taken into account neither in the Member State of residence nor in the Member State of employment."[199] As there is no EU definition of tax advantages on the basis of personal or family circumstances, national law granting those advantages is the basis. Thereby, the tax advantages linked to personal and family circumstances cannot be understood restrictively as advantages which pursue a social objective by guaranteeing the taxpayer a minimum subsistence income that is not subject to tax and which must meet a social need.[200] Rather, it is necessary to ascertain whether those advantages are linked to taxpayers' ability to pay. For example, reductions in respect of long-term savings, services paid with service vouchers, costs incurred in saving energy in the home, costs incurred in protecting the home against theft or fire as well as charitable donations, are designed, principally, to encourage taxpayers to spend and make investments which necessarily have an impact on their ability to pay taxes. As a result, such tax reductions may be considered to be linked to the personal and family situation, in the same way as tax reductions in respect of tax-free allowances.[201]

60 The classical distinction between resident and non-resident taxpayers does not apply if this would lead to a situation incompatible with subjective net taxation. Going beyond subjective net taxation is a disproportionate restriction of the fundamental freedoms.[202] Consequently, "the Member State in which the income originated is required to take into account personal and family circumstances only where the taxpayer receives almost all or all of his taxable income in that State and where he has no significant income in his State of residence, so that the latter is not in a position to grant him the advantages resulting from taking account of his personal and family circumstances."[203]

However, in principle, **the Member State of residence** is responsible for taking into account personal and family circumstances in the first place. That Member State of residence can be released from that obligation by way of an international agreement or if, in the absence of a convention, one or more of the States of employment, with respect to the income taxed by them, grant advantages based on the personal and family circumstances of taxpayers who do not reside in the territory of those States but receive taxable income there. Independently from the Member States' allocations though, as already mentioned, taxpayers must be certain that, as the end result, all their personal and family circumstances will be duly taken into account.[204]

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This case law has been further developed with regard to the special case of a taxpayer having no taxable income, but only costs for residing, in his Member State of residence, and who earns 60 % of his taxable income in another Member State. According to this case law, the injunction to refuse the benefits of deductions "concerns any Member State of activity within which a self-employed person receives income enabling him to claim there an equivalent right of deduction, in proportion to the share of that income received within each Member State of activity"[205] (**pro-rata approach**). This approach might not always be easy to handle, but is in accordance with the principles of symmetry and ability to pay.

[199] ECJ judgment of 9.2.2017 – C-283/15, para. 34 – *X*.

[200] ECJ judgment of 14.3.2019 – C-174/18, para. 37 – *Jacob, Lennertz*.

[201] Ibid., paras. 39 et seq.

[202] ECJ judgment of 1.7.2004 – C-169/03, paras. 21 et seq. – *Wallentin*.

[203] ECJ judgment of 28.2.2013 – C-168/11, para. 44 – *Beker*; of 12.12.2002 – C-385/00, para. 89 – *de Groot*; of 18.6.2015 – C-9/14, paras. 25 et seq. – *Kieback*. Bardini, "The Ability to Pay in the European Market: An Impossible Sudoku for the ECJ" (2010) 1 *Intertax* 2 at 4 et seq.

[204] *de Groot*, ibid., paras. 99 et seq.; ECJ judgment of 12.12.2013 – C-303/12, paras. 69 et seq. – *Imfeld and Garcet*; of 1.7.2004 – C-169/03, para. 21 – *Wallentin*; of 28.2.2013 – C-168/11, para. 56 – *Beker*.

[205] ECJ judgment of 9.2.2017 – C-283/15, tenor (2) – *X*; and Henze, "Anmerkung zu EuGH, Urt. V. 9.2.2017 – Rs. C-283/15 – X" (2017) 4 *ISR* 127.

61 However, based on non-discrimination, the precondition for an obligation to take into account personal and family circumstances remains, that the tax law of the state responsible provides for such benefits. And whether to do so falls into the competences of the Member States. There is no such obligation under EU law. Moreover, even if granted by national legislation, there is no guarantee that personal and family circumstances will always be taken into account once.

