The sources of EU law and their relationships: Lessons for the field of taxation
Szudoczky, R.

Citation for published version (APA):
Szudoczky, R. (2013). The sources of EU law and their relationships: Lessons for the field of taxation
Chapter 11
Conclusions

The ‘mission’ of this thesis was defined, in the Introduction, as providing a systematic analysis of the relationship of the various sources of EU law with the aim of promoting a more theoretical and conceptual approach to the problems which arise from the interactions, conflicts and overlaps of the various norms of EU law. We set out to apply a systematic method, while fully recognizing the indispensable role that the case law plays in not only clarifying but also defining the relationships of the different sources of law within the system of EU law. Accordingly, our goal was to deduce – principally from the Court’s case law – rules, principles and theories that govern the relationships between the various elements of the Union’s normative order. What we hope to have achieved is best explained with the words of the scholar whom we cited in the Introduction:

“Based on case material, on comparison and comparability, systematic abstract concepts are a crucial instrument in the attempt to attain knowledge beyond singular cases. Methodology is not doctrine, but ‘assistance in the process of enhancing the feasibility of abstract regulations for implementation’, ie assistance in the positivistic motivated attempt to organise the existing stock. Finally, methodology makes law – which should not simply be memorised case by case – both more teachable and learnable. However, methodology that refrains from offering an abstract framework for the solution of cases becomes ... fruitless and vain ...”

With these objectives in mind, the main findings of this thesis are put forward as follows:

We have set out from the basic tenet that EU law is characterized by a hierarchical order of norms. Primary law (the founding Treaties, the Charter of Fundamental Rights and the general principles of EU law) is superior to secondary law (essentially, the binding acts of the Union institutions as set out in Article 288 TFEU, i.e. regulations, directives and decisions) (Chapter 3). International agreements concluded by the Union are located in the hierarchy of sources of EU law between primary law and secondary law; that is, they are inferior to primary law but superior to secondary law

1907. Kingreen, supra note 1, pp. 518-519 (footnote citations omitted).
Chapter 11 - Conclusions

(Section 4.3.) The case law of the Union Courts, which also functions as a source of EU law, shares the hierarchical ranking of the norm which it interprets.

The basic tenet that EU law is a hierarchical system of norms must be qualified in certain respects. First, the relationships between the various norms which are located at the same level of the normative order are, evidently, not hierarchical. This can lead to numerous conflicts between various juxtaposed norms which cannot be resolved on the basis of the principle of hierarchy of norms. We pointed out that this is the case as regards the relationship between different acts of secondary law. Regulations, directives and decisions all have the same rank in the normative hierarchy. Differently from a national legal system, the democratic legitimisation of the authors of these acts and the procedure through which they are adopted do not influence the place of these acts in the legal order. The only exception to this is the hierarchical relationship between a basic act and a delegated/implementing act which has been adopted on the basis of a delegation or conferral of powers included in the basic act whereby the delegated/implementing act must comply with the basic act. Conflicts between acts of the same rank may be resolved by the application of organizing principles such as *lex posterior* or *lex specialis* (Sections 4.1. and 4.2.).

Another instance of conflict between norms which are at the same level of the hierarchy is where different norms of primary law, such as a fundamental right and a Treaty freedom, collide with each other. The Court perceives such situation as a collision of ‘principles’ in the sense of legal theory. Thus, instead of giving priority to one norm over the other, which would entail the invalidity of the overruled norm, it tries to optimize the competing principles, that is, realize them to the greatest extent possible under the concrete circumstances of the case. As neither the requirement of free movement nor (most of) the fundamental rights are absolute, the Court admits restrictions to them. The question whether under the given circumstances of the case the fundamental freedom or the fundamental right has to yield to the other depends on a weighing and balancing exercise carried out by the Court. Hence, a fundamental freedom which comes into conflict with a fundamental right is treated by the Court as a ‘principle’. We argued that the same is not true where a fundamental freedom clashes with a national measure in which case the Court applies the fundamental freedom as a ‘rule’ (Section 5.3.2.2.).

The second qualification to the statement that EU law is a hierarchical normative order refers to the relationship of primary law and secondary law.

716
Undoubtedly, the founding Treaties, the general principles of EU law and fundamental rights are the highest ranking norms in the Union’s legal order. Moreover, they qualify as the constitution of the Union’s legal order in a substantive-functional sense (Chapter 3). Thus, secondary law must comply with primary law not only as a consequence of the principle of hierarchy of norms but also as a function of the constitutionality of the Union’s legal order. Nevertheless, the intensity of the judicial review by which the Court scrutinizes the compatibility of secondary law with primary law must also be taken into account in order to answer the question how strict the hierarchy between primary law and secondary law is, in reality.

