulatively apply as a standard of control.

According to article 51, paragraph 1, sentence 1 of the CFR, the Charter shall apply "to Member States only when they are implementing Union law". That the Member States are addressed by the CFR is not a matter of course; after all, the fundamental rights of the Member States already provide a standard of control. Even if the terms "implementing" and "only" used appear, at first glance, to suggest a restrictive interpretation of the provision, the ECJ interprets these words broadly. Following the case law on the Member States' obligation to respect fundamental rights

developed as general principles of EU law, the ECJ has consistently held that "the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations".¹³ On this basis, the Member States are bound by the fundamental rights of the Union when they implement binding directives.¹⁴ However, the ECJ expressly assumes that the Member States are bound by the fundamental rights of the Union, even if the directive opens up legislative leeway in favour of the Member States.¹⁵ The ECJ emphasizes that, when transposing a directive, "the level of protection of fundamental rights provided for in the Charter must be achieved in such a transposition, irrespective of the Member States' discretion in transposing the directive".¹⁶ As a result, the ECJ assumes that the Member States are largely bound by the Union's fundamental rights irrespective of the degree of harmonization of the secondary law.

In view of the broad scope of application of the European Union's fundamental rights, the compelling follow-up question arises as to what significance national fundamental rights still have. In principle, the ECJ has long assumed the possibility of a cumulative applicability of Union and national fundamental rights.¹⁷ Thus, the ECJ emphasizes that national authorities and courts remain free to apply national standards of protection for fundamental rights in a situation "in which the action of a Member State is not entirely determined by EU law".¹⁸ In other words, the degree of harmonization of secondary law is decisive.¹⁹ If secondary law does not bring about complete harmonization, there is room for national fundamental rights standards. The German Federal Constitutional Court (FCC) also no longer assumes two strictly separate spheres of fundamental rights, but it recognizes a pluralism of fundamental rights.²⁰ The FCC refers to secondary law to determine the standard of control of fundamental rights too.

If one wishes to examine the protection of fundamental rights in tax enforcement, it is therefore essential to determine the status of the harmonization of tax enforcement within the European Union.

6. See also T. Kingreen, in: C. Calliess & M. Ruffert (eds.), *TEU/TFEU* art. 51 CFR, para 4 (6th ed. C.H. Beck 2022).

7. ECJ, 17 Dec. 1970, Case 11/70, *International Trading Company*, ECLI:EU:C:1970:114, para. 3, Case Law IBFD.

8. See also A. Schwerdtfeger, in: J. Meyer & S. Hölscheidt (eds.), *Charter of Fundamental Rights of the EU* art. 51 para. 27 (6th ed. Nomos 2024).

9. See also J. Kokott & C. Sobotta, *Die Charta der Grundrechte der Europäischen Union nach dem Inkrafttreten des Vertrags von Lissabon*, EuGRZ, p. 267 (2010).

10. ECJ, 14 May 2019, Cases C-391/16, C-77/17 and C-78/17, *M et al.*, ECLI:EU:C:2019:403, para. 112; ECJ, 21 Dec. 2016, Case C-444/15, *Associazione Italia Nostra Onlus*, ECLI:EU:C:2016:978, para. 63 f.; specifically in the context of tax law, ECJ, 7 March 2017, Case C-390/15, *RPO*, ECLI:EU:C:2017:174, para. 71 f.

11. ECJ, 29 May 2018, Case C-426/16, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and others*, ECLI:EU:C:2018:335, para. 84; ECJ, 5 July 2017, Case C-190/16, *Fries*, ECLI:EU:C:2017:513, para. 80.

12. ECJ, 29 July 2024, Case C-623/22, *Belgian Association of Tax Lawyers*, ECLI:EU:C:2024:639, para. 22 et seq.; ECJ, 8 Dec. 2022, Case C-694/20, *Orde van Vlaamse Balies*, ECLI:EU:C:2022:963, para. 66; M. Stöber, *EU-Grundrechte-Charta und Steuerrecht*, DStR, p. 1970 et seq. (2023); F. Engler, *Steuerverfassungsrecht im Mehrebenensystem*, p. 73 (2014) correctly states that the provisions on cooperation between tax administrations are a "significant gateway" for the application of EU fundamental rights.

13. See ECJ, 24 Feb. 2022, Case C-257/20, *Viva Telecom Bulgaria*, ECLI:EU:C:2022:125, para. 127.

14. ECJ, 29 July 2019, Case C-516/17, *Spiegel Online*, ECLI:EU:C:2019:625, para. 20; ECJ, 29 July 2019, Case C-469/17, *Funke Medien*, ECLI:EU:C:2019:623, para. 31.

15. ECJ, 9 March 2017, Case C-406/15, *Milkova*, ECLI:EU:C:2017:198, para. 52 f.

16. ECJ, 29 July 2019, Case C-476/17, *Pelham et al.*, ECLI:EU:C:2019:624, para. 79.

17. The coexistence of several fundamental rights standards is already laid down in the most favoured principle of art. 53 CFR.

18. ECJ, 21 Dec. 2021, Case C-357/19, *criminal proceedings PM and others*, ECLI:EU:C:2021:1034, para. 211; ECJ, 29 July 2019, Case C-516/17, *Spiegel Online*, ECLI:EU:C:2019:625, para. 21; ECJ, 26 Feb. 2013, Case C-617/10, *Åkerberg-Fransson*, ECLI:EU:C:2013:105, para. 29.

19. See also expressly ECJ, 29 July 2019, Case C-516/17, *Spiegel Online*, ECLI:EU:C:2019:625, para. 22.

20. Fundamental FCC, 6 Nov. 2019, Case 1 BvR 16/13, *Right to be forgotten I*, para. 42 et seq.; on this paradigm shift, see also A. Edenharter, *Die EU-Grundrechte-Charta als Prüfungsmaßstab des Bundesverfassungsgerichts*, DÖV, p. 349 (2020).

3. Determining the Degree of Harmonization

3.1. Introductory remarks

As the previous explanations have shown, the degree of harmonization of EU law is not of decisive importance for the question of the scope of application of Union fundamental rights, but for the question of the cumulative applicability of national fundamental rights.²¹ The central question is when full or partial harmonization by EU law can be assumed.²² First, the case law of the ECJ is presented (see section 3.2.) before an own assessment is made (see section 3.3.).

3.2. Case law of the ECJ

According to the ECJ's case law, the degree of harmonization of EU law must be determined by interpreting the respective provision, considering both the wording of the provision and the context and objectives of the directive or regulation as a whole.²³ Materials relating to the enactment of secondary legislation must also be taken into account.²⁴ The recitals preceding the secondary law are important, especially when determining the purpose of the directive or regulation.²⁵

Full harmonization through secondary law is to be assumed if something is defined in "unequivocal terms" by EU law, the provision is "not qualified by any condition," and is not subject, "in its implementation or effects, to any measures being taken in any particular form".²⁶ Moreover, the specific legal form – regulation or directive – can at best be used as an indication of the degree of harmonization.²⁷ The ECJ has always examined the degree of harmonization with regard to a specific provision.²⁸ Advocate General Bobek rightly speaks of a "micro-analysis, looking at a specific rule or at best, a specific and

well-defined aspect of EU law".²⁹ Therefore, it makes no sense to look at the entire DAC. Instead, the degree of harmonization must be determined by interpreting the individual provision.³⁰ In doing so, not only the wording but also the system and the overall purpose of the harmonization measure must be considered.³¹ The recitals play an important role in determining the regulatory purpose of secondary legislation.³²

3.3. Own assessment

A methodical interpretation of secondary legislation is crucial. All common methods of interpretation must be applied.³³ The interpretation must be based on whether the respective provisions of EU law are designed to allow for legal diversity. It is convincing that only the fundamental rights of the European Union apply in fully harmonized areas of law. The primacy and unity of EU law require a uniform standard of control. If national legislators were obliged to also observe the requirements of national constitutions when implementing fully harmonized secondary law, a conflict could arise between the requirements of EU law and national constitutional law.³⁴ In contrast, in areas of law that are not fully harmonized by EU law, there is, in principle, no need for a uniform standard of control. The decisive factor is whether the EU legislator leaves it to the national legislators to "adopt national measures on their own responsibility and on the basis of different assessments".³⁵ If secondary law allows for different legal standards, this could result in different fundamental rights standards for control.

Furthermore, an "as far as" approach is necessary, which is particularly relevant where secondary law only leads to minimum harmonization.³⁶ Examples of this include

21. M. Wendel, *Europäischer Grundrechtsschutz und nationale Spielräume: Grundlagen und Grundzüge eines Spielraumtests im europäischen Grundrechtspluralismus*, EuR, p. 332 (2022); see also T. Kingreen, *Die Grundrechte des Grundgesetzes im europäischen Grundrechtsföderalismus*, JZ, p. 807 (2013).
22. M. Wendel, *Europäischer Grundrechtsschutz und nationale Spielräume: Grundlagen und Grundzüge eines Spielraumtests im europäischen Grundrechtspluralismus*, EuR, p. 327 (2022), rightly states that this distinction is of "systemic relevance" for the protection of fundamental rights in the European Union.
23. ECJ, 29 July 2019, Case C-469/17, *Funko Medien*, ECLI:EU:C:2019:623, para. 42 et seq.; cf. also ECJ, 26 Feb. 2013, Case C-399/11, *Melloni*, ECLI:EU:C:2013:107, para. 61 in conjunction with para. 40 et seq.
24. ECJ, 29 July 2019, Case C-516/17, *Spiegel Online*, ECLI:EU:C:2019:625, para. 29.
25. ECJ, 29 July 2019, Case C-516/17, *Spiegel Online*, ECLI:EU:C:2019:625, para. 35 f.; generally on the importance of the reasoning considerations in the context of teleological interpretation, G. Kofler, *Auslegung und Anwendung des harmonisierten Steuerrecht*, in *Europäisches Steuerrecht*, para 13.5 (H. Schaumburg, J. Englisch & L. Dobratz eds., Otto Schmidt 3rd ed. 2025).
26. ECJ, 29 July 2019, Case C-476/17, *Pelham*, ECLI:EU:C:2019:624, para. 84.
27. See also ECJ, 17 Dec. 2015, Case C-300/14, *Intech Marine Belgium*, ECLI:EU:C:2015:825, para. 27 et seq.; and of 27 Oct. 1971, Case C-6/71, *Rheinmühlen Düsseldorf*, ECLI:EU:C:1971:100, para. 6 et seq.; on the GDPR also Opinion of Advocate General Richard de la Tour, 2 Dec. 2021, Case C-319/20, *Facebook Ireland*, ECLI:EU:C:2021:979, para. 53 et seq.
28. ECJ, 14 June 2018, Case C-440/17, *GS*, ECLI:EU:C:2018:437, para. 31; ECJ, 7 Sept. 2017, Case C-6/16, *Egiom and Enka*, ECLI:EU:C:2017:641, para. 15.

