EUROPEAN LAW/EUROPEAN TAX LAW

PART III

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OVERVIEW

Overview

- Tax sovereignty remains largely within the competence of the member states
- The European Union has only limited competences, which, moreover, can only be exercised unanimously, i.e. with the consent of all Member States in the Council of the European Union
- The EU is not allowed to introduce a new tax, for example an "EU tax" to finance its expenditures
- An insignificant exception to the inadmissibility of EU-owned taxes is the taxation of the income of EU employees (cf. Art. 12 of the Protocol on the Privileges and Immunities of the European Communities of April 8, 1965)

Overview

- The consequence of this legal situation is that, although European tax law has an impact on the Member States' tax systems, they (for the most part) continue to enact and apply their national laws within this framework
- Nevertheless, European law has also become increasingly important for national tax law in the past:

➢ Many standards and administrative regulations have been amended or enacted as a result of EU legal influences

➢ In addition, numerous standards of national tax law of the Member States are under scrutiny

➢ The question is to what extent national standards are compatible with EU law

INFLUENCE OF SECONDARY LAW - BASICS

Influence of secondary law - Basics

- In the area of taxation, directives are the primary regulatory instrument
- Directives under Article 288 (3) TFEU are binding targets for the Member States
- They therefore require transformation into national law and are generally not directly effective
- Insofar as EU directives are to regulate income taxes, Art. 115 TFEU is the basis for the EU's authorization: The principle of unanimity applies
- Directives are exceptionally applicable even without implementation if they work in favor of the citizen, were culpably not or incompletely transposed and the content of the directive is sufficiently defined

DIRECTIVE 2006/112/EC (VAT SYSTEM DIRECTIVE)

Directive 2006/112/EC (VAT system directive)

- The Value Added Tax System Directive (VATSystRL) is a European directive which, on the basis of Art. 113 TFEU, prescribes a largely uniform value added tax system in the European Union

➢ In order to create an internal market within the European Union, Member States are to apply legislation on the taxation of transactions that does not distort the conditions of competition and does not impede the free movement of goods and services

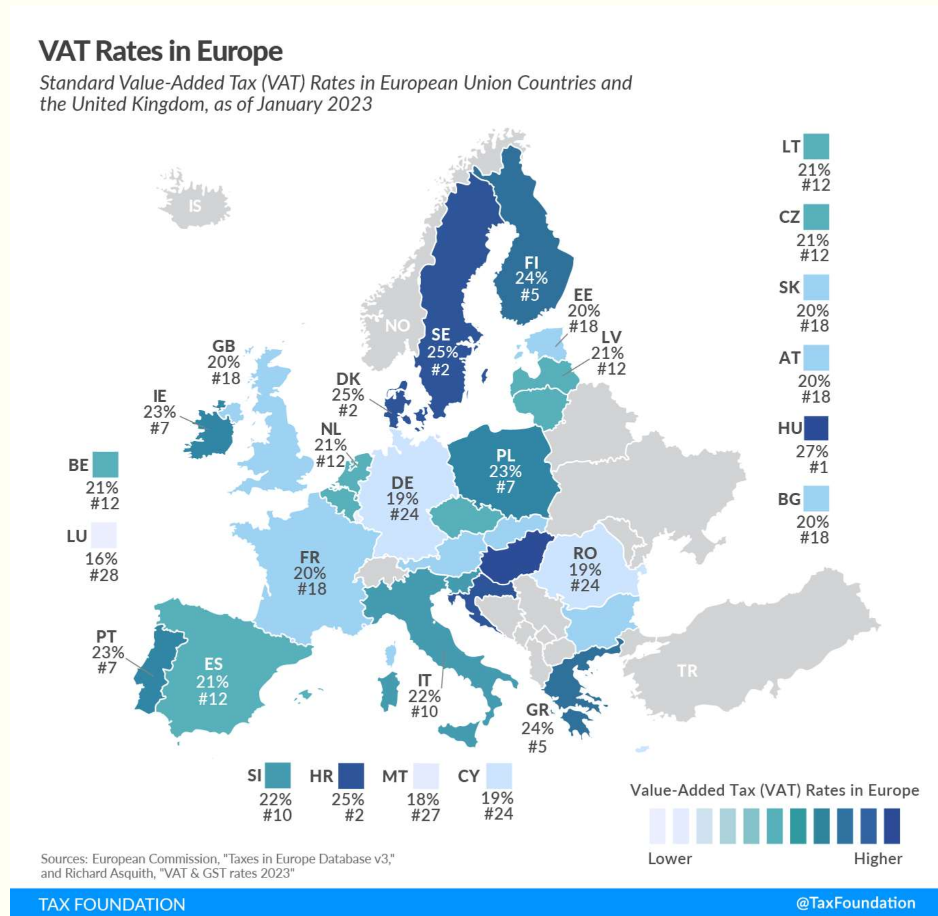
➢ To this end, the Directive harmonizes national legislation on turnover taxes by prescribing a VAT system to be complied with