Hence, we examined the case law of the Court on the substantive scrutiny of Union legislation and made several distinctions to comprehend the wide-ranging case law on this matter (Chapters 5 and 7). First, it is apparent that the intensity of scrutiny of secondary law differs depending on whether the act of secondary law is reviewed for its compliance with procedural rules, primarily the legal basis provisions set out in the Treaties, or norms of a substantive nature. The Court is much more reluctant to engage in a substantive review of secondary Union law than in a procedural one. Second, a distinction must be drawn between the scrutiny of secondary law under the general principles of EU law, including the fundamental rights and its review under the fundamental freedoms. While the Court has traditionally shown a high degree of deference towards the Union legislature in the face of challenges to the legality of secondary legislation on any substantive ground, more recently, it seems to have intensified the review of Union legislation in the light of fundamental rights. We examined cases where the Court declared general Union acts invalid on the ground of infringement of the right to defence and effective judicial protection, right to property, right to protection of personal data and equality between men and women (Joined Cases C-402/05 P and C-415/05 P Kadi, Joined Cases C-92/09 and C-93/09 Schecke, Case C-236/09 Test Achats). Such stricter scrutiny may have been triggered by the fact that the Charter of Fundamental Rights gained binding force with the Lisbon Treaty. However, the enforcement of stricter fundamental rights standards towards the Union legislature seems to be limited to non-economic fundamental rights (Section 5.1.). Thus, the Court continues to allow a broad scope of discretion to the Union legislature in situations where what is at stake is essentially an economic interest. This entails that the standard of scrutiny of Union acts in the light of the fundamental freedoms – given their inherently economic nature – is still very low. The conclusion that the economic/non-economic nature of the higher ranking norm matters as regards the intensity of scrutiny of secondary law is confirmed by our analysis of the case law on Union citizenship.
We have seen that the Court has taken a very activist stance in giving effect to Union citizenship rights in the face of secondary legislation which maintained restrictions on the free movement, residence and equal treatment rights of economically non-active Union citizens. The Court rendered these restrictions ineffective by interpreting secondary law consistently with Articles 18 and 21 TFEU thus, enforcing its own interpretation of these primary law provisions vis-à-vis the Union legislature. The freedom of movement and residence of Union citizens set out in Article 21 TFEU, although we have dealt with this alongside the other free movement provisions, is different from the latter, as it confers rights of a non-economic nature and it has a strong fundamental right character. This may explain why the Court had taken a different approach to this primary law norm from the one it takes to the (economic) freedoms.

From the conclusion that the Court exercises a very low level of scrutiny of Union legislation on substantive grounds – especially, in the light of primary law norms granting economic rights, most importantly, the fundamental freedoms – two questions follow. First, what are the reasons for the low level of scrutiny? Second, how does the Court avoid addressing conflicts between secondary law and primary law and, if necessary, annulling conflicting secondary law?

As regards the first question, it has been suggested by academic commentators (see the views of Snell in Section 7.1. and Barents in Section 7.4.2.3.) that Union acts are not prone to coming into conflict with the fundamental freedoms, as they apply uniformly to the whole of the Union, therefore, unlike Member State measures, they cannot partition the internal market into different territorial regimes which would inevitably cause restrictions to free movement. This would imply that Union measures are unlikely to conflict with the free movement provisions by their very nature. It has also been argued that the Union does not usually have an incentive to adopt discriminatory measures. Contrary to this, we have emphasized that Union measures are not necessarily uniform, as they very often contain authorizations for one or more or, even, all the Member States to deviate from the common regime or a harmonized rule (Section 7.4.4.2.). Such authorization measures endanger the unity of the internal market just as much as Member State measures. Whether they grant authorization to particular Member States or to all while only some of them make use of it, the result will be differentiations between the Member States and discrimination between comparable situations in different Member States. As regards the second argument, while it is true that the Union itself has no incentive to enact discriminatory acts, it has to be remembered that the Council – the Union
Conclusions

institution which has a predominant role in the legislative process – consists of the Member States. The Member States certainly do have an interest in obtaining special favourable treatment in deviation from the common rules and – under the circumstances of supranational lawmaking – they are in a position to extract such. A cartel of Member States or, depending on the legislative procedure at issue, even one renegade Member State can forestall the adoption of an act until it receives the favourable treatment it requests. Thus, compromises are sometimes unavoidable and discriminatory – occasionally blatantly discriminatory (see Case C-475/01 Ouzo) – measures can pass through the channels of Union legislation. This is even more so where the legislative procedure prescribes unanimity voting, as is the case with all the measures concerning taxation. Overall, situations where Union measures contain distinctly applicable or outright discriminatory provisions are not unheard of. Therefore, the argument that the Court does not effectively review Union measures for their compatibility with the Treaty freedoms because it does not need to, cannot be accepted. Union measures can and not infrequently do, infringe the fundamental freedoms.