A Member State may still refuse a non-resident worker who has pursued his occupational activity in that Member State during part of the year a tax advantage which takes account of his personal or family circumstances, on the basis that, although he received, in that Member State, all or almost all his income for that period, that income does not form the major part of his taxable income for the entire year in question. The Member State in which a taxpayer has received only part of his taxable income during the whole of the year is therefore not bound to grant him the same advantages which it grants to its own residents.[206] "The fact that that worker left to pursue his occupational activity in a non-member State and not in another EU Member State does not affect that interpretation."[207] Under such circumstances, and contrary to the other cases cited, there is no discrimination arising from the fact that the personal and the family circumstances of a non-resident who receives the major part of his income and almost all his family income in a Member State other than that of his residence are taken into account neither in the Member State of residence nor in the Member State of employment.[208]

Finally, personal advantages resulting from the parallel application of two autonomous tax regimes may even be taken into account twice.[209] This as well as sometimes not taking into account personal and family circumstances at all confirms that the principle of ability to pay is no self-standing principle of EU tax law, but rather a **corollary of fundamental freedoms** as applied to certain circumstances.

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62 According to the objective net principle, expenditure linked directly to the income of a person, such as business expenses, may not be subject to taxation (→ mn. 59 et seq.).[210] Where Member States follow that principle they must not discriminate between resident and non-resident taxpayers.[211] Ability to pay thus requires net taxation meaning that expenses directly linked to generating income must be detracted from the tax base. This, in principle, is the responsibility of the Member State of residence or of the source State. The existence of a **direct link** does not mean that an expense must be unavoidable, but such direct link results from the fact that the expense is inextricably linked to the activity which gives rise to that income. For example, there is a direct link in respect of costs involved in obtaining tax advice for the purpose of preparing a tax return, since the duty to file such a tax return results from the fact of receiving income in the Member State in question.[212] Or, the payment of the contributions to the lawyers' provident institution is necessary on account of membership of the bar association, which is itself necessary in order to carry on the activity which generated the taxable income.[213]

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[206] ECJ judgment of 18.6.2015 – C-9/14, para. 34 – *Kieback*.

[207] Ibid., tenor.

[208] ECJ judgment of 9.2.2017 – C-283/15, para. 34 – *X*.

[209] ECJ judgment of 12.12.2013 – C-303/12, para. 78 – *Imfeld and Garcet*.

[210] Cf. ECJ judgment of 6.12.2018 – C-480/17, paras. 33 et seq., 36 et seq., 41 et seq. – *Montag*. See also § 2(2) EStG (*Einkommensteuergesetz*; German Income Tax Act).

[211] ECJ judgment of 19.1.2006 – C-265/04, paras. 35 et seq. – *Bouanich*; of 6.7.2006 – C-346/04, paras. 20 et seq. – *Conijn*; *Montag*, ibid., paras. 30 et seq.; opinion AG Kokott of 17.3.2016 to judgment of 13.7.2016 – C-18/15, paras. 26 et seq – *Brisal*.

[212] ECJ judgment of 6.7.2006 – C-346/04, para. 22 – *Conijn*.

[213] ECJ judgment of 6.12.2018 – C-480/17, paras. 41 et seq. – *Montag*.

63 But what about the general operational expenditures (**overheads**) of a multinational company which have no specific territorial link to a particular Member State so that a source State for those expenditures can hardly be established?[214] Responsibility of the Member State of residence may not be compatible with the principle of symmetry where and in so far as source Member States tax the income of the company. A possible solution would be a pro-rata approach as introduced by the ECJ with regard to personal and family circumstances where the taxpayer did not receive the major part of his income and almost all of his family income in a Member State other than that of his residence, but in a third country. In that specific situation, as just mentioned, the prohibition to refuse deductions applies to "any Member State of activity within which a self-employed person receives income enabling him to claim there an equivalent right of deduction, in proportion to the share of that income received within each Member State of activity."[215] This approach indeed creates administrative burdens both for taxpayers and the fiscal authorities of Member States, though digitalisation may help to cope with administrative challenges. Also, such administrative burdens are a corollary of the continued existence of autonomous tax law systems. The ECJ cannot easily eliminate such "disparities" (see → § 2 mn. 149).[216]