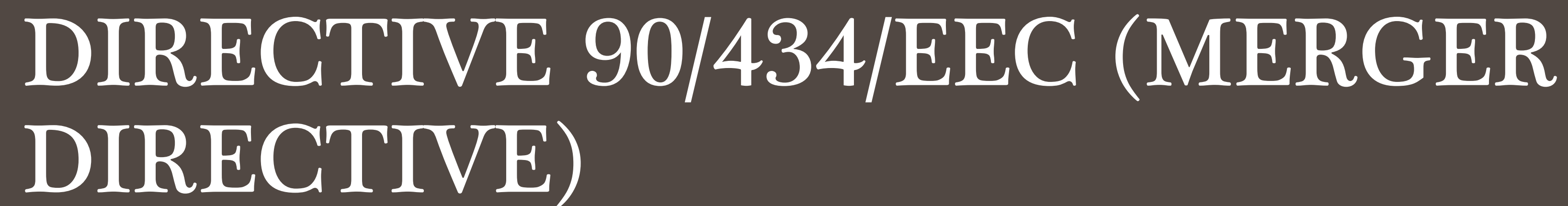
- Member States must adhere to a system of all-phase net VAT with input tax deduction

Directive 2006/112/EC (VAT system directive)

- Under this system, VAT is due at each stage of the value chain, but entrepreneurs can deduct the VAT incurred on inputs as input tax vis-à-vis the tax authorities
- This ensures that the product is not subject to sales tax during production
- Only when an end consumer or a company not entitled to deduct input tax purchases the product does the VAT amount remain in the treasury
- After the Council reached an agreement for amendments in December 2021 the amended directive entered into force in April 2022
- It provides for a regular tax rate of at least 15% and a reduced tax rate of at least 5%
- Full tax exemption is only possible in certain areas, including food and other goods to cover basic needs

Directive 2006/112/EC (VAT system directive)




DIRECTIVE 90/434/EEC (MERGER
DIRECTIVE)

Directive 90/434/EEC (Merger Directive)

- A common tax system for corporations in cross-border restructuring within the EU was first applied in 1992 and improved in 2006
- On July 23, 1990, the Council adopted Directive 90/434/EEC on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (the "Merger Directive")
- The purpose of the Merger Directive is to remove obstacles to cross-border restructurings involving companies resident in two or more Member States
- The Merger Directive contains a list of types of companies that fall within the scope of the Directive
- The companies must be subject to corporate income tax without any right of option, and be considered resident in the Community for tax purposes

Directive 90/434/EEC (Merger Directive)

- Directive 2005/19/EC amending the Merger Directive

➢ On October 17, 2003, the Commission approved a proposal (COM(2003) 613) to amend the Directive

➢ Later, on 17 February 2005, the Council adopted an amended version of this proposal as Directive 2005/19/EC

➢ Main innovations:

- The benefits of the Merger Directive will be available to more entities, including the European Company and the European Cooperative Society

- The benefits of the Directive can also be enjoyed in the case of transparent entities

PARENT-SUBSIDIARY DIRECTIVE

Parent-Subsidiary directive

- Scope of application

- Entered into force on July 30, 1990 and regulates the taxation of dividend payments between associated companies within the European Union
- The debtor and creditor of the payments must be corporations domiciled in two different member states of the European Union
- A minimum shareholding of the receiving company (parent company) in the amount of 10% of the capital of the company making the payments (subsidiary) is required
- If, alternatively, a calculation is made on the basis of voting rights, a minimum holding period of two years is added
- Participations via a permanent establishment located in the country of domicile of the subsidiary are also favored

Parent-Subsidiary directive

- Legal consequences

- In principle, multiple taxation of dividends paid across borders is to be avoided
- The subsidiary is taxed in accordance with the regulations of the state in which it is resident, which is entitled to the full tax revenue
- However, it may not levy any capital gains tax on the distribution of the dividends
- The state of residence of the parent company is responsible for avoiding double taxation: it may apply either the exemption or the imputation method to the dividend payments