29. Opinion of Advocate General Bobek, 25 July 2018, Case C-310/16, *Petar Dzivev and others*, ECLI:EU:C:2018:623, para. 74.
30. See also J. Schönfeld & B. Ellenrieder, *Das Verhältnis von Primär- und Sekundärrecht – oder: Gibt es „gegen Primärrecht immunisiertes Recht“?*, *StuW*, p. 258 (2019).
31. ECJ, 12 Nov. 2015, Case C-198/14, *Visnapuu*, ECLI:EU:C:2015:751, para. 42; ECJ, 16 July 2015, Case C-95/14, *UNIC and Uni.co.pel*, ECLI:EU:C:2015:492, para. 35.
32. ECJ, 7 Sept. 2017, Case C-6/16, *Egiom and Enka*, ECLI:EU:C:2017:641, para. 20 f.; ECJ, 30 Sept. 2003, Case C-167/01, *Inspire Art*, ECLI:EU:C:2003:512, para. 68; G. Kofler, *Auslegung und Anwendung des harmonisierten Steuerrecht*, in *Europäisches Steuerrecht*, para 13.5 (H. Schaumburg, J. Englisch & L. Dobratz eds., Otto Schmidt 3rd ed. 2025).
33. M. Wendel, *Europäischer Grundrechtsschutz und nationale Spielräume: Grundlagen und Grundzüge eines Spielraumtests im europäischen Grundrechtspluralismus*, EuR, p. 359 (2022);
34. Austrian Constitutional Court, 12 Oct. 2017, Case G 52/2016, ECLI:AT:VFGH:2017:G52.2016, para. 50 in the context of the Consumer Rights Directive 2011/83/EU; on a comparable conflict between primary and secondary law, see also J. Schönfeld & B. Ellenrieder, *Das Verhältnis von Primär- und Sekundärrecht – oder: Gibt es „gegen Primärrecht immunisiertes Recht“?*, *StuW*, p. 258 (2019).
35. M. Wendel, *Europäischer Grundrechtsschutz und nationale Spielräume: Grundlagen und Grundzüge eines Spielraumtests im europäischen Grundrechtspluralismus*, EuR, p. 358 et. seq. (2022) sees this as the decisive test question.
36. T. Sendke, *Die Bedeutung der Unionsgrundrechte im harmonisierten Steuerrecht – zugleich Anmerkung zum Urteil des EuGH v. 8.12.2022 – C-694/20*, *ISR*, p. 14 (2023); C. Levedag, *Gerichtlicher Rechtsschutz gegen belastendes unionsrechtliches Sekundärrecht und darauf beruhende Umsetzungsakte im Rechtsschutzverbund von FG, EuGH und BVerfG*, *StuW*, p. 201 (2024).

the DAC (article 1, paragraph 3, sentence 2) and the VAT administrative co-operation regulation (article 60, paragraph 1). It could be argued that a mere minimum harmonization never leads to complete harmonization and that, therefore, there is always room for the application of different fundamental rights standards. However, such an approach overlooks the fact that even minimum harmonization can lead to a full harmonization within the specified framework because the Member States must implement the measures prescribed by secondary law. In this respect, the states have no leeway of their own. The minimum harmonization merely means that the states can take more far-reaching measures. However, they may not fall below the minimum level. Insofar as the minimum level is concerned, the primacy and unity of EU law require a uniform standard of control. Only insofar as the Member States go beyond the minimum level is there room for a different fundamental rights' standard. Such a view is also supported by the fact that the determination of the degree of legal uniformity is ultimately a matter of "gradual gradations".³⁷ Advocate General Bobek states that there is a "scale" of regulatory density on which to locate how strong the connection between a national provision and EU law is.³⁸ Accordingly, it makes little sense to understand the question of full harmonization as a pure "yes or no" question. Such a classification would not do justice to the complex and diverse effects of EU law on national law. This is because there is no clear dividing line between harmonization under EU law and the Member States' leeway.³⁹

The consequences are as follows: if Member States only implement the minimum level prescribed by secondary law, this is fully harmonized law for which only the European Union's fundamental rights can be considered as the standard of control. In fully harmonized areas of law, the fundamental rights of the European Union constitute the highest standard of protection of fundamental rights.⁴⁰ If, on the other hand, the Member States go beyond the minimum standard and take further measures in national law, this is not a fully harmonized area of law. Thus, the national fundamental rights can be applied as a standard of control. Assuming that the Member States also implement Union law in this respect, the fundamental rights of the Union represent the common minimum standard of protection.

37. M. Wendel, *Europäischer Grundrechtsschutz und nationale Spielräume: Grundlagen und Grundzüge eines Spielraumtests im europäischen Grundrechtspluralismus*, EuR, p. 350 (2022).
38. Opinion of Advocate General Bobek, 25 July 2018, Case C-310/16, Petar Dzivev et al., ECLI:EU:C:2018:623, para. 79.
39. See M. Wendel, *Europäischer Grundrechtsschutz und nationale Spielräume: Grundlagen und Grundzüge eines Spielraumtests im europäischen Grundrechtspluralismus*, EuR, p. 351 et. seq. (2022) with examples of the GDPR.
40. Likewise Opinion of Advocate General Bobek, 25 July 2018, Case C-310/16, *criminal proceedings against Petar Dzivev and others*, ECLI:EU:C:2018:623, para. 92 f.

4. The Status of the Harmonization of Tax Enforcement within the European Union

4.1. Introductory remarks

Based on the aforementioned principles, the question arises regarding the extent to which tax enforcement is harmonized in the European Union. First, there must be a reference to EU law; only if the Member States implement EU law within the meaning of article 51, paragraph 1, sentence 1 of the CFR, are they bound by the fundamental rights of the European Union. Second, the degree of harmonization determines whether national fundamental rights can be applied cumulatively.

Tax enforcement means the execution of tax law.⁴¹ If a tax claim exists, it must also be enforced. It is primarily the task of tax procedural law to ensure the administrative enforcement of the substantive tax laws.⁴² Based on this, it must first be examined to what extent tax procedural law is harmonized under EU law (see section 4.2.). In this respect, one can speak of enforcement through EU law. However, the question of harmonization of tax enforcement is not limited to this group of cases. Insofar as substantive tax law is harmonized at EU level, EU law also imposes requirements on its enforcement in the Member States (see section 4.3.). Therefore, it is also possible to speak of the enforcement of EU law. Finally, non-tax EU law also has an impact on the tax procedure (see section 4.4.). The General Data Protection Regulation (GDPR) is particularly important in this regard. Based on these three groups of cases, the status of the harmonization of tax enforcement will be examined and the applicable fundamental rights standard of control will be determined.

4.2. Enforcement through EU law

This section examines the extent to which the tax procedural law ensuring tax enforcement is harmonized. With Regulation (EU) No. 904/2010⁴³ and the DAC, the EU legislator has so far only enacted tax procedural law provisions in the field of cross-border tax enforcement.⁴⁴ This means that the tax authorities of the Member States cooperate to determine tax-relevant facts.⁴⁵ The following considerations are limited to the DAC, but they can also be applied to Regulation (EU) No. 904/2010 in principle.

41. See also K. Tipke, *Die Steuerrechtsordnung – Vol. III*, p. 1404 (Otto Schmidt 2nd ed. 2012).
42. See R. Seer, *Steuerrecht als Teil der Rechtsordnung*, in: *Steuerrecht*, para. 1.67 (K. Tipke & J. Lang eds., 25th ed. Otto Schmidt 2024).
43. Council Regulation (EU) No. 904/2010 of 7.10.2010 on administrative cooperation and combating fraud in the field of value added tax, OJ L268, p. 1 (12 Oct. 2010).
44. However, see also most recently Council Directive (EU) 2025/50 of 10.12.2024 on faster and more certain relief from excess withholding taxes, OJ L (10 Jan. 2025), so-called FASTER Directive.
45. On the concept of cross-border tax enforcement, see T. Eisgruber & E. Oertel, *Grenzüberschreitender Steuervollzug – nationale Sicht*, in *100 Jahre Steuerrechtsprechung in Deutschland 1918-2018 – Festschrift für den Bundesfinanzhof*, p. 1113 (K.-D. Drüen, J. Hey & R. Mellinghoff eds., Otto Schmidt 2018); C. Staringer, *Grenzüberschreitender Steuervollzug – nachbarschaftliche Außensicht*, in *100 Jahre Steuerrechtsprechung in Deutschland 1918-2018 – Festschrift für den Bundesfinanzhof*, p. 1127 (K.-D. Drüen, J. Hey & R. Mellinghoff eds., Otto Schmidt 2018).

4.2.1. Purpose of the DAC

As already explained, the context and objectives of the directive must be considered when determining the degree of harmonization. In the fundamental revision of the DAC by Directive 2011/16/EU in 2011, the Council emphasized that the internationalization of the economy and the increasing mobility of taxpayers would make it more difficult for Member States to assess taxes due properly.⁴⁶ This affects the functioning of national tax systems and entails double taxation, leading to tax evasion and tax fraud. Closer administrative cooperation is therefore needed which, in turn, requires confidence between the Member States. This could be achieved specifically by setting up the same rules, obligations and rights for all Member States.⁴⁷ This general objective of the DAC indicates that the aim is to harmonize cross-border administrative cooperation as comprehensively as possible. After all, if confidence-building requires uniform rules in all Member States, there will hardly be any room for national legislative leeway.

4.2.2. Definition of a mere minimum standard

The question arises as to whether article 1, paragraph 3, sentence 2 of the DAC precludes the assumption of full harmonization from the outset. Accordingly, the directive shall be without prejudice to the fulfilment of any obligations of the Member States in relation to wider administrative cooperation. Such cooperation may arise from bilateral agreements (e.g. article 26 of the OECD Model (2017)) or special TIEAs between the Member States. Even if no further administrative cooperation will result from these legal bases, article 1, paragraph 3, sentence 2 of the DAC nevertheless expresses the fact that the DAC merely establishes a binding minimum standard for the administrative cooperation within the European Union.⁴⁸

It could be concluded from this that the DAC does not lead to a full harmonization of EU law. However, this is not convincing. Rather, the “as far as” approach already described must be applied. The wording of article 1, paragraph 3, sentence 2 of the DAC, which only permits “wider administrative cooperation” ensuing from other legal instruments, speaks in favour of this. As far as the DAC allows for administrative cooperation, the Member States cannot rely on treaty law or other bilateral agreements. This is confirmed by the purpose of the DAC to create binding and uniform rules for administrative cooperation within the European Union.⁴⁹ The primacy of the DAC can also be justified by the primacy of EU law in relation both to national law and the double tax treaties concluded

between the Member States.⁵⁰ Accordingly, the Commission also assumes that any form of administrative cooperation within the scope of the DAC must be carried out according to these rules.⁵¹ Finally, this result is also convincing with regard to the protection of the fundamental rights of the persons affected by administrative cooperation. The Member States are bound by the fundamental rights of the Union when implementing the DAC. They should not be able to evade this obligation by resorting to bilateral agreements or national provisions.⁵²

Thus, a distinction must be made as follows: insofar as the scope of application of the DAC is opened, administrative cooperation in tax matters between the Member States is uniformly governed by its provisions. In this respect, there can also be a full harmonization if the provisions of the DAC do not provide for any leeway in favour of the Member States. However, as far as international agreements or national provisions allow for more extensive administrative cooperation, this remains permitted. The DAC does not apply in this respect. In the absence of harmonization, there is room for different fundamental rights standards.