However, such pro-rata approach which the ECJ applied once with regard to personal and family circumstances to a specific set of facts cannot easily be based on the prohibition of discrimination under the basic freedoms. In turn, according to settled case law in the non-tax area, basic freedoms do not only prohibit discrimination. Rather "all measures which prohibit impede or render less attractive the exercise of freedom of establishment must be considered to be restrictions on that freedom."[217] On the basis of this wide definition of restrictions as applied to tax law (though see → § mn. 107 et seq.), it is evident that not taking into account overheads renders doing business in other Member States less attractive. Applying a pro-rata approach to overheads of cross-border operating companies would strengthen the objective net principle and the principle of ability to pay without infringing on the Member States' tax sovereignty.[218]

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64 **b) "Final losses": ability to pay and allocation of taxing powers.** Recently, the ECJ, and particularly AG Campos Sánchez-Bordona, have used the principle of ability to pay to justify cross-border deduction of "final losses" arising for a company which is member of a group of companies.[219] Accordingly, fundamental freedoms interpreted in the light of the principles of proportionality and ability to pay modify the allocation of taxing powers between Member States derogating from the principle of symmetry. A Member State which does not have the corresponding taxing power can therefore be

[214] Cf. ECJ judgment of 13.7.2016 – C-18/15, paras. 44 et seq. – *Brisal* with opinion AG Kokott of 17.3.2016, paras. 26 et seq.; of 15.2.2007 – C-345/04, paras. 26 et seq. – *Centro Equestre*.

[215] ECJ judgment of 9.2.2017 – C-283/15 – *X*; Henze, "Anmerkung zu EuGH, Urt. V. 9.2.2017 – Rs. C-283/15 – X" (2017) 4 *ISR* 127.

[216] Cf. ECJ judgment of 10.2.2011 – joined cases C-436/08 and 437/08, paras. 169 et seq. – *Haribo and Österreichische Salinen*. Schön, "Neutralität und Territorialität – Gegensätze oder Grundsätze des Europäischen Steuerrechts?" in Schön/Heber, *Grundfragen des Europäischen Steuerrechts* (Springer 2015), p. 109 at p. 121, p. 144; for the English version see Schön, "Neutrality and Territoriality – Competing or Converging Concepts in European Tax Law?" (2015) 69(4/5) Bulletin for International Taxation 271. Grassi, "Status and impact of the ability to pay principle in the ECJ's case law concerning tax benefits based on personal and family circumstances" (20015) CFE *Working Papers Series No. 52*, 34.

[217] Cf. e.g. judgment of 25.10.2017 – C-106/16, para. 46 – *Polbud*.

[218] Similarly opinion AG Kokott of 17.3.2016 to judgment of 13.7.2016 – C-18/15 – *Brisal*, conclusion No. 2.

[219] ECJ judgment of 12.6.2018 – C-650/16, paras. 39, 59 – *Bevola* with opinion AG Campos Sánchez-Bordona of 17.1.2018, paras. 38, 59, 60, 78 – criticism Eisendle, "EuGH, Schlussantr. v. 17.1.2018 – C-650/16–Bevola" (2018) 4 *ISR* 126.

required to take into account the losses of an extraterritorial group member. "Alignment of the company's tax burden with its ability to pay tax is ensured better if a company possessing a permanent establishment in another Member State is authorised, in that specific case, to deduct from its taxable results the definitive losses attributable to the establishment."[220] Applying the **principle of ability to pay to a group of companies** is a new approach. Such groups are only fictitious units consisting in reality of different legal entities, each with its own ability to pay.

65 In summary, the principle of ability to pay may only have an impact when read together with the **fundamental freedoms**.[221] The prohibition of discrimination leads to subjective or objective net taxation in so far as Member States provide so for their own nationals, as they usually do. This result is in accordance with the principle of ability to pay. As to general costs or overheads, recognising an equivalent right of deduction, in proportion to the share of income received within each Member State of activity, would also serve the principle of ability to pay. However, in my opinion, requiring Member States to take into account "final" losses of group members established in other Member States overstretches this principle. First, problems arise as soon as the principle of ability to pay is applied in a cross-border situation, second, further problems arise when applying ability to pay to groups of companies consisting of several separate entities allowing for profit and loss shifting.[222]

66 **c) Avoiding double taxation.** Juridical and economic double taxation are contrary to the principle of ability to pay,[223] but arise as a result of the **parallel exercise of the Member States' powers of taxation**.