Parent-Subsidiary directive

- Implementation into German law

➢ In the case of investments into Germany (inbound), no withholding tax is levied in accordance with Sec. 43b EStG and Sec. 50d (1), (1a) and (2) EStG

➢ National abuse regulations are laid down in Sec. 50d (3) EStG; in these cases, there is no entitlement to application of the directive in favor of the foreign company

➢ In the case of investments outside Germany (outbound), dividends are exempt pursuant to Sec. 8b (1) of the German Corporate Income Tax Act (KStG)

➢ In this context, 5% of the payments received are regarded as non-deductible operating expenses when determining taxable income (modified zero-income method)

COMMON REPORTING STANDARD
(CRS)

Common Reporting Standard (CRS)

- History

➢ The Common Reporting Standard was developed by the OECD after the U.S. made a push for data exchange between the U.S. and the closing countries with its information exchange FATCA and the extension for numerous countries with the Inter Governmental Agreement (IGA)

➢ On July 21, 2014, the OECD published its proposal for the automatic exchange of financial account information

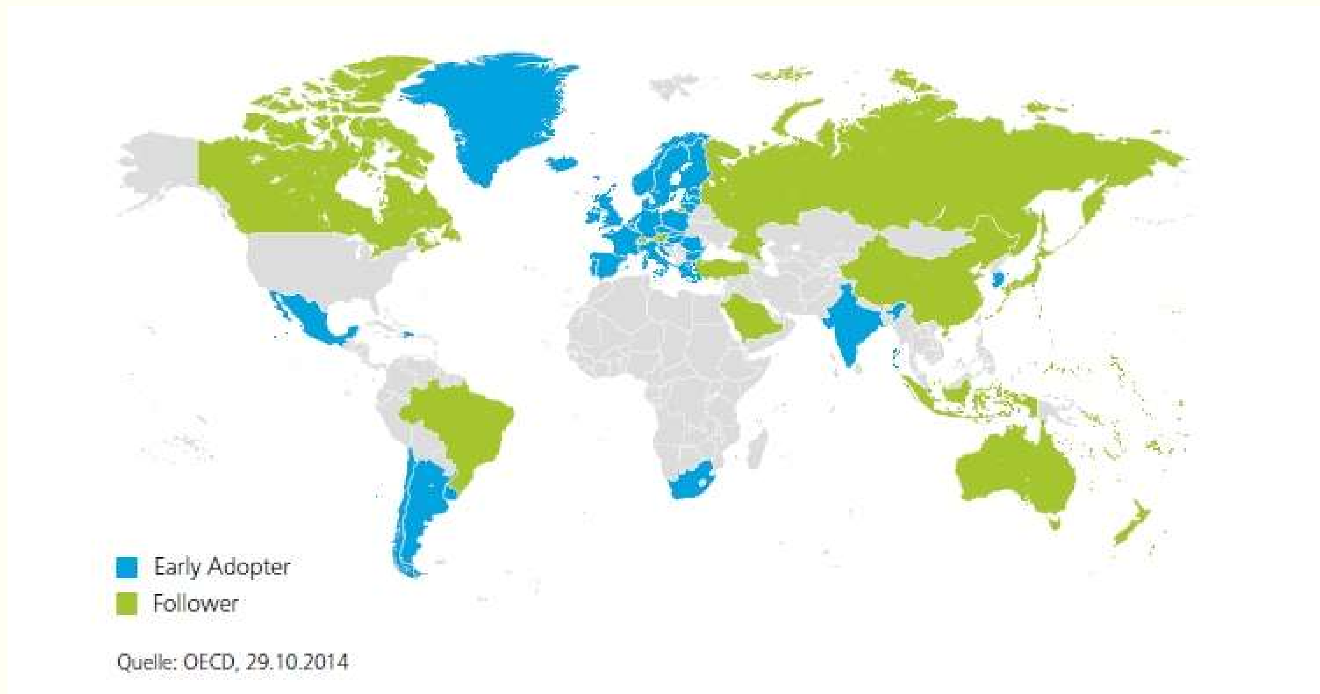
➢ The proposal was based on the Multilateral Agreement between Competent Authorities on the Automatic Exchange of Financial Account Information