4.2.3. Degree of harmonization through the DAC

Chapter 2 of the DAC provides legal bases for all three types of exchange of information.⁵³ According to the distinction established in international tax law,⁵⁴ a differentiation is made between the exchange of information upon request, the mandatory automatic exchange of information and the spontaneous exchange of information. The degree of harmonization of the DAC must be determined separately for each of these types. However, this would go beyond the scope of this article. In general, however, the following conclusion can be drawn: the DAC has conclusively harmonized the procedures between the competent authorities of the Member States. This applies, for example, to the request for information and the transmission of the requested information to the requesting state. The same applies largely to the automatic and spontaneous exchange of information. DAC’s aim, to enable effective administrative cooperation through uniform regulations, allows hardly any leeway for Member States.

In contrast, the DAC regulates the procedure between the Member State tax authorities and the taxpayers in a rudimentary manner at best. In this respect, the DAC only provides a broad framework. This framework justifies

46. Recital 1 of Directive 2011/16/EU.

47. Recital 2 of Directive 2011/16/EU.

48. See also S. Hemels, *Exchange of information and recovery assistance: background, history and legal basis*, in Terra/Wattel European Tax Law, p. 551 (P. J. Wattel, O. Marres & H. Vermeulen eds., 7th ed. Kluwer Law International 2019); R. Seer, in: K. Tipke & W. Kruse, *AO/FGO*, sec. 117 AO, para. 21 (Otto Schmidt 2023); Recital 21 of Directive 2011/16/EU speaks equivalently of “minimum rules”.

49. See recitals 2 and 21 of Directive 2011/16/EU.

50. See also ECJ, 19 January 2006, Case C-265/04, *Bouanich*, ECLI:EU:C:2006:51, para. 49 f.; specifically on the exchange of information also ECJ, 11 Oct. 2007, Case C-451/05, *ELISA*, ECLI:EU:C:2007:594, para. 49 et seq.; in general, see also I. Panzeri, *Tax Treaties versus EU Law: Which Should Prevail?*, ET, p. 148 et seq (2021).

51. See the Commission’s answer to Written Question No. 224/82, OJ C156, p. 33 (21 June 1982) on Directive 77/799/EEC; M. Engelschalk, in: K. Vogel & M. Lehner, *Doppelbesteuerungsabkommen*, article 26 OECD MC, para. 151 (7th ed. C.H. Beck 2021).

52. T. Sendke, *Der Anwendungsbereich von unionalen und nationalen Grundrechten im Steuerrecht*, StuW, p. 231 et. seq. (2020).

53. The other forms of administrative cooperation regulated in chapter 3 are also of increasing importance. However, these cannot be considered here.

54. See *OECD Model Tax Convention on Income and on Capital: Commentary on Article 26* (21 Nov. 2017), no. 9 and 9.1.

the application of the fundamental rights of the Union. However, as the respective Member State's tax procedural law applies, there is no full harmonization. This legal diversity is accompanied by the possibility of different fundamental rights standards, meaning that the Member States are cumulatively bound by the respective national fundamental rights.

4.3. Enforcement of EU law

At first glance, harmonization of tax procedural law only plays a role in cross-border tax enforcement. To date, there is no secondary law regarding domestic tax enforcement. However, when examining the harmonization of tax enforcement within the Union, tax procedural law cannot be viewed in isolation. EU law requirements for tax enforcement can also arise where substantive tax law is harmonized. The enforcement of harmonized tax law constitutes the enforcement of EU law.

4.3.1. Starting point: Harmonization of substantive tax law

The degree of harmonization of substantive tax law varies within the European Union. Article 113 of the TFEU provides for the Council to adopt provisions to harmonize Member States' rules in the area of indirect taxation.⁵⁵ The aim is to achieve an internal market without tax frontiers.⁵⁶ Based on article 113 of the TFEU, VAT has been largely harmonized by the VAT Directive⁵⁷ and special excise duties have been harmonized by the Excise Directive.⁵⁸ Harmonization affects not only cross-border relationships but also the entire tax system and, thus, purely national taxation procedures.

In direct taxation, there has only been selective harmonization through secondary law to date based on the general competence to harmonize legislation under article 115 of the TFEU. For a long time, harmonization was driven by the aim of removing obstacles to the free movement of goods and capital. The Parent-Subsidiary Directive,⁵⁹ the Interest and License Directive⁶⁰ and the Merger Directive⁶¹ represent this. In the wake of international efforts to

combat tax evasion and profit shifting, harmonization of direct taxation has increased in recent years – albeit with a different emphasis.⁶² At its core, it is about combating tax avoidance and safeguarding the tax base of the Member States. This is what the ATAD⁶³ and the Minimum Taxation Directive⁶⁴ stand for. Positive harmonization is, therefore, also gaining importance in direct taxation.

However, the influence of fundamental freedoms on national direct taxes has been much greater in recent decades. This is not a systematic harmonization of substantive tax law through secondary law but mostly a case-by-case “negative harmonization”.⁶⁵ For example, the ECJ has consistently emphasized in its case law that although direct taxes are within the competence of the Member States, they must exercise their competence in compliance with EU law and, in particular, with the fundamental freedoms.⁶⁶ Harmonization is achieved by the fact that Member State regulations that are contrary to primary law may no longer be applied. In this respect, too, EU law sets certain limits for Member State tax legislators in the sense of a framing principle,⁶⁷ which raises the question of what this means for tax enforcement.

4.3.2. Implementation of harmonized tax law by the Member States

Even if substantive tax law is harmonized, it is implemented by the Member States (*see* section 4.3.2.1.). They apply their national tax procedural law (*see* section 4.3.2.2.). However, primary law imposes certain limits on Member State enforcement and, thus, brings about a minimum harmonization of procedural tax law (*see* section 4.3.2.3.).

4.3.2.1. Indirect enforcement by the Member States

Even where substantive tax law is harmonized, the Member States enforce EU law indirectly through their own tax authorities. The national tax authorities function

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55. H.-G. Kamann, in: R. Streinz, *EUV/AEUV*, article 113 TFEU, para. 1 (3rd ed. C.H. Beck 2018); C. Waldhoff, in: C. Calliess & M. Ruffert (eds.), *TEU/TFEU* art. 113 TFEU, para 2 (6th ed. C.H. Beck 2022); H. Weber-Grellet, in: A. Musil & H. Weber-Grellet (eds.), *Europäisches Steuerrecht* art. 113 TFEU, para 14 (2nd ed. C.H. Beck 2022).
 56. *See also* ECJ, 27 Feb. 1980, Case C-171/78, *Commission/Denmark*, ECLI:EU:C:1980:54, para. 20.
 57. Council Directive 2006/112/EC of 28.11.2006 on the common system of value added tax, OJ L347, p. 1 (11 Dec. 2006), which has, however, been supplemented and amended numerous times in the meantime.
 58. Council Directive (EU) 2020/262 of 19.12.2019 laying down the general arrangements for excise duty, OJ L58, p. 4 (27 Feb. 2020).
 59. Council Directive 2011/96/EU of 30.11.2011 on the common system of parent companies and subsidiaries of different Member States, OJ L345, p. 8 (29 Dec. 2011).
 60. Council Directive 2003/49/EC of 3.6.2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, OJ L157 p. 49 (26 June 2003).
 61. Council Directive 2009/133/EC of 19.10.2009 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 a European

company or a European cooperative society from one Member State to another Member State, OJ L310, p. 34 (25 Nov. 2009).

62. J. Schönfeld, *Die Rolle der Rechtsprechung im Europäischen Steuerrecht – Wolfgang Schön zum 60. Geburtstag*, IStR, p. 620 et. seq. (2022).
63. Council Directive (EU) 2016/1164 of 12.7.2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L193, p. 1 (19 July 2016) [ATAD I]; and Council Directive (EU) 2017/952 of 29.5.2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, OJ L144, p. 1 (7 June 2017) [ATAD 2].
64. Council Directive (EU) 2022/2523 of 14.12.2022 to ensure an overall minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union, OJ L328, p. 1 (22 Dec. 2022).
65. M. Valta, *Europäische Gerichtsbarkeit in Steuersachen*, in *Europäisches Steuerrecht*, para. 5.12 (H. Schaumburg, J. Englisch & L. Dobratz eds., Otto Schmidt 3rd ed. 2025); S. Kempny, in: A. Musil & H. Weber-Grellet (eds.), *Europäisches Steuerrecht Vor EStG Einführung*, para 35 (2nd ed. C.H. Beck 2022); Schaumburg, *Einbettung in den Prozess europäischer Integration*, in *Europäisches Steuerrecht*, para 2.10 (H. Schaumburg, J. Englisch & L. Dobratz eds., Otto Schmidt 3rd ed. 2025) speaks synonymously of a “silent” harmonization.
66. ECJ, 14 Feb. 1995, Case C-279/93, *Schumacker*, ECLI:EU:C:1995:31, para. 21; more recently for example ECJ, 27 April 2023, Case C-537/20, *L Fund*, ECLI:EU:C:2023:339, para. 41.
67. K. Lenaerts, *Die Entwicklung der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften auf dem Gebiet der direkten Besteuerung*, EuR, p. 729 (2009); J. Kokott & H. Ost, *Europäische Grundfreiheiten und nationales Steuerrecht*, EuZW, p. 497 (2011).

as European authorities.⁶⁸ The European Union is primarily a legislative union, while enforcement is decentralized to the Member States. However, the Member States are not only entitled but also obliged to enforce the law. This is because the intended harmonization of substantive tax law is only successful if this law is also enforced uniformly in the Member States. This follows from the loyalty principle of article 4, paragraph 3 of the TEU. In particular, the executive has a duty to ensure the proper enforcement of EU law in compliance with the principles of equivalence and effectiveness.⁶⁹ The requirements of the principle of loyalty are also substantiated by article 291, paragraph 1 of the TFEU.⁷⁰ This states that the Member States shall adopt all measures of national law necessary to implement legally binding Union acts.