As to juridical double taxation, the Member States are competent to determine the criteria for taxation on income and wealth with a view to eliminating double taxation by means, *inter alia*, of international agreements.[224]

EU law does not prohibit economic double taxation as such either. But the basic freedoms' non-discrimination principle may prohibit it by way of extending the scope of application of national legislation (→ § 2 mn. 180 et seq.). The fundamental freedoms "preclude legislation whereby the entitlement of a person fully taxable in one Member State to a tax credit in relation to dividends paid to him by limited companies is excluded where those companies are not established in that State."[225] After all, the principle of ability to pay, under EU law, cannot be interpreted as including a prohibition of double taxation, neither juridical nor economic.

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6. The Principle of Ability to Pay as Applied to EU Legislation

67 The principle of ability to pay applies to EU legislation. In the field of direct taxation, this mainly concerns the taxation of **officials and other servants of the Union**. They are taxed in accordance with the ability to pay principle. Family allowance and social

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[220] *Bevola*, ibid.

[221] Cf. also Valta, "Grenzüberschreitende Leistungsfähigkeit multinationaler Unternehmen im EU-Recht" (2020) 6 *ISR* 189 et seq.

[222] But see ECJ judgment of 12.6.2018 – C-650/16, para. 59 – *Bevola* with opinion AG Campos Sánchez-Bordona of 17.1.2018, paras. 38, 59, 60, 78 – criticism Eisendle, "EuGH, Schlussantr. v. 17.1.2018 – C-650/16–Bevola" (2018) 4 *ISR* 126; ECJ judgment of 4.7.2018 – C-28/17, para. 35 – *NN*. Critical, Cordewener, "Die grenzüberschreitende Berücksichtigung von ("finalen") Verlusten im EU-Binnenmarkt – eine primärrechtliche Sackgasse?" in Ismer et al. (eds.), *Territorialität und Personalität, FS für Moris Lehner* (Otto Schmidt 2019), p. 329 at p. 348 et seq.

[223] Tipke, Die Steuerrechtsordnung, Vol. I (Otto Schmidt 2000), p. 522.

[224] ECJ judgment of 12.5.1998 – C-336/96, para. 24 – *Gilly*.

[225] ECJ judgment of 7.9.2004 – C-319/02, tenor – *Manninen*. See also *Bardini*, (2010) 1 Intertax 1 et seq.

benefits shall be deducted from the basic taxable amount and there is an additional abatement of 10 % for occupational (objective net principle) and personal expenses.[226] Furthermore, taxation must not have the effect of reducing salaries, wages and other emoluments of any kind paid by the EU to an amount less than the minimum subsistence rate[227] (subjective net principle).

The EU should also respect the net principle in corporate tax law, for example in its proposal for a Common Consolidated Corporate Tax Base. Consequently, operating expenses should be deductible from the tax base.[228] Rules to combat abuse and tax evasion must not go so far as to violate the objective net principle, for instance by overly limiting interest deductions.[229]

68 In the field of indirect taxation, the exemptions, reductions and other differences in treatment in the **EU VAT system** could be tested against the principle of ability to pay so as to ensure, as an example, that business expenditures are not taxed.[230] However, Member States with regard to partial harmonisation and the EU legislator have discretion.

VII. Standards of Scrutiny with Regard to Discrimination

69 When examining the general principle of equality, the ECJ applies a low level scrutiny; when examining more specific expressions of the principle of equality as in particular fundamental freedoms, it uses a more stringent standard. This approach can be found with many constitutional courts, most explicitly by the US Supreme Court.[231] Under that approach, suspect classifications are under strict scrutiny which tends to result in the inapplicability of legislation containing such classifications. In the United States, race, in particular, is considered a suspect classification. In the internal market and in EU law, nationality is a suspect classification. Therefore, the ECJ applies strict scrutiny to the fundamental freedoms.