In view of this, the low level of scrutiny of secondary law in the light of the fundamental freedoms is rather due to the Court’s reluctance to influence the choices of the Union legislature in matters belonging to the economic sphere.

When answering the second question, i.e. how the Court avoids the need to scrutinize the legality of secondary law in the light of primary law, we have distinguished three situations (Chapter 7). In the first situation, at issue is the relationship of national law – secondary law – primary law. When the primary law norm in this relation is one of the fundamental freedoms, the Court established the rule that in exhaustively harmonized areas, national law is to be tested only against secondary law and not against the fundamental freedom under the scope of which the situation may otherwise fall. By means of this rule, the Court can avoid addressing the question whether the national measure at issue complies with the requirements of the freedoms and thus, also the ensuing question about the compatibility of secondary law with the freedoms. This rule combined with the presumption of legality of Union acts, i.e. lack of ex officio examination of the validity of Union acts, helps the Court stay away from examining the compatibility of secondary law with the fundamental freedoms (Section 7.2.).

We have identified some further rules governing the relationship between national law, secondary law and primary law. Particularly, in non-exhaustively harmonized areas, the fundamental freedoms and secondary law apply
Chapter 11 - Conclusions

simultaneously for testing the compatibility of national law with EU law. This rule has a particular importance in the field of direct taxation where only a few harmonizing directives exist covering only narrow areas. Outside those narrow areas, the freedoms apply to the effect of setting a limit to the exercise by the Member States of their powers retained in the field of taxation. In the context of the Merger Directive, the complementary application of the freedoms to the Directive enables the Directive to be interpreted consistently with the freedoms and thereby helps maintain the validity of the Directive and specifically, its restrictive permanent establishment requirement (Section 8.3.3.2.).

There is an exception to the simultaneous application of primary and secondary law in non-exhaustively harmonized areas; namely, where the primary law norm at issue is a general principle of EU law. National law which implements secondary law that brings about minimum harmonization by laying down stricter standards than the ones set out in secondary law cannot be reviewed in the light of the general principles of EU law (Section 5.1.2.1.).

Examining the relationship of national law – secondary law – primary law we drew a distinction between situations where secondary Union law grants an authorization to the Member States and where it provides an option to them (Sections 7.2.7. and 8.3.2.). In the case of an authorization, the Member States can decide whether or not they wish to make use of the authorization, but they cannot decide on how to do so. On the other hand, a provision granting an option leaves scope for the discretion of the Member States as to the manner of exercising the option. We examined authorizations and options granted by secondary law in the context of the tax directives which contain a large number of such provisions. We focused on the question of attribution of an infringement of primary law in cases where either the fundamental freedoms or the State aid rules are claimed to be infringed by national law which exercises an option or authorization granted by secondary law (Section 8.3.2.). We distinguished three scenarios: (i) where a Member State implements a compulsory rule provided for by a tax directive and this leads either to an obstacle to free movement or a selective advantage to certain undertakings, in which case the potential infringement of primary law is attributable to the Union; (ii) where a tax directive grants an authorization which leaves no discretion to the Member States as regards the way in which it can be exercised, in which case the ensuing infringement must be imputed to the Union again (iii) where a tax directive grants an
option which leaves sufficient margin of discretion to the Member States and a Member State exercises it in a way which breaches primary law, in which case the infringement is imputable to the Member State.

We have observed an important difference between the fundamental freedoms and the State aid rules. Namely, as far as the fundamental freedoms are concerned, where a restriction on free movement is imputed to the Union, it remains an infringement. The prohibitions set out under the free movement provisions are addressed to the Union legislature just as much as to the Member States. The same is not true, however, in the context of the State aid rules. The definition of State aid requires that aid must be granted by a Member State, therefore, Union aid is excluded from the scope of Article 107(1) TFEU. When it is established that a selective aid which results from the exercise of an authorization granted by a Union directive is attributable to the Union, no infringement of the State aid rules will follow. In brief, while a Union act may very well infringe the fundamental freedoms, the State aid rules exclude a priori the possibility that aid granted by a Union act could be in breach of Articles 107-108 TFEU. This cannot, however, mean that the competition distortions which Union legislative measures may cause in the internal market should be accepted without any possibility for reviewing such measures. We claimed that such measures must be subjected to a meaningful and effective review in the light of the principle of equality as a general principle of EU law. We have criticized the Court’s unqualified deference towards the Union legislature in this respect, which enables serious distortions to remain in place, contrary to the most basic tenets of the internal market (Section 8.3.2.).