4.3.2.2. Principle of procedural autonomy

The question of which procedural law the Member State authorities apply in the context of indirect enforcement must be distinguished from the aforementioned executive competences. According to the established case law of the ECJ, the principle of procedural autonomy applies.⁷¹ Insofar as EU law does not contain any common rules for the implementation of EU law by the Member States, the national authorities when implementing EU law act in accordance with the procedural and substantive rules of their own national law.⁷² Consequently, the detailed procedural rules applicable are, in principle, a matter for the domestic legal order of each Member State.⁷³ The principle of procedural autonomy is based, inter alia, on the general principle of subsidiarity in article 5, paragraph 3 of the TEU.⁷⁴ There is no need for uniform EU procedural law if the implementation of EU law can be carried out at least as efficiently by the Member States using their respective national procedural law.⁷⁵

The principle of procedural autonomy also applies in tax law.⁷⁶ Unlike substantive tax law, procedural tax law has

hardly been harmonized under EU law to date. The only exception is in cross-border tax enforcement, as already described. As a rule, substantive tax law is enforced by the national tax authorities and by applying the procedural law of the respective Member State.⁷⁷ However, the decentralized and indirect implementation of EU law by the Member States also harbours the risk of inefficiencies. The different procedural systems in the Member States may mean that EU law is not enforced equally and effectively in all Member States.⁷⁸ Procedural autonomy is, therefore, not unlimited.

4.3.2.3. Primary law limits to procedural autonomy

The principle of procedural autonomy is limited by primary law where the primacy and effectiveness of EU law are jeopardized. First, the fundamental rights of the European Union can limit national procedural autonomy.⁷⁹ However, these are not considered here because they cannot be used to justify implementation within the meaning of article 51, paragraph 1, sentence 1 of the CFR. In principle, fundamental freedoms can be a further limit under primary law. However, unlike in substantive tax law, the fundamental freedoms hardly have had a limiting effect on procedural tax law to date. This is probably also because the fundamental freedoms cannot be understood as meaning that Member States are required to harmonize their tax procedural laws.⁸⁰ Without harmonization under EU law, any disparities resulting from the lack of coordination between Member States' procedural laws must, therefore, be accepted.⁸¹

Instead, the principles of equivalence and effectiveness act as the main limits to national procedural autonomy.⁸² Both principles stand independently alongside each other⁸³ and are also characteristic of tax procedural law.⁸⁴ The principle of equivalence prohibits national procedural law from being less favourable in the enforcement of EU law than is the case in purely national situations.⁸⁵ Positively formulated, the rules for the enforcement of Member State

68. In general M. Schladebach, *Rechtsanwendungsgleichheit im Mehrebenensystem*, NVwZ, p. 1244 (2018).

69. Accordingly, art. 197 TFEU also only has a declaratory effect, see C. D. Classen, in: E. Grabitz, M. Hilf & M. Nettesheim (eds.), *Das Recht der EU*, article 197 TFEU, para. 1 (C.H. Beck 2021).

70. On the implementation of EU law by way of national tax procedural law, see J. Englisch, *Europäisches Steuerrecht*, in: *Steuerrecht*, para. 4.41 et seq. (K. Tipke & J. Lang eds., 25th ed. Otto Schmidt 2024).

71. See also ECJ, 17 May 2023, Case C-626/21, *Funke*, ECLI:EU:C:2023:412, para. 78; ECJ, 5 Dec. 2013, Case C-413/12, *Castilla y León*, ECLI:EU:C:2013:800, para. 30; ECJ, 15 March 2007, Case C-35/05, *Reemtsma Cigarettenfabriken*, ECLI:EU:C:2007:167, para. 40; ECJ, 19 Sept. 2006, Cases C-392/04 and C-422/04, ECLI:EU:C:2006:586, para. 57; on VAT law, see I. Oellerich, *Defizitärer Vollzug des Umsatzsteuerrechts*, p. 180 (2008) with further references.

72. ECJ, 21 Sept. 1983, Cases C-205-215/82, *Deutsche Milchkontor and others*, ECLI:EU:C:1983:233, para. 17.

73. Thus expressly ECJ, 7 Jan. 2004, Case C-201/02, *Wells*, ECLI:EU:C:2004:12, para. 67.

74. M. Potacs, *Bestandskraft staatlicher Verwaltungsakte oder Effektivität des Gemeinschaftsrechts? Anmerkung zum Urteil vom 13. Januar Kühne & Heitz NV/Productschap voor Pluimvee en Eieren*, Rs. C-453/00, EuR, p. 597 (2004); J. Englisch, *Europarechtliche Einflüsse auf den Untersuchungsgrundsatz im Steuerverfahren*, IStR, p. 38 (2009).

75. C. Calliess, in: C. Calliess & M. Ruffert (eds.), *TEU/TFEU art. 5 TEU*, para 20 (6th ed. C.H. Beck 2022).

76. Recently in tax law context, for example ECJ, 13 July 2023, Case C-615/21, *Napfény-Toll*, ECLI:EU:C:2023:573, para. 45; ECJ, 24 Feb.

2022, Case C-582/20, *SC Cridar Cons*, ECLI:EU:C:2022:114, para. 42; see also German FFC, 14 Nov. 2018, Case I R 47/16, BStBl. II 2019, 419, para. 27.

77. I. Oellerich, *Grundsatz und Grenzen mitgliedstaatlicher Verfahrensautonomie beim Vollzug harmonisierten Steuerrechts*, in *Europäisches Steuerrecht*, para 27.3 (H. Schaumburg, J. Englisch & L. Dobratz eds., Otto Schmidt 3rd ed. 2025).

78. On further potential effectiveness problems, see C. Ohler, in: R. Streinz, *EUV/AEU V*, article 197 TFEU, para. 2 (3rd ed. C.H. Beck 2018).

79. See also I. Oellerich, *Grundsatz und Grenzen mitgliedstaatlicher Verfahrensautonomie beim Vollzug harmonisierten Steuerrechts*, in *Europäisches Steuerrecht*, para 27.12 (H. Schaumburg, J. Englisch & L. Dobratz eds., Otto Schmidt 3rd ed. 2025).

80. ECJ, 14 April 2016, Case C-522/14, *Sparkasse Allgäu*, ECLI:EU:C:2016:253, para. 31.

81. ECJ, 14 April 2016, Case C-522/14, *Sparkasse Allgäu*, ECLI:EU:C:2016:253, para. 31.

82. The principle of neutrality can also be considered as an additional barrier, particularly in VAT law. However, this is not considered.

83. See also ECJ, 9 Nov. 1983, Case C-199/82, *San Giorgio*, ECLI:EU:C:1983:318, para. 12 et seq.

84. J. Kokott, *Das Steuerrecht der EU*, sec. 2, para. 65 (C.H. Beck 2018).

85. Specifically in tax law context, ECJ, 14 Sept. 2017, Case C-628/15, *The Trustees of the BT Pension Scheme*, ECLI:EU:C:2017:687, para. 58; ECJ, 12 Dec. 2006, Case C-446/04, *Test Claimants in the FII Group Litigation*, ECLI:EU:C:2006:774, para. 203; ECJ, 16 Dec. 1976, Case C-33/76, *Rewe-Zentralfinanz*, ECLI:EU:C:1976:188, para. 5.

law and the enforcement of EU law must be equivalent. Thus, the equivalence requirement can be seen as a manifestation of the general prohibition of discrimination.⁸⁶ It performs a similar function in the field of procedural law as fundamental freedoms do in substantive tax law. In principle, most Member States should have uniform tax procedural laws that do not distinguish between the enforcement of national law and that of EU law. However, the principle of equivalence in tax law may be relevant if, for example, there are exceptionally different procedural rules for the enforcement of largely harmonized indirect taxes and only partially harmonized direct taxes.⁸⁷

The principle of effectiveness is even more important in tax law. Among other things, the ECJ derives from the principle of loyalty that “the application of national law must not affect the scope and effectiveness of EU law” and must not make it “impossible in practice” to enforce EU law.⁸⁸ The principle of effectiveness, therefore, has a double effect. On the one hand, existing obstacles to enforcement in national law must remain unapplied, resulting in a negative harmonization of national procedural law.⁸⁹ On the other hand, there is a positive obligation to enforce EU law with sufficient effectiveness.⁹⁰ Each Member State is, therefore, obliged to take all legislative and administrative measures appropriate for ensuring enforcement of EU law.⁹¹ This obligation is also expressed in article 197, paragraph 1 of the TFEU. Safeguarding the effectiveness of EU law when enforcing it in national procedural law can, therefore, be derived as a subprinciple from the general principle of effectiveness (*effet utile*).⁹²

The principle of effectiveness plays a decisive role in tax law wherever the enforcement of substantive EU law must be ensured by the procedural law of the Member States. This applies first to the enforcement of substantive tax law, insofar as this is harmonized. For example, the ECJ has consistently held that the Member States are obliged

to collect the VAT due and to combat VAT fraud based on article 4(3) of the TEU in conjunction with the provisions of the VAT Directive.⁹³ The same must apply, in principle, to the enforcement of direct taxes insofar as these are harmonized by directives.⁹⁴ The ECJ has already ruled that the Member States must observe the principle of effectiveness when granting benefits under the Merger Directive.⁹⁵ In addition, the principle of effectiveness is important wherever the reimbursement of aid granted⁹⁶ or tax levied⁹⁷ in breach of EU law is concerned.

As a limit to the Member States’ procedural autonomy, the principle of effectiveness can lead to a certain minimum harmonization of national tax procedural law.⁹⁸ However, this is not a systematic harmonization of the law. Rather, the ECJ decides on a case-by-case basis when a national (procedural) provision impairs the effectiveness of EU law. In doing so, the ECJ must weigh up the interests of enforcing EU law against the conflicting national law of the Member States.⁹⁹ Based on these principles, the ECJ has already ruled in the context of tax law that reasonable time-limits for seeking remedies¹⁰⁰ and with regard to actions of a fiscal nature¹⁰¹ do not, in principle, violate the principle of effectiveness. On the other hand, Member States may have an obligation to check the taxpayer’s declarations, accounts and other relevant documents and to calculate and collect the tax due. As a result, comprehensive investigation of the tax relevant facts is required.¹⁰²

The principle of effectiveness, therefore, leads to a certain negative harmonization of tax procedural law which, however, only works on a case-by-case basis. In this respect, the principle of effectiveness has a similar significance for procedural tax law as fundamental freedoms have for substantive tax law.

4.3.2.4. Interim result

Just like the fundamental freedoms in the field of non-harmonized direct taxes, the principles of equivalence and

86. See also I. Oellerich, *Grundsatz und Grenzen mitgliedstaatlicher Verfahrensautonomie beim Vollzug harmonisierten Steuerrechts*, in: *Europäisches Steuerrecht*, para 27.6 (H. Schaumburg, J. Englisch & L. Dobratz eds., Otto Schmidt 3rd ed. 2025); in ECJ, 21 Sept. 1983, Cases C-205-215/82, *Deutsche Milchkontor and others*, ECLI:EU:C:1983:233, para. 21, 23 this prohibition of discrimination is clearly expressed.

87. See also on the non-payment of withholding tax compared to the non-payment of VAT ECJ, 2 May 2018, Case C-574/15, *Scialdone*, ECLI:EU:C:2018:295, para. 55; generally on the different enforcement of VAT and income tax also J. Kokott, *Das Steuerrecht der EU*, sec. 10, para. 6 (C.H. Beck 2018).