This makes sense also from the perspective of the **separation of powers**. The general principle of equality is very broad without offering precise standards. It has enormous potential for EU tax law. In the hands of a dynamic court, it can proof a threat to the legislator. Therefore, low scrutiny in so far serves the separation of powers respecting the legislator's discretion. By contrast, the specific prohibitions of discrimination flowing from the basic freedoms are more precise. Not any different treatment is potentially forbidden, only discriminating against nationals or residents of other Member States or against persons and transactions in a transborder context. In so far, there is no need for legislative discretion. Such special prohibition of discrimination therefore requires strict scrutiny.

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[226] Art. 3(3) and (4) Regulation 260/68.

[227] Art. 6(2) Regulation 260/68.

[228] Cf. Englisch, "Ability to Pay" in Brokelind (ed.), *Principles of Law: Function, Status and Input in EU Tax Law* (IBFD 2014), p. 439 at p. 461.

[229] Cf. ibid.

[230] Cf. Englisch, "VAT/GST and Direct Taxes: Different Purposes" in Lang/Melz/Kristofferson (eds.), *Value Added Tax and Direct Taxation – Similarities and Differences* (IBFD 2009), p. 1 at p. 30 et seq.

[231] BVerfG order of 26.1.1993 – 1 BvL 38, 40, 43/92, BVerfGE 88, 87 (96) – Transsexuals 2; US American Supreme Court Decision of 25.4.1938, 304 U.S. 144 (155) (1938) – *Carolene Products* – the famous footnote 4; Decision of 10.4.1967, 388 U.S. 1(9) (1967) – *Loving v. Virginia*; see also Glock, "Der Gleichheitssatz im Europäischen Recht – Eine rechtsvergleichende Analyse unter Berücksichtigung der Rechtsprechung in ausgewählten Mitgliedstaaten der Europäischen Union, des ECtHR und des ECJ" (Dissertation, University of Gießen, 2007), p. 199 et seq., p. 221 et seq., p. 241, p. 259, p. 271 et seq.

B. The Fundamental Freedoms

70 All the fundamental freedoms are relevant to tax law: the free movement of goods, workers, services and capital as well as the freedom of establishment. There is a variety of external or cross-border elements leading to their application as, for instance, with regard to the taxation of frontier workers, cross-border services, non-residents, international corporations or cross-border capital movements.

While direct taxation, as EU law currently stands, falls within the competence of the Member States, they must nonetheless exercise that competence consistently with EU law[232] including the fundamental freedoms. Generally, Member States' measures may affect fundamental freedoms through discriminations or restrictions. Restrictions are broadly defined as "all measures that prohibit, impede or render less attractive the exercise of the [fundamental] freedoms".[233] Any tax could be a restriction in so far as having to pay taxes for doing something renders that activity less attractive. Taxing cross-border activities would then be subject to the proportionality test by the ECJ even where comparable domestic activities are subject to the very same taxation. It is therefore questionable whether the fundamental freedoms also cover non-discriminatory restrictions in tax law (see → § mn. 107 et seq.).

In any case, infringements of fundamental freedoms imply *de iure* or *de facto* discriminations, including in the tax law area. However, the ECJ appears to be more generous with regard to justifications in the tax law area than in other areas of the law. Both, requiring at least *de facto* discrimination (→ mn. 107 et seq.) and accepting unwritten justifications more easily in the tax law area (→ mn. 120) as compared to other areas of EU law, indicates recognition of the **Member States' fiscal sovereignty**.

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I. The Fundamental Freedoms as *leges speciales*

71 The fundamental freedoms are *leges speciales* in relation to the general prohibition of all discriminations on grounds of nationality[234] laying down specific rules of non-discrimination. According to their wording, they require "abolition of any discrimination based on nationality between workers" (Art. 45(2) TFEU), national treatment regarding freedom of establishment (Art. 49(2) TFEU) and regarding the freedom to provide services (Art. 57(2) TFEU) and, moreover, prohibit import restrictions (Arts. 34 et seq. TFEU) and restrictions on the freedom of establishment (Art. 49(1) TFEU), the freedom to provide services (Art. 56(1) TFEU) and on free movement of capital (Art. 63 (1) TFEU). Independently of such differences in the wording of the Treaty provisions, the ECJ understands all fundamental freedoms as comprehensive prohibitions of restrictions.[235] However, for the special area of tax law, the concept of **non-discriminatory restrictions** remains questionable (→ mn. 107 et seq.). Most of the cases decided

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[232] For example, GC judgment of 14.2.2019 – cases T-131/16 and T-263/16, paras. 61 et seq. – *Belgium/Magnetrol* (regarding State aid); ECJ judgment of 2.7.1973 – case 173/73, paras. 12 et seq. – *Commission/Italy*.