➢ In addition, in December 2014, this standard was incorporated into the EU Mutual Assistance Directive with the obligation to exchange the relevant data between the tax administrations of the Member States of the European Union on the basis of this standard for the first time for taxation periods starting from 2016 as of 30 September 2017

- By mid-2021, 104 countries had agreed to the CRS standard

Common Reporting Standard (CRS)

- History



Common Reporting Standard (CRS)

- Procedure:

- The international requirements were implemented in Germany with the Act on the Automatic Exchange of Information on Financial Accounts in Tax Matters (Financial Account Information Exchange Act - FKAustG) of December 21, 2015

- The information required for the exchange is collected by the financial institutions (depository institutions, depository institutions, investment undertakings and specified insurance companies) and forwarded to the Federal Central Tax Office.

- In 2017, the following data were reported thereafter:

  - Financial accounts that have already been opened as of December 31, 2015 are considered to be legacy (pre-existing) accounts

  - Financial accounts opened on or after January 1, 2016 must be identified in accordance with the new requirements (Newaccount)

Common Reporting Standard (CRS)

- Exchanged Information:

➢ Name, Address, State of residence,

➢ Tax identification number,

➢ Date of birth, Birthplace,

➢ Account number,

➢ Name and identification number of the financial institution,

➢ Account balance,

➢ Interest, dividends, other income

DIRECTIVE 2003/49/EC (INTEREST AND ROYALTIES DIRECTIVE)

Directive 2003/49/EC (interest and royalties directive)

- Scope of application

➢ Entered into force on January 1, 2004

➢ Regulates the taxation of interest and royalty payments between associated companies within the European Community (as well as Switzerland)

➢ The debtor and creditor of the payments must be corporations domiciled in two different member states of the European Union

➢ A minimum shareholding of 25% in the capital of the company making the payments is required of the receiving company, as is a minimum holding period of two years.

➢ The payments may not be profit-related

➢ Payments from/to sister companies and from/to permanent establishments may also be eligible

Directive 2003/49/EC (interest and royalties directive)

- Legal consequences

➢ In principle, these payments are to be taxed in the state in which the recipient of the payments is resident

➢ The state in which the debtor of the payments is resident thus waives the levying of capital gains tax

➢ Interest and royalty payments remain fully deductible as business expenses when determining the debtor's taxable income

- Implementation into German law

➢ This was transformed into German law by Section 50g of the German Income Tax Act (EStG), which was inserted in accordance with Art. 1 No. 3 of the EC Administrative Assistance Adjustment Act of December 2, 2004

DIRECTIVE (EU) 2016/1164 (ANTI-TAX AVOIDANCE DIRECTIVE, ATAD)

Directive (EU) 2016/1164 (Anti-Tax Avoidance Directive, ATAD)

- Essential content of the directive

➢ Rules against tax avoidance practices that directly affect the functioning of the internal market

➢ Package of legally binding anti-avoidance measures that must be applied by all Member States against common forms of aggressive tax planning

➢ Germany already largely complies with the minimum standards set by ATAD

➢ Nevertheless, there was still a need for adjustment in some areas

Directive (EU) 2016/1164 (Anti-Tax Avoidance Directive, ATAD)

- Essential content of the directive

➢ Art. 4 ATAD contains regulations limiting the deductibility of interest payments

- This regulation, also known as the interest barrier, is based on action point 4 of the BEPS package of measures and is very similar in its concrete form to the interest barrier under the German Section 4h EStG
- Differences exist insofar as the Directive is based on an extended definition of interest
- Furthermore, the directive provides for an exemption amount, not an exemption limit, for an exemption from the scope of application

Directive (EU) 2016/1164 (Anti-Tax Avoidance Directive, ATAD)

Essential content of the directive

➢Art. 5 of the ATAD deals with the taxation of exit and deprivation of tax domicile

○The provision covers both cases in which assets are transferred across borders and cases in which the entire tax residence is transferred to another country

○For these cases, the provision provides rules that largely correspond to the case law of the European Court of Justice on exit taxation and taxation of the loss of tax domicile

○In particular, the principles from the ECJ decision National Grid Indus and the subsequent case law are implemented: hidden reserves have to be taxed within the scope of five years

Directive (EU) 2016/1164 (Anti-Tax Avoidance Directive, ATAD)