88. Fundamentally ECJ, 21 Sept. 1983, Cases C-205-215/82, *Deutsche Milchkontor and others*, ECLI:EU:C:1983:233, para. 22; subsequently e.g. ECJ, 24 April 2008, Case C-55/06, *Arcor*, ECLI:EU:C:2008:244, para. 166; ECJ, 13 Feb. 2014, Case C-479/12, *Gautzsch*, ECLI:EU:C:2014:75, para. 42 et seq.; ECJ, 10 Nov. 2022, Case C-385/21, *Zenith Media*, ECLI:EU:C:2022:866, para. 34.

89. I. Oellerich, *Grundsatz und Grenzen mitgliedstaatlicher Verfahrensautonomie beim Vollzug harmonisierten Steuerrechts*, in: *Europäisches Steuerrecht*, para 27.5 (H. Schaumburg, J. Englisch & L. Dobratz eds., Otto Schmidt 3rd ed. 2025).

90. C. D. Classen, in: E. Grabitz, M. Hilf & M. Nettesheim (eds.), *Das Recht der EU*, article 197 TFEU, para. 25 (C.H. Beck 2021).

91. Specifically on the enforcement of VAT law, but also with recourse to the VAT Directive, ECJ, 26 Feb. 2013, Case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105, para. 25; ECJ, 17 July 2008, Case C-132/06, *Commission/Italy*, ECLI:EU:C:2008:412, para. 37.

92. See also L. Jansen, *Das Steuerverfahren im Spannungsfeld von Europa- und Verfassungsrecht*, p. 79 (2012).

93. See also ECJ, 16 Oct. 2019, Case C-189/18, *Glencore Agriculture Hungary*, ECLI:EU:C:2019:1001, para. 40; ECJ, 21 Nov. 2018, Case C-648/16, *Fontana*, ECLI:EU:C:2018:932, para. 33; ECJ, 20 March 2018, Case C-524/15, *Menci*, ECLI:EU:C:2018:197, para. 18.

94. Likewise I. Oellerich, *Grundsatz und Grenzen mitgliedstaatlicher Verfahrensautonomie beim Vollzug harmonisierten Steuerrechts*, in: *Europäisches Steuerrecht*, para 27.8 (H. Schaumburg, J. Englisch & L. Dobratz eds., Otto Schmidt 3rd ed. 2025).

95. ECJ, 8 March 2017, Case C-14/16, *Euro Park Service*, ECLI:EU:C:2017:177, para. 34 et seq.; ECJ, 18 Oct. 2012, Case C-603/10, *Pelati*, ECLI:EU:C:2012:639, para. 23.

96. ECJ, 5 March 2019, Case C-349/17, *Eesti Pagar AS*, ECLI:EU:C:2019:172, para. 137.

97. ECJ, 30 June 2011, Case C-262/09, *Meilicke II*, ECLI:EU:C:2011:438, para. 55.

98. U. Geisenberger, *Der Einfluss des Europarechts auf steuerliches Verfahrensrecht*, p. 65 (2010); S. Schill & C. Krenn, in: E. Grabitz, M. Hilf & M. Nettesheim (eds.), *Das Recht der EU*, article 4 TEU, para. 93 (C.H. Beck 2018) speak instead of an “overlay” of national administrative law.

99. C. Krönke, *Die Verfahrensautonomie der Mitgliedstaaten der Europäischen Union*, p. 9 et. seq. (2013).

100. ECJ, 12 Feb. 2008, Case C-2/06, *Kempter*, ECLI:EU:C:2008:78, para. 60.

101. See also ECJ, 16 Dec. 1976, Case C-33/76, *Rewe Zentralfinanz*, ECLI:EU:C:1976:188, para. 5 f.; see also German FFC, 16 Sept. 2010, Case V R 57/09, BStBl. II 2011, 151, para. 28 et seq.

102. J. English, *Europarechtliche Einflüsse auf den Untersuchungsgrundsatz im Steuerverfahren*, IStR, p. 39 (2009).

effectiveness result in a negative harmonization of tax procedural law. Conflicting procedural law of the Member States must not be applied in individual cases if it is not in line with these principles.¹⁰³ As a result, procedural tax law, insofar as it serves the enforcement of substantive EU law, is not free from the influence of EU law despite the principle of procedural autonomy.

4.3.3. *Consequences for the Member States' binding to fundamental rights*

It is questionable what consequences result from this finding for the binding nature of fundamental rights. A distinction must again be made between a possible binding of the Member State tax administrations to the fundamental rights of the Union (see section 4.3.3.1.) and a possible cumulative binding to the respective national fundamental rights (see section 4.3.3.2.).

4.3.3.1. *Binding to the fundamental rights of the European Union*

The challenge in determining the fundamental rights standard of control when enforcing EU law arises from the fact that there are two different levels for which implementation within the meaning of article 51, paragraph 1, sentence 1 of the CFR can be applied.¹⁰⁴ On the one hand, the harmonization of substantive tax law alone could be sufficient for the implementation of EU law in tax enforcement. In this case, it would be irrelevant whether the procedural law ensuring tax enforcement has a connection to EU law. On the other hand, tax procedural law and its determination by EU law could also be given priority. Both connecting factors will, therefore, now be examined.

4.3.3.1.1. Implementation with positive harmonization of substantive tax law

In the context of VAT law, the ECJ has already ruled that measures taken by Member States to ensure the proper collection of VAT and to combat tax fraud – in particular, administrative penalties or criminal proceedings initiated – are to be regarded as the implementation of EU law within the meaning of article 51, paragraph 1 of the CFR.¹⁰⁵ The connecting factors for this implementation were neither the principle of equivalence nor the principle of effectiveness, but rather articles 2, 250(1) and 273 of the VAT Directive in conjunction with article 4, paragraph 3 of the TEU. Article 250, paragraph 1 of the VAT Directive stipulates the obligation of every taxable person to submit a VAT return. In addition, according to article 273 of the VAT Directive, Member States may impose other obli-

gations which they deem necessary to ensure the correct collection of VAT and to prevent tax evasion. The ECJ deduces from these provisions, in conjunction with the loyalty requirement of article 4, paragraph 3 of the TEU, that the Member States are obliged to enforce the VAT due and to combat VAT fraud.¹⁰⁶ If the Member States take corresponding measures, they are implementing EU law. In some cases, the ECJ explicitly refers to article 51, paragraph 1, sentence 1 of the CFR.¹⁰⁷ However, even in those decisions in which the ECJ does not explicitly refer to the CFR, it emphasizes that the Member States are bound by the principle of proportionality¹⁰⁸ and the principles of legal certainty and protection of legitimate expectations¹⁰⁹ as general principles of EU law. It can be inferred from all decisions that the Member States implement EU law when enforcing VAT law and, therefore, are bound by the fundamental rights of the European Union. This is also confirmed by the case law of the ECJ on the gathering of evidence in VAT fraud cases. According to the established case law of the ECJ, the Member States must refuse the right provided for in article 167 et seq. of the VAT Directive if this right is relied on for fraudulent or abusive ends by the taxable person.¹¹⁰ However, the rules of evidence laid down in national law must observe the rights guaranteed by EU law, especially the Charter.¹¹¹ Finally, the Member States also implement EU law when refunding excess VAT and paying interest on this refund amount and are, therefore, bound by the fundamental rights of the European Union.¹¹²

However, to the extent that the ECJ partially bases the implementation of EU law on article 325, paragraph 1 of

103. See also I. Oellerich, *Grundsatz und Grenzen mitgliedstaatlicher Verfahrenautonomie beim Vollzug harmonisierten Steuerrechts*, in *Europäisches Steuerrecht*, para 27.5 (H. Schaumburg, J. Englisch & L. Dobratz eds., Otto Schmidt 3rd ed. 2025).

104. ECJ, 13 Jan. 2022, Case C-363/20, *MARCAS MC*, ECLI:EU:C:2022:21, para. 37 f.

105. ECJ, 20 March 2018, Case C-524/15, *Menci*, ECLI:EU:C:2018:197, para. 21; ECJ, 5 April 2017, Cases C-217/15 and C-350/15, *Orsi and Baldetti*, ECLI:EU:C:2017:264, para. 16; ECJ, 17 Dec. 2015, Case C-419/14, *WebMindLicenses*, ECLI:EU:C:2015:832, para. 67; ECJ, 26 Feb. 2013, Case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105, para. 25 et seq.

106. See also ECJ, 21 Nov. 2018, Case C-648/16, *Fontana*, ECLI:EU:C:2018:932, para. 33; ECJ, 20 March 2018, Case C-524/15, *Menci*, ECLI:EU:C:2018:197, para. 18; ECJ, 9 July 2015, Case C-144/14, *Tomoiağa*, ECLI:EU:C:2015:452, para. 25.

107. Thus expressly ECJ, 20 March 2018, Case C-524/15, *Menci*, ECLI:EU:C:2018:197, para. 21; ECJ, 5 April 2017, Cases C-217/15 and C-350/15, *Orsi and Baldetti*, ECLI:EU:C:2017:264, para. 16; ECJ, 17 Dec. 2015, Case C-419/14, *WebMindLicenses*, ECLI:EU:C:2015:832, para. 67; ECJ, 26 Feb. 2013, Case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105, para. 27.

108. ECJ, 21 Nov. 2018, Case C-648/16, *Fontana*, ECLI:EU:C:2018:932, para. 35 et seq.

109. ECJ, 9 July 2015, Case C-144/14, *Tomoiağa*, ECLI:EU:C:2015:452, para. 33.

110. ECJ, 24 Feb. 2022, Case C-582/20, *SC Cridar Cons*, ECLI:EU:C:2022:114, para. 33; ECJ, 4 June 2020, Case C-430/19, *C.F. [Contrôle fiscal]*, ECLI:EU:C:2020:429, para. 42; ECJ, 16 Oct. 2019, Case C-189/18, *Glen-core Agriculture Hungary*, ECLI:EU:C:2019:1001, para. 34.

111. ECJ, 24 Feb. 2022, Case C-582/20, *SC Cridar Cons*, ECLI:EU:C:2022:114, para. 36; ECJ, 4 June 2020, Case C-430/19, *C.F. [Contrôle fiscal]*, ECLI:EU:C:2020:429, para. 45; ECJ, 16 Oct. 2019, Case C-189/18, *Glen-core Agriculture Hungary*, ECLI:EU:C:2019:1001, para. 37; ECJ, 17 Dec. 2015, Case C-419/14, *WebMindLicenses*, ECLI:EU:C:2015:832, para. 65 et seq.