[233] For example, ECJ judgment of 20.12.2017 – C-322/16, para. 35 – *Global Starnet*.

[234] For example, ECJ judgment of 21.1.2010 – C-311/08, para. 31 – *SGI*; of 22.6.2017 – C-20/16, paras. 30 et seq. – *Bechtel*.

[235] ECJ judgment of 15.12.1995 – C-415/93, paras. 98 et seq. – *Bosman*; of 16.3.2010 – C-325/08, para. 33 – *Olympique Lyonnais*; of 30.11.1995 – C-55/94, para. 37 – *Gebhard*; of 21.1.2010 – C-311/08, paras. 98 et seq. 50 – SGI; of 25.7.1991 – C-76/90, para. 12 – *Saeger*; of 28.4.2009 – C-518/06, para. 62 – *Commission/Italy*; of 20.5.2008 – C-194/06, para. 74 – *Orange European Smallcap Fund*.

by the ECJ can be traced back to the question of whether a situation involving exercise of a fundamental freedom is treated (*de iure* or *de facto*) less favourably than a purely internal situation.

II. Scope of Application of the Fundamental Freedoms

1. *Ratione personae* (personal scope)

72 The fundamental freedoms are foremost rights of the **nationals of the Member States**. In principle, it is for each Member State, having due regard to international law,[236] to lay down the conditions for acquisition and loss of nationality.[237]

73 According to Article 45(4) TFEU, the free movement of workers does not apply to employment in the **public service**. The concept of "public service" within the meaning of Article 45(4) TFEU must be given uniform interpretation and application throughout the EU. It cannot be left entirely to the discretion of the Member States. That concept covers posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities. Such posts presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality.[238] Member States are allowed to restrict admission of foreign nationals to such positions in the public service.[239] However, taking account of the fundamental nature of the principles of freedom of movement and equality of treatment of workers within the EU, the exemptions made by Article 45(4) TFEU have to be proportionate. Article 45(4) TFEU cannot have the effect of disentitling a worker, once admitted into the public service of a Member State, to the application of the provisions contained in Article 45(1) to (3) TFEU,[240] and, for example, discriminate against him in tax matters.

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74 Pursuant to Articles 54 and 62 TFEU, **companies** formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the EU may also rely on the freedom of establishment and the freedom to provide services. Companies exist only by virtue of the national legislation which determines its incorporation and functioning.[241] They are creatures of national law. In the absence of harmonisation of EU law, the definition of the connecting factor that determines the national law applicable to a company or firm falls, in accordance with Article 54 TFEU, within the powers of each Member State. That provision places on the same footing the registered office, the central administration and the principal place of business of a company or firm as such connecting factors.[242] In the absence of a uniform definition in EU law of the companies which may enjoy the right of establishment on the basis of a single connecting factor determining the national law applicable

[236] *Ius soli* and *ius sanguinis* are two generally recognised principles: Natural persons acquire the nationality of their parents (*ius sanguinis*) or of the State in which they are born by birth (*ius soli*) or acquire the nationality of a State in accordance with its nationality law by naturalisation.

[237] ECJ judgment of 12.3.2019 – C-221/17, para. 30 – *Tjebbes*.

[238] ECJ judgment of 10.9.2014 – C-270/13, paras. 43 et seq. – *Haralambidis*.

[239] ECJ judgment of 22.6.2017 – C-20/16, paras. 34 et seq. – *Bechtel*; of 26.4.2007 – C-392/05, para. 70 – *Alevizos*; of 12.2.1974 – case 152/73, para. 4 – *Sotgiu*; of 6.10.2015 – C-298/14, para. 32 – *Brouillard*.

[240] *Bechtel*, ibid., para. 35.