The second technique used by the Court (also) for the purpose of avoiding direct conflicts between primary and secondary law is consistent interpretation whereby the Court interprets secondary law in a way which renders it compatible with primary law. Besides allowing the Court to circumvent the question of validity of secondary law, consistent interpretation can also be used for construing an undefined term or imprecise norm included in secondary law, as well as for choosing the correct interpretation of secondary law from more, equally plausible alternatives. When consistent interpretation functions as a means to avoid formal invalidation, the use of the technique may result in contra legem interpretation. The analysis of the case law on Union citizenship demonstrated the risks inherent to such use of consistent interpretation – i.e. leading to uncertainty and unpredictability in the application of the law – while it also showed that this interpretation technique is a
powerful tool in the hands of the Court to push forward integration in areas where the reluctant Member States would otherwise block the development of EU law (Section 7.3.4.2.).

Examining how the technique of consistent interpretation is applied in the field of taxation, we devoted much of our attention to the concept of abuse and its various manifestations in different areas of taxation (Section 8.3.4.4.). In particular, the analysis boiled down to the question to what extent the specific anti-abuse provisions of the direct tax directives are – and should be – interpreted consistently with the general (case law-based) doctrine of prohibition of abuse. The answer to this question depends on the status of the latter doctrine. The Court’s position, i.e. the prohibition of abuse of rights is a general principle of EU law, implies that it has the ranking of primary law of a constitutional nature meaning that secondary law must comply with it. Under this view, the specific anti-abuse provisions of the direct tax directives must be in line, as a matter of normative hierarchy, with the general principle of prohibition of abuse. Accordingly, the Court has strived to interpret consistently the directives’ anti-abuse rules with the concept of abuse which it developed in the context of its case law on the fundamental freedoms and VAT thereby, trying to formulate a uniform concept of abuse. In contrast to the Court’s perception, we suggested that the prohibition of abuse should be considered a principle of interpretation rather than a formal general principle. The qualification of the status of the principle, however, does not affect the conclusion regarding the interpretation of the anti-abuse rules of the direct tax directives; namely, that they need to be construed consistently with the general doctrine of prohibition of abuse which applies to the abuse of the fundamental freedoms. Although it is not a requirement flowing from the principle of hierarchy of norms, it follows from the objective of the direct tax directives and the fact that they are aimed at giving effect to the fundamental freedoms in their respective areas of application. In the light of this, it is reasonable that the concept of abuse within the scope of the direct tax directives should be interpreted in the same way as under the fundamental freedoms.

The anti-abuse rule of the Parent-Subsidiary Directive, which is a mere authorization for the Member States to apply the anti-avoidance rules under their domestic laws or tax treaties, can be interpreted consistently with the general doctrine of prohibition of abuse. Such interpretation entails that only those domestic anti-avoidance rules or principles can be applied for the purpose of denying the benefits under the Directive which target transaction that fulfil the criteria of abuse as developed by the Court in the fundamental freedoms (and VAT) case law. We have argued that the wording of the
Merger Directive’s anti-abuse clause does not leave scope for consistent interpretation, as it deviates considerably from the content of the general doctrine of prohibition of abuse insofar as it does not refer to the objective element of abuse (i.e. artificiality of the transaction) only to the subjective one (i.e. tax avoidance purpose). The Court, nevertheless, interpreted the provision in a way which reconciles it with the general principle of prohibition of abuse (Case C-321/05 Kofoed). As this appears to be contra legem interpretation which jeopardizes legal certainty, we have suggested that a better option would be to declare the provision invalid or preferably, have it amended by the Union legislature to bring it in line with the general abuse doctrine.