112. See also ECJ, 12 May 2011, Case C-107/10, *Enel Maritsa Iztok 3*, ECLI:EU:C:2011:298, para. 29; ECJ, 11 July 2002, Case C-62/00, *Marks & Spencer*, ECLI:EU:C:2002:435, para. 44 with further references; K.-D. Drüen, *Unionsrechtliche Vorgaben für die Verzinsung von Umsatzsteuer*, UR, p. 267 et. seq. (2023); J. Englisch, *Verzinsung von Steuernachforderungen wegen fehlerhafter Berechnung von Umsatzsteuer*, UR, p. 652 (2011); see also H. Anzinger, *Verzinsung als Hemmschuh richterlicher Entscheidungen*, in *100 Jahre Steuerrechtsprechung in Deutschland 1918–2018 – Festschrift für den Bundesfinanzhof*, p. 1813 et. seq. (K.-D. Drüen, J. Hey & R. Mellinshoff eds., Otto Schmidt 2018) on the payment of interest on additional tax claims.

the TFEU,¹¹³ this is not convincing. The provision serves to protect the financial interests of the European Union. Therefore, the implementation of EU law can only be based on this provision to the extent that the financial interests of the European Union are affected. In principle, the European Union is currently entitled to a share of 0.3% of the Member States' VAT revenue.¹¹⁴ However, the European Commission has stated that a reduction in the Member States' VAT revenue would not have a negative impact on the EU budget.¹¹⁵ This is because the own resource based on gross national income compensates for any expenditure not covered by the VAT own resource. If the financial interests of the EU are not actually affected by VAT fraud, the link to article 325 of the TFEU for the implementation of EU law is not convincing.

As a result, at least in VAT law, the implementation of EU law can be justified by the fact that the substantive tax law is harmonized under EU law.¹¹⁶ This means that the national tax authorities are bound by the fundamental rights of the Union in all measures that serve to enforce VAT law.¹¹⁷

It is questionable whether these considerations can also be applied to the enforcement of direct taxes insofar as these are harmonized. Conversely, the question arises as to what distinguishes the enforcement of indirect and direct taxes and could, therefore, justify different treatment. In this respect, two aspects must be considered: first, the revenue from direct taxes is not part of the European Union's budget. In a recent judgment in the *MARCAS MC* case, the ECJ rejected the assumption of implementation in the field of corporate tax law because, unlike VAT, corporate tax is not part of the European Union's own resources system.¹¹⁸ Although the result is convincing, the reasoning is not. It is true that article 325 of the TFEU does not apply to direct taxation. However, the fact that VAT is part of the European Union's own resources is not the sole reason for the assumption of an obligation to implement indirect taxes, as already explained. Rather, the decisive factor is the obligation to effectively enforce EU law enshrined in article 4(3) of the TEU.¹¹⁹ This obligation of the Member States generally exists in connection with the administrative enforcement of EU law and is indepen-

dent of whether the enforced taxes belong to the European Union's budget. The fact that direct taxes, unlike VAT, are not part of the European Union's own resources does not justify a different treatment.

Second, the substantive law of indirect taxes is almost completely harmonized. In contrast, only "partial harmonization"¹²⁰ has taken place in direct taxes. Here, too, the ECJ's ruling in the already cited case of *MARCAS MC* could be understood to mean that, in the case of direct taxes that have not been fully harmonized, a recourse to substantive tax law for deciding if EU law is implemented is excluded.¹²¹ However, it should also be noted that the specific case obviously did not concern positively harmonized corporate tax law – for example, the Parent-Subsidiary Directive or the ATAD – so that the Court's decision is correct. However, in the author's opinion, a general statement beyond this¹²² cannot be inferred from the decision and would not be convincing.¹²³ This cannot be justified – as occasionally argued – by recourse to the case law of the ECJ in the *Berlioz Investment Fund* case.¹²⁴ There, the assumption of implementation essentially resulted from the obligations arising from the DAC. This meant that the procedural law itself was harmonized so that the substantive law was no longer relevant. However, the link to substantive tax law – as well as the determination of the degree of harmonization in general – should be considered on an "as far as" basis. Insofar as substantive tax law is harmonized, the Member States are also obliged to enforce it uniformly and effectively.¹²⁵ The obligation under article 4, paragraph 3 of the TEU exists irrespective of the scope and degree of harmonization.

However, it must be admitted that this can lead to practical problems in the application of the law. Because of the only selective harmonization, most administrative enforcement measures in the field of direct taxes will relate to both harmonized and non-harmonized tax law. In the end, however, there will only be one uniform enforcement measure, such as a specific investigative measure or the issuing of a tax assessment notice. In this respect, a separation seems hardly conceivable. The solution must, therefore, be that in those cases in which an enforcement measure also serves to enforce harmonized tax law, the measure qualifies as the implementation of EU law and, thus, must also be measured against the standard of fundamental EU rights.

113. ECJ, 20 March 2018, Case C-524/15, *Menci*, ECLI:EU:C:2018:197, para. 21; ECJ, 17 Dec. 2015, Case C-419/14, *WebMindLicenses*, ECLI:EU:C:2015:832, para. 67; ECJ, 26 Feb. 2013, Case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105, para. 27.

114. Art. 2(1)(b) of the 2021 decision on own resources of the EU. However, the VAT bases is capped at 50% of each country's Gross National Income (GNI) base, in order to limit the regressive aspects of the VAT-based resource.

115. Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax and Directive 2008/118/EC concerning the general arrangements for excise duty in respect of the EU defence effort of 24.4.2019, COM(2019) 192 final, p. 10.

116. Likewise L. Dobratz, *EU-Grundrechte und Umsatzsteuerrecht*, UR, p. 427 (2014); M. Krumm, in: K. Tipke & W. Kruse, *AO/FGO*, Introduction, para. 45 et. seq. (Otto Schmidt 2022); K.-D. Drüen, *Unionsrechtliche Vorgaben für die Verzinsung von Umsatzsteuer*, UR, p. 268 (2023).

117. See also German FFC, 30 Aug. 2022, Case X R 17/21, BStBl. II 2023, 396, para. 50.

118. ECJ, 13 Jan. 2022, Case C-363/20, *MARCAS MC*, ECLI:EU:C:2022:21, para. 38.

119. W. Kahl, in: C. Calliess & M. Ruffert (eds.), *TEU/TFEU* art. 4 TEU, para 128 (6th ed. C.H. Beck 2022).

120. J. English, *Gemeinschaftsgrundrechte im harmonisierten Steuerrecht*, in *Zukunftsfragen des deutschen Steuerrechts – MPI Studies on Intellectual Property, Competition and Tax Law Vol. 11*, p. 60 (W. Schön & K. E. M. Beck eds., Springer 2009).

121. ECJ, 13 Jan. 2022, Case C-363/20, *MARCAS MC*, ECLI:EU:C:2022:21, para. 387 et seq.; see also M. Krumm, in: K. Tipke & W. Kruse, *AO/FGO*, Introduction, para. 46 (Otto Schmidt 2022).

122. In any case, when dealing with ECJ judgments, the ECJ only said what it actually said, according to D. Hummel, *Der EuGH als Finanzgericht*, StuW, p. 214 (2024).

123. See also M. Krumm, in: K. Tipke & W. Kruse, *AO/FGO*, Introduction, para. 46 (Otto Schmidt 2022).

124. Id.

125. J. English, *Grundrechte und allgemeine Rechtsgrundsätze*, in *Europäisches Steuerrecht*, para 6.9 (H. Schaumburg, J. English & L. Dobratz eds., Otto Schmidt 3rd ed. 2025).

4.3.3.1.2. Implementation even with merely negative harmonization of substantive law?

Based on this finding, the follow-up question arises as to whether implementation within the meaning of article 51, paragraph 1, sentence 1 of the CFR also exists if the substantive tax law is only negatively harmonized. This concerns cases in which the substantive tax law is not systematically harmonized, but rather where the tax autonomy of the national legislators is merely subject to certain limits set by primary law. As already mentioned, this is still the usual case in direct taxation.

In this respect, the principle applies that the enforcement of non-harmonized taxes does not constitute the enforcement of EU law, even if the national tax legislators may only act within the framework provided by primary law. Thus, according to ECJ case law, a purely national procedure for levying income tax does not fall within the scope of EU law.¹²⁶ Similarly, the question of the extent to which EU law permits or prohibits the use of unlawfully obtained evidence must be assessed on the basis of fundamental Union rights when levying harmonized VAT,¹²⁷ but not when levying non-harmonized income tax.¹²⁸ Finally, the ECJ has ruled that a tax audit in the field of corporate taxation cannot be regarded as the implementation of EU law either so that, in this respect too, there is no obligation to comply with the EU fundamental rights.¹²⁹ This is convincing, in principle. The negative harmonization alone cannot lead to the assumption of a comprehensive implementation of EU law. This follows from the fact that negative harmonization is not a systematic harmonization of laws through EU law, but rather only a case-by-case incompatibility of Member State tax law with primary law as decided by the ECJ.¹³⁰ This means that the enforcement of direct taxes, insofar as they are not harmonized by secondary law, remains in principle a purely national matter. Accordingly, only national fundamental rights apply.

However, there are two exceptions to this principle. First, the fundamental rights of the Union may apply if the Member States restrict fundamental freedoms. According to the case law of the ECJ, the fundamental rights of the European Union may justify restrictions on the exercise of the fundamental freedoms. This group of cases has not yet played a role in tax law. However, it is not ruled out that the ECJ will refer to the Union's fundamental rights in future. For example, the ECJ has consistently recognized that restrictions on the exercise of the fundamental freedoms can be justified by the need for effective fiscal super-

vision.¹³¹ In this respect, the general principle of equality of article 20 of the CFR could justify the aforementioned restrictions, since the principle also requires – in its concretization as equality in the application of the law – equal tax enforcement. However, a justification due to the need for effective fiscal supervision has become considerably less important in view of the possibilities of cross-border administrative cooperation available to the Member States.¹³²

The second group of cases is, therefore, more important. This is because the Member States also implement EU law within the meaning of article 51, paragraph 1, sentence 1 of the CFR when it comes to the enforcement of a claim for repayment or reimbursement under EU law. This is conceivable in tax law in two constellations: (i) cases involving the recovery of aid granted in breach of EU law; and (ii) cases involving the reimbursement of a tax levied by the Member States in breach of EU law.

In the case of aid granted in breach of article 107 et seq. of the TFEU, equality of competition requires that the aid is immediately recovered by the Member States, including interest. Recovery is carried out in accordance with the procedural laws of the Member States.¹³³ From a German perspective, the provisions of the German Fiscal Code are, therefore, applicable.¹³⁴ Notwithstanding this, the Member States implement EU law in this respect and, thus, are also bound by the fundamental rights of the European Union.