[241] ECJ judgment of 16.12.2008 – C-210/06, para. 104 – *Cartesio*.

[242] *Cartesio*, ibid., para. 106; ECJ judgment of 25.10.2017 – C-106/16, para. 34 – *Polbud*.

to a company, the question whether Article 49 TFEU applies to a company is a preliminary matter which can only be resolved by the applicable national law.[243]

A company's corporate seat can serve to determine, like nationality for natural persons, their connection to a Member State's legal order.[244] However, Member States may choose between the real seat and the incorporation theory.[245] Under the real seat theory, the company law applicable to a legal entity is that of the jurisdiction in which the entity has its real seat. Under the incorporation theory, the company laws applicable to a legal entity are those of the jurisdiction in which the legal entity has been incorporated, irrespective of where the entity has its real seat.[246] EU laws leave Member States that choice even though, in case of application of the real seat theory, the removal of the central administration from a Member State's territory presupposes the winding-up of the company with all the consequences that winding-up entails under national law. The fundamental freedoms can thus be exercised more easily by a company under the incorporation theory: a company may freely move across-borders without having to wind itself up and re-incorporate in its Member State of destination.[247]

75 In addition to being incorporated under the law of a Member State, companies must have "their **registered office, central administration or principal place of business** within the Union".[248] These are alternative criteria (*ou*; *oder*). Companies having their registered office, central administration or principal place of business in third countries can therefore also rely on the freedom of establishment or the freedom to provide services, as long as they meet another of the alternative criteria within the EU. On the other hand, the origin of the shareholders, be they natural or legal persons, of companies resident in the EU, does not affect the right of those companies to rely on freedom of establishment. Rather, the status of being an EU company is based, under Article 54 TFEU, on the location of the corporate seat or the legal order where the company is incorporated, not on the nationality of its shareholders.[249] They may be third-country residents.

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A company may also, for tax purposes, rely on a restriction of the freedom of establishment of another company which is linked to it in so far as such a restriction affects its own taxation. This follows from the *effet utile* of the fundamental freedoms.[250]

76 Member States define their own nationals, whether natural or legal persons. EU law in so far refers to the **law on citizenship and to the company law of the Member States**. But on the other hand, "companies […] and other legal persons" within the meaning of Article 54 TFEU are autonomous concepts of EU law. Therefore, it is not a prerequisite that the person is a legal person under national law. Rather, the concept of "other legal person" extends to an entity which, under national law, possesses rights and obligations that enable it to act in its own right within the legal order concerned,

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[243] *Cartesio*, ibid., paras. 109 et seq.; ECJ judgment of 11.9.2014 – C-47/12, paras. 48 et seq. – *Kronos*; of 29.11.2011 – C-371/10, para. 26 – *National Grid Indus*.

[244] ECJ judgment of 21.9.1999 – C-307/97, para. 35 – *St Gobain*; of 26.6.2008 – C-284/06, para. 77 – *Burda*; of 16.7.1998 – C-264/96, para. 20 – *ICI* with references; of 17.5.2017 – C-68/15, para. 35 – *X*; opinion AG Jääskinnen of 24.10.2013 to judgment of 1.4.14 – C-80/12, para. 59 – *Felixstowe et al.*

[245] Cf. ECJ judgment of 9.3.1999 – C-212/97 – *Centros*; of 5.11.2002 – C-208/00 – *Überseering*; of 30.9.2003 – C-167/01 – *Inspire Arts*.

[246] Cf. Van de Looverbosch, "Real Seat Theory v Incorporation Theory: The Belgian Case for Reform" (2017) 1 *International Company and Commercial Law Review* 1.

[247] Cf. ECJ judgment of 16.12.2008 – C-210/06, paras. 99 et seq. and tenor (4) – *Cartesio*; of 29.11.2011 – C-371/10, paras. 26 et seq. – *National Grid Indus*.

[248] Art. 54(1) TFEU.

[249] ECJ judgment of 1.4.2014 – C-80/12, paras. 37 et seq., 40 – *Felixstowe et al.*

[250] Ibid., paras. 23 et seq.; ECJ judgment of 6.9.2012 – C-18/11, para. 39 – *Philips Electronics*.