Finally, the third technique through which the Court avoids the need to formally invalidate secondary legislation which is in breach of primary law is the relaxation of the proportionality standard towards Union acts. It is applied in cases where the question of validity of secondary law cannot be avoided by having recourse to the previous techniques. In this respect, we have examined all the steps in the Court’s analysis by which it reviews the legality of Union measures in the light of the fundamental freedoms (Section 7.4.). We compared this analysis with the one the Court applies to Member State measures, as the most common criticism the Court faces as regards its scrutiny of secondary legislation is that it applies a double standard, in that it is much more lenient with the Union legislature than with the Member States. With respect to the first step of the analysis, we concluded that most of the obstacles that qualify as restriction on the freedoms when caused by Member State measures are also considered as such when introduced by a Union act. Thus, in principle, not only discrimination between cross-border and domestic situations is prohibited for Union measures but also non-discriminatory restrictions. However, Union measures which are capable of restricting free movement but due to their uniform nature do not adversely affect the unity of the market, such as an outright ban on the marketing or use of certain products or services, although brought within the scope of the freedoms, are invariably excused by the Court as justified restrictions. On the other hand, all the (four) Union acts which have been declared invalid by the Court on the ground of infringing the fundamental freedoms were authorization measures which introduced a derogation, or a tailor-made arrangement for a Member State thereby, causing discrimination and/or different treatment of comparable situations in different Member States. Thus, we concluded that, in effect, what is prohibited for the Union legislature is to discriminate against intra-Union movement of goods, persons, services and capital in comparison with purely domestic trade, transactions and operations.
In addition, the Court has also held, in the context of coordination measures, that Union legislation must refrain from adding to the disparities which already stem from the absence of harmonization of national legislation. Coordination measures are rules which have the function to designate the applicable law where a situation falls under the jurisdiction of more Member States. The Court considers that disadvantages flowing from the application of genuine coordination rules do not restrict free movement, as they are rather the result of disparities between the different legal systems of the Member States. However, providing for or allowing deviations from the generally applicable coordination rules can enhance disparities. Based on this, we have argued that discrimination for the Union legislature should be prohibited not only in the sense that a Union act cannot treat domestic and cross-border situations differently from the perspective of the individual Member States but also to the effect that it cannot regulate similar situations in the various Member States differently unless such is justified by the objective differences between the Member States. This follows, in fact, from the general principle of equality. This premise becomes especially relevant in the field of taxation given that the tax directives contain a host of derogations, special arrangements and transitional rules addressed to certain Member States. We claimed that some of these may well be challenged on the basis that they introduce new disparities to the already diverging tax legislation of the Member States and lead to unequal treatment. As such arrangements appear to be necessary compromises without which Union legislation on taxation could not come into being, it is highly unlikely that the Court would interfere in the political process of Union legislation by substantively reviewing such arrangements (Section 8.3.5.2.).

Besides disadvantages flowing from the application of coordination rules, there is another category of obstacles to free movement which can only be triggered by Union acts and not national rules given the federal nature of Union law; namely, obstacles which derive from the incompleteness or imperfectness of harmonization. With respect to these, the Court acknowledges that the decision whether to pursue harmonization gradually or in stages is in the discretion of the Union legislature. From this it follows that the limited, narrowly drawn scope of the direct tax directives and the ensuing situation that some potential beneficiaries may be left outside their scope cannot, of itself, be considered an infringement of the fundamental freedoms (Case C-247/08 *Gaz de France*). The Union legislature is free to leave certain segments of the field subject to harmonization outside the actual scope of harmonization measures. If this leads to discrimination of cross-border situations, that will be imputable to the domestic law of the Member States rather than the directive. However, we pointed out that
leaving certain potential subjects outside the scope of a beneficial regime, where they are in a comparable situation to those falling within the scope of the regime, may contravene the principle of equality. The infringement of the latter would have to be attributed to the Union directive. Further, as regards the ‘harmonization-in-stages’ reasoning, we have criticized the Court for using this in order to shield discriminatory provisions maintained under national law on the basis of an authorization contained in secondary law based on the mere fact that such provisions are transitional in nature (Case C-36/99 Idéal Tourisme).

As regards the justification stage of the analysis, Union measures which *prima facie* infringe the free movement provisions can be justified on the same grounds as restrictive national measures with the notable exception of the ‘promotion of the internal market’, which is a justification ground specific to Union measures.

As far as the proportionality test is concerned, we have emphasized that it is at this stage of the analysis where the review of Union measures, on the one hand, and Member State measures, on the other, differ most. The Court, when analysing the proportionality of Union measures *prima facie* infringing the freedoms, had normally used the ‘manifestly inappropriate’ test which leaves a wide margin of discretion to the Union legislature in striking a balance between two conflicting interests, i.e. the internal market and the public policy objective pursued by the Union measure at issue. Under this test, the various elements of proportionality, i.e. suitability and especially, necessity (and potentially, *stricto sensu* proportionality), are not examined to the same extent as in the case of Member State measures. The Court had applied the ‘manifestly inappropriate’ test not only when it examined proportionality under the fundamental freedoms but also when it reviewed Union acts in the light of the principle of proportionality as an autonomous standard. However, more recently the Court seems to have abandoned the ‘manifestly inappropriate’ test. We have seen this in cases concerning the fundamental right review of Union legislation (Joined Cases C-92/09 and C-93/09 Schecke) as well as in a case where the VAT Directive was scrutinized in the light of the fundamental freedoms (Case C-97/09 Schmelz). In these cases, the Court examined in detail the suitability and, especially, the necessity of the Union measures under review. The enhanced proportionality analysis resulted in the invalidation of the Union measure only in the fundamental rights case. This signals, on the one hand, that in the fundamental freedom analysis, the standard of proportionality is still not the same for Union measures and Member State measures and, on the other hand, that a lower standard of proportionality applies to Union measures in cases where
the interests and rights at issue are of an economic nature. At the same time, it appears that the question whether the principle of proportionality plays a public law or a market integration function in the review of secondary legislation does not influence the level of proportionality analysis.