- Essential content of the directive

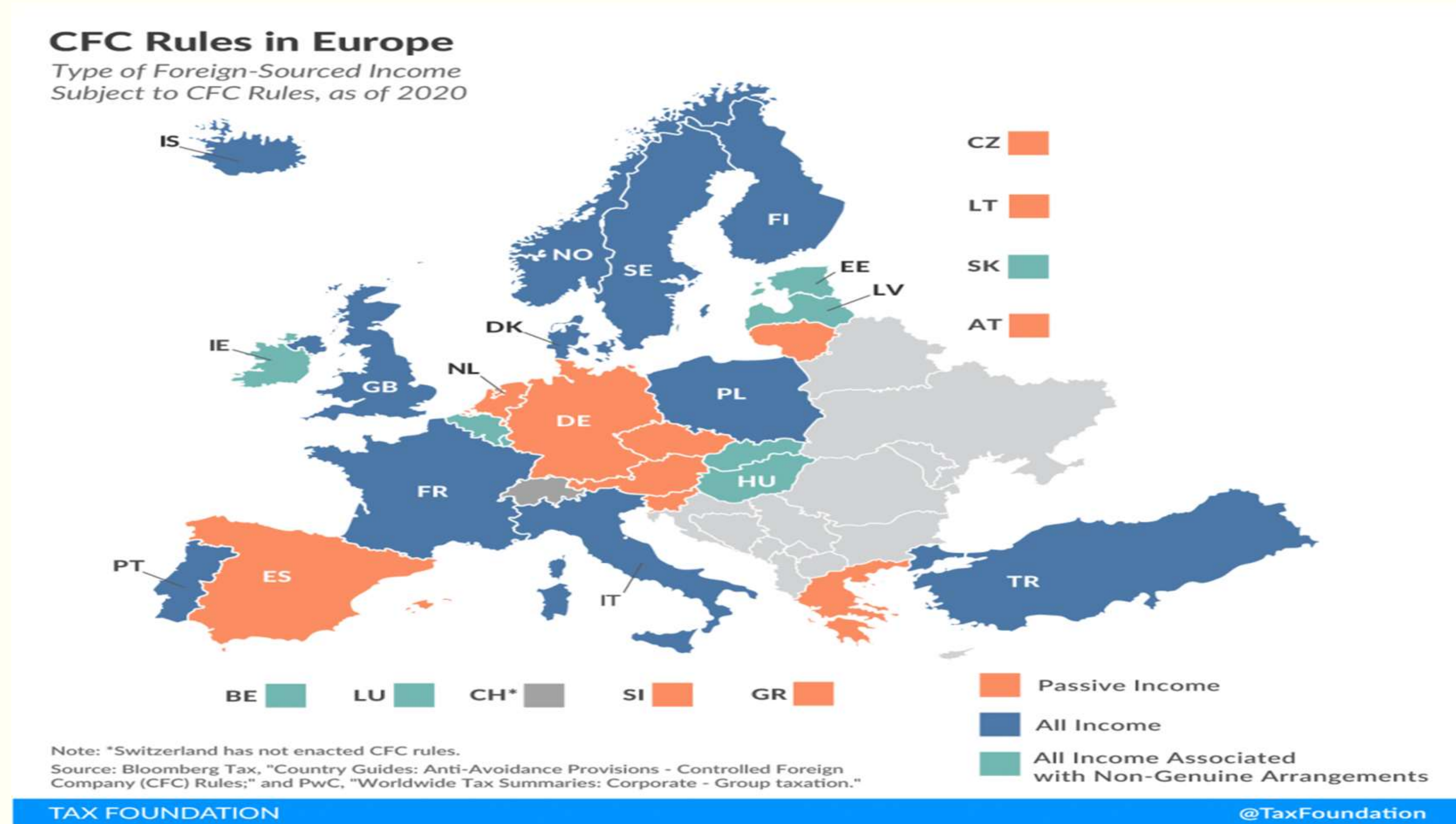
➢ Articles 7 and 8 of the ATAD contain provisions on controlled foreign companies (so-called CFCs)

- This attribution taxation has long been the focus of the discussion on regulations to curb tax avoidance
- The directive provisions contain a concept in this regard that is based on action point 3 of the BEPS action plan
- Unlike under German law, the income to be added is determined on the one hand according to a catalog of passive income and on the other hand according to whether it originates from inappropriate arrangements
- Here, too, only a minimum standard is standardized, but all member states must now introduce so-called CFC rules

Directive (EU) 2016/1164 (Anti-Tax Avoidance Directive, ATAD)