The second constellation concerns the reimbursement of a tax levied by the Member States in breach of EU law. According to established case law of the ECJ, Member States are obliged to reimburse a tax levied in breach of EU law.¹³⁵ In the absence of EU law provisions, reimbursement is carried out in accordance with the procedural law of the Member States, whereby Member States are bound by the principles of equivalence and effectiveness.¹³⁶ In this respect, the ECJ has decided that the obligation to reimburse a tax levied in breach of article 110 of the TFEU follows from the principle of loyalty pursuant to article

126. ECJ, 24 Oct. 2019, Cases C-469/18 and C-470/18, *Belgian State*, ECLI:EU:C:2019:895, para. 17 f.

127. ECJ, 17 Dec. 2015, Case C-419/14, *WebMindLicenses*, ECLI:EU:C:2015:832, para. 91.

128. ECJ, 24 Oct. 2019, Cases C-469/18 and C-470/18, *Belgian State*, ECLI:EU:C:2019:895, para. 19.

129. ECJ, 13 Jan. 2022, Case C-363/20, *MARCAS MC*, ECLI:EU:C:2022:21, para. 39.

130. For this understanding of negative harmonization, see S. Kempny, in: A. Musil & H. Weber-Grellet (eds.), *Europäisches Steuerrecht Vor EStG Einführung*, para 35 (2nd ed. C.H. Beck 2022); see also M. Valta, *Europäische Gerichtsbarkeit in Steuersachen*, in *Europäisches Steuerrecht*, para 5.12 (H. Schaumburg, J. Englisch & L. Dobratz eds., Otto Schmidt 3rd ed. 2025).

131. ECJ, 30 June 2011, Case C-262/09, *Meilicke II*, ECLI:EU:C:2011:438, para. 41; ECJ, 9 Nov. 2006, Case C-433/04, *Commission/Belgium*, ECLI:EU:C:2006:702, para. 35; ECJ, 4 March 2004, Case C-334/02, *Commission/France*, ECLI:EU:C:2004:129, para. 27; ECJ, 8 July 1999, Case C-254/97, *Baxter and others*, ECLI:EU:C:1999:368, para. 18; ECJ, 15 May 1997, Case C-250/95, *Futura Participations and Singer*, ECLI:EU:C:1997:239, para. 31.

132. See also J. Kokott, *Das Steuerrecht der EU*, sec. 5, para. 34 (C.H. Beck 2018).

133. See art. 16 (3) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L248, p. 9 (24 Sept. 2015); see also recital 25 to this Regulation.

134. For more details, see U. Geisenberger, *Der Einfluss des Europarechts auf steuerliches Verfahrensrecht*, p. 71 et. seqs. (2010).

135. See also for non-harmonized taxes ECJ, 6 Oct. 2015, Case C-69/14, *Tarsia*, ECLI:EU:C:2015:662, para. 24; ECJ, 18 April 2013, Case C-565/11, *Irimie*, ECLI:EU:C:2013:250, para. 20; ECJ, 6 Sept. 2011, Case C-398/09, *Lady & Kid et al.*, ECLI:EU:C:2011:540, para. 17; ECJ, 30 June 2011, Case C-262/09, *Meilicke II*, ECLI:EU:C:2011:438, para. 55 et seq.

136. ECJ, 6 Oct. 2015, Case C-69/14, *Tarsia*, ECLI:EU:C:2015:662, para. 27; ECJ, 18 April 2013, Case C-565/11, *Irimie*, ECLI:EU:C:2013:250, para. 23; ECJ, 30 June 2011, Case C-262/09, *Meilicke II*, ECLI:EU:C:2011:438, para. 55.

4, paragraph 3 of the TEU.¹³⁷ The reimbursement, therefore, also constitutes the implementation of EU law and falls within the scope of application of the fundamental rights of the European Union. The ECJ, therefore, does not refer to the principles of equivalence and effectiveness for implementation within the meaning of article 51, paragraph 1, sentence 1 of the CFR, but rather to the principle of loyalty in article 4, paragraph 3 of the TEU.

In summary, the following therefore applies: the fact that the Member States must exercise their powers in the field of non-harmonized direct taxes in compliance with EU primary law and, in particular, the fundamental freedoms does not mean that the tax authorities also implement EU law when enforcing these taxes. The link to EU law is not strong enough to justify binding the Member States to the fundamental rights of the Union solely based on substantive tax law. However, there are two exceptions to this principle: first, the European Union's fundamental rights are applicable if the Member States restrict fundamental freedoms. Second, there is an enforcement of EU law if the ECJ has already established that the granting of aid or the levying of a tax is in breach of EU law. When reversing such aid or tax through the Member States' tax procedural law, the Member States are bound by the fundamental rights of the Union (and the national fundamental rights, see section 4.3.3.2.).

4.3.3.1.3. In addition: Principles of equivalence and effectiveness as connecting factors?

Incidentally, the same result is also reached if the question of implementation is not linked to the enforcement of substantive tax law, but rather directly to the tax procedural law that ensures this enforcement. It is true that this is not positively harmonized at EU level, with a few exceptions. However, as already explained, Member States are subject to primary law limits when enforcing EU law, despite the principle of procedural autonomy. The ECJ also argues (additionally) with the principles of equivalence and effectiveness when deciding on the implementation of EU law.¹³⁸ These principles are, in turn, always applicable when EU law is indirectly enforced by the Member States. In tax law, this includes the enforcement of taxes harmonized by secondary law, the recovery of tax aid that violates EU law and the reimbursement of taxes levied in violation of EU law.

In contrast to substantive tax law, these principles of primary law are likely to constitute a sufficient connecting factor for the implementation of EU law within the meaning of article 51, paragraph 1, sentence 1 of the CFR.¹³⁹ First, the principles of equivalence and effectiveness only apply if they have been activated by other EU law, e.g. the obligation to enforce harmonized taxes

or the obligation to reimburse an unduly levied tax. In other words, both principles presuppose the enforcement of EU law. Second, both principles lead to a negative harmonization of tax procedural law.¹⁴⁰ This results in certain obligations for the Member States, namely to ensure the effective implementation of EU law and to apply procedural law in a non-discriminatory manner. These are abstract general obligations, which are sufficient to bind the Member States to the fundamental rights of the European Union.

4.3.3.2. On the cumulative binding to national fundamental rights

In view of the extensive binding of the Member States to the fundamental rights when enforcing harmonized tax law, the follow-up question arises as to whether there is still room for the cumulative application of national fundamental rights standards. As already explained, this is a question of the degree of harmonization of EU law. In the field of tax enforcement, however, there is the particularity that there are two possible legal points of reference for determining the degree of harmonization: the harmonized substantive tax law or the largely non-harmonized procedural tax law. At first glance, it seems convincing to use substantive tax law as a starting point. After all, this law also provides the sufficient reference for the implementation of EU law within the meaning of article 51, paragraph 1, sentence 1 of the CFR. However, in principle, harmonized substantive tax law does not contain any specific requirements for tax enforcement by the Member States. Such requirements can only arise from procedural tax law, which has hardly been harmonized to date. It would, therefore, make no sense to assume a full harmonization in the field of tax enforcement only because the substantive tax law on which enforcement is based has been fully harmonized. After all, how exactly EU tax law is enforced and what measures the Member States take are primarily determined by national procedural tax law, which is subject to certain limits set by the principles of equivalence and effectiveness. Consequently, in the context of the protection of fundamental rights, full harmonization should only be assumed if both the substantive tax law to be enforced and the procedural tax law are harmonized under EU law and no leeway remains for the Member State tax administrations. As these conditions have not yet been met in the enforcement of EU tax law, the national tax authorities remain cumulatively bound by the respective national fundamental rights.¹⁴¹

4.3.4. Interim conclusion

For "implementation" to be assumed, it is sufficient that one of the two legal levels, i.e. substantive tax law or procedural tax law, is harmonized under EU law. EU law

137. ECJ, 30 June 2016, Case C-205/15, *Toma and Biroul Executorului Judecătoresc Horatiu-Vasile Cruduleci*, ECLI:EU:C:2016:499, para. 28.

138. On VAT law ECJ, 12 May 2011, Case C-107/10, *Enel Maritsa Iztok 3*, ECLI:EU:C:2011:298, para. 29; ECJ, 21 Jan. 2010, Case C-472/08, *Alstom Power Hydro*, ECLI:EU:C:2010:32, para. 17; ECJ, 17 Nov. 1998, Case C-228/96, *Aprile*, ECLI:EU:C:1998:544, para. 18 with further references.

139. L. Dobratz, *EU-Grundrechte und Steuerrecht*, UR, p. 427 (2014), also points in this direction.

140. See also I. Oellerich, *Grundsatz und Grenzen mitgliedstaatlicher Verfahrenautonomie beim Vollzug harmonisierten Steuerrechts*, in *Europäisches Steuerrecht*, para 27.5 (H. Schaumburg, J. Englisch & L. Dobratz eds., Otto Schmidt 3rd ed. 2025), on the principle of effectiveness.

141. See also M. Krumm, *Grundfragen des steuerlichen Datenverarbeitungsrechts*, DB, p. 2185 (2017).

has, so far, only had a minor effect on purely domestic tax enforcement in the Member States. In particular, there is no secondary law in this field, meaning that the necessary reference to EU law only exists if substantive tax law is harmonized at EU level. In the field of indirect taxes, harmonization of substantive tax law is already well advanced, so further requirements can also be placed on national enforcement by primary law. In the area of direct taxes, on the other hand, the only selective harmonization of substantive tax law is also reflected when it comes to the enforcement of these taxes. Although the primary law limits applicable to harmonized indirect taxes also apply in this respect. However, they only apply insofar as harmonization has been achieved through secondary law.

When determining the degree of harmonization, a cumulative approach applies in deviation from the aforementioned alternative approach. To the extent that neither substantive tax law nor procedural law leaves the Member States any leeway, there is full harmonization. In view of the current predominantly negative harmonization of procedural tax law, this situation does not yet exist. The consequence is cumulative protection of fundamental rights by the CFR and national fundamental rights when the Member States enforce harmonized substantive tax law.¹⁴²

4.4. Tax procedural law and non-tax harmonization

The previous statements could give the impression that the European Union's fundamental rights are the primary standard of control when Member States' are enforcing tax law. However, despite progressive harmonization, the domestic enforcement of non-harmonized tax law through national tax procedural law continues to be the rule. Therefore, tax procedural law still is primarily a purely national matter.¹⁴³ The standard of control when enforcing a purely national tax law by the Member State's tax authorities is therefore, in principle, the national fundamental rights system.¹⁴⁴

However, even this finding must now be put to the test. This is because the implementation of EU law within the meaning of article 51, paragraph 1, sentence 1 of the CFR can also result from non-tax secondary law – particularly the GDPR – in tax procedural law.¹⁴⁵ The GDPR also largely applies to tax proceedings and has a significant influence on the binding to fundamental rights.