The analysis in this thesis of the nature, methods and forms of judicial review over secondary Union law shows that the intensity of such review is generally very low. The Court refrains from substantively influencing the Union’s political institutions in making legislative and regulatory choices in the ever-growing areas of Union policies and activities. Thus, while there is a hierarchy between primary law and secondary law in the Union’s legal order, it is undeniably weak in the absence of effective enforcement. The self-restraint by the Court in scrutinizing Union legislation can be explained by the Court’s intent not to interfere with the institutional balance in the Union as well as, by the circumstances of constitutional pluralism under which the primary focus of the Court is and has been to ensure the status of EU law vis-à-vis national law rather than enforcing substantive standards towards the Union legislature. In addition, the Court’s deferential attitude recognizes the difficulties inherent to a supranational legislative process, which requires – in the field of taxation – the consensus of 28 Member States. While these factors may justify the Court’s rejection of judicial activism in the substantive scrutiny of Union legislation, they cannot justify weakening the hierarchy of norms under EU law and rendering the constitutional review of secondary legislation a mere formality. The hierarchy of norms is one of the fundaments of the Union’s legal system and its constitutional construct. Ensuring that Union legislation complies with primary law – whether the fundamental rights, general principles or the fundamental freedoms – is essential, on the one hand, as a constitutional guarantee in the absence of which the authority of EU law may be challenged, and, on the other hand, as a guarantee that the internal market – the economic constitution of the Union – remains free of restrictions and distortions even from Union legislation. Thus, in our view, the Court needs to take a less deferential, more balanced approach to the constitutional review of legality of secondary law by stepping up the level of such review without, at the same time, upsetting the institutional balance. On the other hand, it is also important for the legal doctrine to recognize the role of the hierarchy of norms in the Union’s legal order and, by providing the theoretical framework, guide the Court towards a more effective enforcement of such hierarchy.

We analysed the relationships of various sources of EU law by focusing on the specific field of taxation. It is a policy field with some specific
characteristics which make it especially a suitable context to demonstrate the various aspects of the interactions of primary and secondary Union law. As taxation is one of the most sensitive areas of national sovereignty, finding the equilibrium between the interest of national tax policies and that of the internal market has always been a daunting challenge in European integration. As far as direct taxation is concerned, the Member States retained most of their sovereign powers which means that only marginal and fragmented harmonization exists in this area. As a consequence of lacking harmonization and the uncoordinated exercise of national tax policies, there are still significant obstacles to the internal market created by national direct tax measures. Negative integration based on the primary law freedoms can offer only a partial solution insofar as it tackles only discriminatory national tax measures leaving obstacles stemming from disparities between the national tax systems and juridical double taxation unresolved. In this context, we examined the question to what extent negative integration based on primary law could or should take over the role and function of harmonizing secondary law (Section 8.2.). Further, we reiterated that the limited or imperfectly defined scope of harmonizing secondary law cannot, of itself, lead to an infringement of primary law. In relation to the direct tax directives we also pointed to the fact that secondary law – which, once adopted, is very difficult to amend due to the unanimity requirement in the legislative process applicable to the field of taxation – can become obsolete or even conflicting with primary law due to the lack of its adaptation to the evolving process of integration (Section 8.3.3.2.). As far as indirect taxation is concerned, the exhaustive harmonization which exists in this area displays a different aspect of the relationship of primary and secondary law from those examined with regard to direct taxation. Due to the substantial presence of secondary law, there is greater potential for conflicts with primary law. However, the Cour – just as in other policy fields – refrains from exercising an effective judicial review over Union legislation in the area of taxation too. The field of taxation is not an exception from our conclusion that the Court ought to enhance the intensity of substantive review of secondary law even if – or precisely because – the adoption of secondary law in this domain is especially hard and therefore, often loaded with compromises which are far from being immaculate from the point of view of compliance with primary law.