- Essential content of the directive

➢ CFC-Rules:



DAC-6 GUIDELINE

DAC-6 guideline

- Obliges the Member States of the European Union to establish rules according to which certain cross-border tax arrangements must be notified to the tax authorities of the Member States and then automatically exchanged between the Member States
- Was to be transformed into national law by the member states by December 31, 2019
- Concerns cross-border tax arrangements for which the first step of implementation took place after June 24, 2018
- Notifications on cross-border tax arrangements are to be submitted as of July 1, 2020
- These notifications are to be subsequently entered into an EU central directory to enable the automatic intergovernmental exchange of information

GLOBAL MINIMUM TAXATION

Global minimum taxation

- At the beginning of June 2021, the finance ministers of the G7 countries agreed on the cornerstones of a globally applicable minimum taxation for large internationally operating companies in order to prevent tax dumping in view of the increasing digitalization of the economy
- 136 countries, including all members of the Group of Twenty major industrialized and emerging economies and also some tax havens such as the Cayman Islands, represent over 90% of global gross domestic product
- Under the umbrella of the OECD's Inclusive Framework on Base Erosion and Profit Shifting project, the countries agreed in October 2021 on the main features of this comprehensive tax reform, which includes a globally applicable minimum tax rate for large corporations of 15%
- In future, taxes will also have to be paid at the location where the companies operate and generate their profits, irrespective of their legal domicile

Global minimum taxation

- The global minimum taxation applies exclusively to large companies, but not to letterbox companies of wealthy individuals
- Directive (EU) 2022/2523 ensuring a global minimum level of taxation for multinational enterprise groups and large domestic groups within the Union is to be implemented by Member States by 31 December 2023 (Council Directive (EU) 2022/2523 of 14 December 2022 ensuring a global minimum level of taxation for multinational enterprise groups and large domestic groups within the Union)

IMPACT OF THE EUROPEAN FUNDAMENTAL FREEDOMS ON NATIONAL TAXATION

Impact of the European fundamental freedoms on national taxation

- The fundamental freedoms enshrined in the TFEU (Art. 26 (2) TFEU) have acquired great significance for national tax law
- They prohibit differentiations that lead to disadvantages for nationals or taxpayers of EU member states compared to nationals (so-called prohibitions of discrimination and restrictions)
- The differentiation does not necessarily have to be linked to nationality; so-called indirect (hidden) discrimination is also sufficient. Such indirect discrimination exists if the differentiation typically leads to a disadvantage of EU/EEA foreigners
- In addition, the fundamental freedoms also give rise to prohibitions on restrictions. According to these, no member state may prevent or impede the realization of the fundamental freedoms in another EU member state. This also protects nationals who want to do business in another EU member state.
- A fundamental freedom is restricted if a tax law measure in question makes the exercise of this freedom less attractive for the taxpayer or is likely to deter the taxpayer from exercising the fundamental freedom

Impact of the European fundamental freedoms on national taxation

- Examination scheme: Is a national tax norm compatible with a fundamental freedom?

I. Scope of protection of the fundamental freedom

1. Material scope of protection

a. Existence of an objectively protected activity; if applicable, delimitation of the fundamental freedoms among each other;

b. No range exception

2. Personal scope of protection (beneficiary): Existence of a cross-border situation

II. Infringement of the scope of protection

1. action (in part also omission in breach of duty) of an obligated party: Member States, Union institutions, intermediary powers, partly real private persons)

2. existence of discrimination

a. Open discrimination: discrimination on the basis of nationality (always inadmissible).

b. Hidden discrimination: regulation typically makes a cross-border situation worse off than a purely national situation

3.. Existence of a restriction on market access or market activities by means of a non-discriminatory measure: measures which, while having an indiscriminate effect, make the enjoyment of a fundamental freedom substantially more difficult or impossible.

Impact of the European fundamental freedoms on national taxation

- Examination scheme: Is a national tax norm compatible with a fundamental freedom?

III. Justification of the intervention

1. written (contractual) justification grounds (barriers): apply to any intervention
2. unwritten grounds for justification (barriers)

a. Overriding reasons in the general interest (Cassis formula, Gebhard formula): apply for sovereign restrictions through nondiscriminatory measures

b. Union fundamental rights: apply to sovereign and partly also to private interventions

c. Factual reasons for interventions by private parties (direct third-party effect)

3. barriers-barriers

a. Fundamental Union Rights

b. Proportionality principle