The GDPR,¹⁴⁶ which specifies and standardizes the protection of natural persons with regard to the processing of personal data enshrined in article 8 of the GDPR, affects almost all areas of life.¹⁴⁷ Tax procedures are not exempt from this. There is no doubt that every tax assessment leads to fully or partially automated processing of personal data within the meaning of article 2, paragraph 1 of the GDPR.¹⁴⁸ According to article 2(2)(a) of the GDPR, the GDPR does not apply to the processing of personal data in the course of an activity which falls outside the scope of Union law. However, according to strict interpretation by the ECJ, only those areas that are intended to protect essential State functions and the fundamental interests of society are excluded.¹⁴⁹ This applies to national security.¹⁵⁰ Tax law is obviously not one of them, even if it is recognized as an important objective of general public interest by article 23, paragraph 1(e) of the GDPR.¹⁵¹ There is no other explanation for the fact that the ECJ makes no reference whatsoever to the exception in article 2(2)(a) of the GDPR in tax procedural law.¹⁵² It was not clear from the request for a preliminary ruling which types of taxes were affected in the specific case. However, as neither the Advocate General nor the ECJ addressed this, the distinction between the enforcement of harmonized and non-harmonized taxes does not appear to be relevant.¹⁵³ The German Federal Fiscal Court has also endorsed this understanding.¹⁵⁴ Accordingly, the GDPR applies almost without restriction in tax proceedings. This is because almost every investigation, assessment or collection measure by the tax authorities also constitutes the processing of personal data. Consequently, the GDPR has an effect throughout the entire administrative procedure, i.e. from the determination of the tax-relevant facts (e.g. through an tax audit) to the assessment and collection of the taxes as well as (administrative or judicial) appeal proceedings.

This raises the question of what significance this far-reaching application of the GDPR in tax proceedings has for the

142. The microanalysis required, in principle, to determine the degree of harmonization should therefore currently be dispensable when implementing EU law through national procedural law.

143. R. Seer, *Europäisierung des Steuerverfahrensrechts – Wege zu einem Steuerverwaltungsraum*, in *Heidelberger Beiträge zum Finanz- und Steuerrecht*, Vol. 6 – *Europäisches Finanzrecht: Stand – Methoden – Perspektiven*, p. 193 (H. Kube & E. Reimer (eds.), 2017).

144. K.-D. Drüen, *Rechtsrahmen und Rechtsfragen der multilateralen Betriebsprüfung*, DStR-Beih, p. 84 (2013).

145. This category, therefore, becomes particularly relevant if neither the procedural tax law nor the substantive tax law to be enforced is harmonized. Otherwise, the fundamental rights of the Union already apply anyway.

146. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27.4.2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L119, p. 1 (4 May 2016).

147. Opinion of Advocate General Bobek, 2 Sept. 2021, Case C-175/20, *Valsts ienemumu dienests*, ECLI:EU:C:2021:690, para. 1 correctly speaks of a “virtually limitless” reach of the GDPR.

148. Data processing in the tax authorities is partially automated; in this respect, it is irrelevant whether the files are kept in paper form, see also German FFC, 12 April 2024, Case IX R 35/21, BFH/NV 2024, 954, para. 17 et seq.

149. ECJ, 22 June 2021, Case C-439/19, *B penalty points*, ECLI:EU:C:2021:504, para. 67.

150. See Recital 16 to the GDPR; ECJ, 22 June 2021, Case C-439/19, *B penalty points*, ECLI:EU:C:2021:504, para. 63 f., also with reference to the material scope of application of the previously applicable Data Protection Directive; also D. von Armansperg, *Datenschutz im Steuerverfahren nach der DSGVO – Anwendungsbereich und Betroffenenrechte*, DStR, p. 455 (2021), who also considers the retention of the broad scope of application to be convincing.

151. T. Sendke, *Aktuelle Verfahren des EuGH im Bereich des Steuerverfahrensrechts*, ISR, p. 49 (2022).

152. ECJ, 24 Feb. 2022, Case C-175/20, *Valsts ienemumu dienests*, ECLI:EU:C:2022:124, para. 39 f.

153. For example, see T. Sendke, *Aktuelle Verfahren des EuGH im Bereich des Steuerverfahrensrechts*, ISR, p. 49 (2022).

154. German FFC, 12 March 2024, Case IX R 35/21, BFH/NV 2024, 954, para. 24; subsequently also German FFC, 7 May 2024, IX R 21/22, BFH/NV 2024, 1070, para. 22.

binding of the Member States to the different fundamental rights systems. The provisions of the GDPR impose obligations on the tax administrations of Member States every time they process personal data. In some cases, the GDPR only contains abstract, general obligations to act, such as the principles listed in article 5 of the GDPR, which every processing of personal data must comply with. In particular, the rights of data subjects regulated in chapter III of the GDPR result in further specific obligations for the Member States. In the past, the ECJ has already allowed a less close connection to EU law to constitute an implementation within the meaning of article 51, paragraph 1, sentence 1 of the GDPR. This means that within the scope of application of the GDPR, there is also an implementation of EU law within the meaning of article 51, paragraph 1, sentence 1 of the CFR. Since the European Union's fundamental rights are ancillary to secondary law, their scope of application is broadened by the cross-sectional nature of data protection law.¹⁵⁵ However, it should also be noted that the GDPR will, at best, result in a certain minimum harmonization of Member State tax procedural law.¹⁵⁶ In particular, Member States have considerable leeway in the area of tax law due to the opening clause in article 23, paragraph 1(e) of the GDPR. In the absence of full harmonization, the national fundamental rights remain applicable. In this respect, cumulative protection of fundamental rights should be the rule in tax proceedings.

However, it is questionable how the understanding of a significantly expanded scope of application of the European Union's fundamental rights by the GDPR can be reconciled with the aforementioned case law of the ECJ, according to which there is generally no obligation to comply with the European Union's fundamental rights in the area of purely national tax procedural law.¹⁵⁷ In this respect, it should be noted that neither of the two proceedings was based on the requirements of the GDPR. It is true that the question of the use of evidence in the context of income taxation also involves the processing of personal data. However, the GDPR does not contain any specific requirements for the use of evidence. In addition, the collection of evidence was in any case related to criminal proceedings, to which the GDPR does not apply pursuant to article 2(2)(d) of the GDPR. Finally, it should be noted that in the context of a request for a preliminary ruling pursuant to article 267 of the TFEU, the ECJ only decides on the specific legal question raised. According to article 94 of the Rules of Procedure of the ECJ, it is up to the referring court to explain to what extent a legal question relates to EU law.¹⁵⁸ The referring Belgian *Hof van Cassatie* failed in

doing so in the case decided. It is, therefore, possible that the ECJ's decision would have been different if the referring court had also made a reference to the GDPR.

In the *MARCAS MC* case, there was probably another decisive reason for the lack of implementation of EU law assumed by the ECJ. The underlying main proceedings concerned a tax audit in the field of corporate taxes.¹⁵⁹ The GDPR only regulates the protection of natural persons with regard to the processing of personal data.¹⁶⁰ Thus, the GDPR does not protect legal persons, meaning that the GDPR has no influence on the procedure for determining, assessing and collecting corporate taxes.¹⁶¹ The GDPR was, therefore, simply not applicable in the case decided by the ECJ.

As a result, the importance of the GDPR for the national tax procedures should not be underestimated. The GDPR applies regardless of whether harmonized or non-harmonized taxes are being enforced. Therefore, the GDPR leads to a certain minimum harmonization of tax procedural law. This means that the Member States' tax authorities are largely bound by the fundamental rights of the European Union when enforcing non-harmonized taxes. Only the domestic enforcement of corporate income tax law is likely to be unaffected by EU law, insofar as the substantive law is not harmonized by the ATAD or other secondary law. Cumulative protection of EU and national fundamental rights is already the rule in procedural tax law.¹⁶²

5. Conclusions

Examining the status of the harmonization of tax enforcement within the European Union leaves a mixed picture. The tax procedural law is only partially harmonized. Secondary law only exists in the field of cross-border tax enforcement, namely the Regulation (EU) No. 904/2010 in VAT law and the DAC. In this respect, the European Union plays a pioneering role in cross-border exchange of information.¹⁶³ An "internal market for tax information" is being created.¹⁶⁴ The process of administrative cooperation is largely harmonized. Precisely because this is a rather technical matter, Member States have little room for leeway. The effective protection of fundamental rights must, therefore, be guaranteed by the European Union's fundamental rights.

In contrast, there is currently no secondary tax procedural law for domestic tax enforcement. However, pro-

155. T. Sendke, *Datenverarbeitung für steuerliche Zwecke*, ISR, p. 108 (2023).

156. M. Krumm, *Grundfragen des steuerlichen Datenverarbeitungsrechts*, DB, p. 2187 (2017) also speaks of Member States' leeway for legislation despite full harmonization.

157. ECJ, 24 Oct. 2019, Cases C-469/18 and C-470/18, *Belgian State*, ECLI:EU:C:2019:895, para. 19; ECJ, 13 Jan. 2022, Case C-363/20, *MARCAS MC*, ECLI:EU:C:2022:21, para. 39.

158. ECJ, 24 Oct. 2019, Cases C-469/18 and C-470/18, *Belgian State*, ECLI:EU:C:2019:895, para. 24; ECJ, 20 Sept. 2018, Case C-343/17, *Fremoluc*, ECLI:EU:C:2018:754, para. 22; ECJ, 8 Dec. 2016, Cases C-532/15 and C-538/15, *Eurosancamiento and others*, ECLI:EU:C:2016:932, para. 47; ECJ, 15 Nov. 2016, Case C-268/15, *Ullens de Schooten*, ECLI:EU:C:2016:874, para. 55.

159. ECJ, 13 Jan. 2022, Case C-363/20, *MARCAS MC*, ECLI:EU:C:2022:21, para. 16 et seq.

160. See art. 1(1) GDPR.

161. Here too, however, the GDPR can always become relevant if natural persons are affected, e.g. as shareholders or managing directors of a legal entity.

162. The new AI Regulation is also likely to have a further impact on tax procedural law in the future. Insofar as the tax authorities use AI applications for tax assessment, they are implementing EU law and are, therefore, bound by the fundamental rights of the Union.

163. X. Oberson, *International Exchange of Information in Tax Matters*, para. 8.03 (2018).

164. See G. Kofler, *Entwicklungslinien und Zukunftsfragen des Europäischen Steuerrechts*, in *100 Jahre Steuerrechtsprechung in Deutschland 1918-2018 – Festschrift für den Bundesfinanzhof*, p. 734 (K.-D. Drüen, J. Hey & R. Mellinghoff eds., Otto Schmidt 2018).

cedural and substantive tax laws are not isolated matters. The enforcement of harmonized tax law constitutes the enforcement of EU law. For this reason, EU law places special requirements on its enforcement in the Member States. This is sufficient to assume an “implementation” of EU law within the meaning of article 51, paragraph 1, sentence 1 of the CFR. However, there is no full harmonization. The consequence is a cumulative protection through EU fundamental rights and national fundamental rights.

Finally, tax procedural law can also be harmonized through non-tax secondary law. This applies to the GDPR,

which is a gateway for the application of EU fundamental rights. However, in the absence of full harmonization, national fundamental rights remain applicable. This means that cumulative protection of fundamental rights in tax procedural law is the rule. Overall, tax enforcement currently oscillates between the sovereignty of member states on the one hand and harmonization by the EU on the other. Since partly national and partly EU law applies, the question of the effective protection of fundamental rights is of particular importance and deserves appropriate attention.

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