In Part Three of this thesis, we analysed the relationship between two norms of primary EU law, the fundamental freedoms and the State aid rules, both of which qualify as the legal foundations of the internal market and as such, they are of equal status. In this horizontal relationship, we focused on methodology; in particular, we analysed and compared the methods of
analysis that the Union Courts, and, in the case of the State aid rules, the Commission apply for testing the compatibility of national tax measures with these two sets of rules. We have described a gradual convergence of these methods which can be observed on the basis of the evolution of the case law, especially, the fiscal State aid case law which is in a status of constant change and adjustment.

As a result of the convergence, both the fundamental freedom analysis and the State aid analysis boil down to the question whether the national measure under review treats objectively comparable situations differently and if so, whether such differential treatment can be justified. This is the basic pattern of analysis which is followed under all equal treatment rules. This indicates that both the fundamental freedoms and the State aid rules are the expression of the principle of equality in their specific field of application. The conditions of State aid as defined in Article 107(1) TFEU, i.e. advantage, State resources, selectivity, distortion of competition and effect on intra-Union trade, do not apparently imply this two-stage analysis. However, in its more recent case law, the Court has tended to merge the examination of the criteria of ‘advantage’ and ‘selectivity’ while ‘distortion of competition/ effect on trade’ is a condition which is almost automatically assumed to be met when a measure is found selective. Similarly, ‘State resources’ is also invariably fulfilled in the case of fiscal State aid. This, basically, leaves ‘selectivity’ as the only (relevant) criterion of fiscal State aid. In addition, it has been long settled case law that selective measures can be justified by the ‘nature and general scheme of the system’. Thus, selectivity and the nature and general scheme justification constitute a two-stage analysis.

The main driver in the approximation of the State aid analysis to the fundamental freedom analysis was the interpretation given by the Court(s) to the concept of selectivity. In particular, the Court interprets selectivity in a way that it implies a comparative analysis of the kind required for the establishment of discrimination. Hence, both selectivity and discrimination are concerned with different treatment of comparable situations. In comparing the selectivity analysis under the State aid rules and the discrimination analysis under the fundamental freedoms, we focused on two questions; particularly, what criterion is used under the two analyses for the purpose of comparing two distinct situations and at which level of the analysis the comparison takes place under the two regimes, that is, whether at the level of examining the existence of selectivity/discrimination or the level of justification or both. As regards the first question, with respect to the fundamental freedom analysis we concluded that the Court essentially takes into account three types of factors for the purposes of establishing comparability
and in turn, discrimination: (i) the tax treatment of the cross-border situation under the law of the Member State concerned, (ii) the factual circumstances of the case, and (iii) the objective of the national measure under review. The comparison test under the State aid analysis integrates all these factors while it also designates the objective of the measure as the actual criterion of the comparison. Thus, the objective of the measure helps in identifying the relevant legal and factual characteristics of the subjects which need to be taken into account in the course of the comparison. In the discrimination analysis, it is not clear what the actual comparability criterion is, as the Court treats randomly one or the other of the three factors as such. The selectivity analysis also involves uncertainty insofar as the Court sometimes uses the objective of the measure under review sometimes the objective of the system of which the measure forms part as comparability criterion. As regards the stage of the analysis at which the comparison is made, the Court's approach under both the fundamental freedoms and the State aid rules is unclear and confusing. In the fundamental freedom analysis, the comparison which belongs to the first phase is often shifted to the justification phase or the objective of the measure which is normally taken into account at the justification phase is used as a comparability criterion in establishing the existence of discrimination. The latter also happens in the State aid analysis. These inconsistencies make it difficult to keep apart the two stages of the analysis thus, leading to conceptual ambiguities (Section 9.4.).

As far as the justification phase of the analysis is concerned, a common feature between the fundamental freedom analysis and the State aid analysis is that under both, the case law-based justification grounds play an important role besides or instead of the Treaty-based exceptions. Further, with respect to the concrete case law-based justification grounds, we concluded that the reasons which fall under the justification by the nature and general scheme of the system are similar to the accepted justification grounds under the fundamental freedom analysis (balanced allocation of taxing rights, cohesion of the tax system, preventing tax avoidance, effectiveness of fiscal supervision) to the extent that they are all reasons internal to the tax system. Finally, another symptom of convergence is that the proportionality test forms part of the State aid analysis, as recently expressly confirmed by the Court, just as the fundamental freedom analysis (Section 9.7.).

Having regard to the lack of a consistent method of analysis in the application of the State aid rules to fiscal measures, we have proposed an analytical framework which suggests solutions for the anomalies that characterizes the Court’s current approach. Under the proposed analytical framework, the analysis of \textit{prima facie} selectivity depends on whether the measure under
review is a self-sufficient measure or it forms part of a broader system. In the case of a self-sufficient measure, that is, a measure which constitutes a system itself – either the general tax system or a subsystem – the question to be answered under the State aid review is whether its scope is defined in such a way that it covers all the undertakings which are in a legally and factually comparable situation in the light of the objective of the tax. Thus, the *prima facie* selectivity of such measure is to be established via the pure comparison approach without the need to identify a reference system and a derogation from the latter. By this interpretation, the State aid regime can be used to ensure that taxes are levied in a coherent and neutral way so that all those subjects who should be liable to tax according to the internal logic of the tax are, in fact, covered by the scope of the tax.

In the case of measures which form part of a broader, comprehensive system the derogation approach also plays a role in establishing their *prima facie* selectivity. Under this approach, first, the reference system must be identified and then it has to be examined whether the (dis)advantageous treatment that the tax measure entails constitutes a derogation from such reference system inasmuch as it leads to situations which are legally and factually comparable being treated differently. The rules which make up the reference system are those which implement the fundamental guiding principle of the system, which can be either the principle of ‘ability to pay’ or another specific principle, for example, environmental protection. In the case of these measures, the analysis combines the derogation test with the comparison test. The comparison test is used to verify the presence of a derogation from the reference system. A derogation will only exist if the measure under review results in differential treatment of objectively comparable situations. The function of the derogation test in this analysis is to help choose – by making the identification of the reference system necessary – the correct pair of comparators for the purposes of the comparison test.

Under the proposed analytical framework, the *prima facie* selectivity of fiscal measures does not depend on whether the measure derogates from the reference system to the effect of creating an advantage or a burden for certain undertakings. Any unjustified differentiation within a system which constitutes a derogation to either direction from the benchmark can constitute State aid.

Further, a comparison is made both at the stage of examining *prima facie* selectivity and that of justification. At the first stage of the analysis, the objective of the system is taken as the criterion of comparison while at the justification stage the objective of the measure.
At the justification stage of the analysis, a three-pronged test applies under which it has to be examined whether (i) the measure pursues a legitimate objective, (ii) all the undertakings which are in a legally and factually comparable situation in the light of the (legitimate) objective of the measure are covered by the measure, and (iii) the measure is proportional to its (legitimate) objective insofar as it is suitable and necessary to attain that objective. Under the proposed analytical framework, general policy objectives which are external to the tax system can justify *prima facie* selective measures as long as they are compatible with the internal market and its underlying rules and principles. The justification analysis is the same whether the measure pursues an aim internal or external to the tax system. The only difference between the two types of objectives is that external objectives must be appraised for their compatibility with the internal market in order to be accepted as justification grounds whereas internal objectives are *per se* legitimate.

Finally, we addressed the issue of overlap between the fundamental freedoms and the State aid rules (Chapter 10). Due to the similarity of the methods of analysis under the two regimes, one and the same national measure may qualify both as State aid and as a restriction on the fundamental freedoms. Due to the differences in the enforcement mechanisms of the two regimes and the contradictory remedies which follow from their infringement, we maintained that their concurrent application should be avoided. Therefore, the relationship of the State aid rules and the fundamental freedoms should be considered as being in the nature of general – specific on the basis that their core concepts, i.e. selectivity – discrimination, are in a similar relation. In particular, selectivity covers all differential treatment of comparable situations which distort competition while discrimination targets a specific category of such differential treatments namely, that between residents and non-residents or domestic and cross-border situations. Accordingly, national measures which treat non-residents less favourably than residents should be tackled by the more specific norm, that is, the fundamental freedoms. On the basis of the *lex specialis* premise, these measures come within the scope of the freedoms which excludes the application of the more general rule, i.e. the State aid rules. In the case of reverse discrimination where a national measure treats cross-border situations more favourably than domestic ones, the differential treatment falls outside the scope of the *lex specialis*, i.e. fundamental freedoms, thus it falls back on the *lex generalis*, i.e. State aid rules. Similarly, when a national measure entails a differentiation other than cross border – domestic or resident – non-resident it will come within the scope of the general rule, i.e. State aid. Such is the case when a national measure grants advantages limited to a certain geographical area of a Member State.
Chapter 11 - Conclusions

Such measure disadvantages both non-resident undertakings and undertakings of the same Member State which are established outside the eligible region. As the scope of the fundamental freedoms is too narrow to cover all aspects of such measures, the more general State aid rules should be applied which offer remedies to all the disadvantaged competitors and thereby cover all aspects of the measure.