



International Association of Tax Judges

## Soft law (Germany)

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### A. The impact of soft law at the national level

- Principle of Legality of Taxation – based on the principles of democracy and legal certainty
- Art. 2(1) Basic Law: “Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.”
- Art. 20(3) Basic Law: “The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.”

2

## A. The impact of soft law at the national level

- § 3(1) Fiscal Code: “‘Taxes’ shall mean payments of money, other than payments made in consideration of the performance of a particular activity, which are collected by a public body for the purpose of raising revenue and imposed by the body on all persons to whom the characteristics on which the law bases liability for payment apply; (...).”
- § 38 Fiscal Code: “Claims shall arise from the tax debtor-creditor relationship as soon as the matter to which the law attaches liability for the payment has occurred.”

3

## A. The impact of soft law at the national level

- § 4 Fiscal Code: “‘Law’ shall mean every legal norm.”
- Legal norms: formal statutes, ordinances (authorised on the basis of a formal statute), public international law and supranational law (EU law).

4

## A. The impact of soft law at the national level

- Exceptions:

-> § 176(2) Fiscal Code: "Where a tax assessment notice is cancelled or amended, it may not be taken into account if it is to the taxpayer's disadvantage that a general administrative provision of the Federal Government, a highest federal authority or a highest authority of a *Land* has been classified by a highest federal court as being incompatible with current law."

(Translation: [www.gesetze-im-internet.de](http://www.gesetze-im-internet.de))

-> Self-binding commitment of the tax authorities, interpreted in accordance with the principle of equal treatment under Article 3 of the Basic Law, in situations where the law entitles the tax authorities to act at their own discretion.

5

## B. The impact of the OECD commentary on DTTs

Federal Finance Court judgment of 11 July 2018 I R 44/16, BFHE 262, 354

- The importance of the OECD Commentary is comparable to that of the explanatory memorandum in the interpretation of national laws. It may be important for the interpretation of Double Taxation Treaties concluded later, but has under no circumstances the same rank as the rules of the Double Taxation Treaty themselves.
- Therefore, it is possible that the intentions of the authors of the Commentary are not reflected in the legal text of the Double Taxation Treaty or that these intentions are superseded by overriding systematic or teleological considerations.
- ([www.rechtsprechung-im-internet.de](http://www.rechtsprechung-im-internet.de))

6

## B. The impact of the OECD commentary on DTTs

Clause 3 of the Protocol to Germany's Double Taxation Treaty with Hungary of 28 February 2011:

- “The application and interpretation of Articles 5 and 7 of this Agreement and, in particular the settlement of any disputes insofar, should be done by using the Commentary on Articles 5 and 7 of the current Model Convention of the OECD. If the Commentary is revised in the future by the OECD, Articles 5 and 7 of this Agreement should be interpreted in the spirit of the revised Commentary, provided this is in accordance with the text of the Agreement.”

7

## C. The impact of the OECD Transfer Pricing Guidelines

- TPGs reflects the views of the participating tax authorities, but have no binding effects comparable to those of a legal statute.
- TPGs may produce factual effects in the context of mutual agreement procedures for dispute resolution in order to reach a mutually agreed solution.

8

## D. The impact of soft law on EU tax law

- **Treaty on European Union (TEU)**

-> forms the basis of EU law, setting out general principles on the EU's purpose, the governance of its central institutions – such as the Commission, Parliament and Council –, as well as the rules on external action and the common foreign and security policy.

- **The Treaty on the Functioning of the European Union (TFEU)**

-> forms the detailed basis of EU law, setting out the scope of the EU's authority to legislate and the principles of law in those areas where EU law operates.

9

## D. The impact of soft law on EU tax law

- Article 288 TFEU

To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety. A decision which specifies to those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force.

- Article 288(5) TFEU does not contain an exhaustive list of the types of soft law.

10

## D. The impact of soft law on EU tax law

> Grimaldi doctrine (ECJ judgment of 13 December 1989 Case C-322/88, paragraph 19)

- “(The recommendations at issue) cannot in themselves confer rights on individuals upon which the latter may rely before national courts. However, national courts are bound to take those recommendations into consideration in order to decide disputes submitted to them, in particular where they are capable of casting light on the interpretation of other provision of national or Community law.”
- (reaffirmed in ECJ judgments of 21 January 1993, *Deutsche Shell*, Case C-188/91, paragraph 18; of 11 September 2003, *Altair Chimica*, Case C-207/01, paragraph 41; and of 18 March 2010, *Alassini*, Case C-317/08 paragraph 40).

11

## D. The impact of soft law on EU tax law

> Interpretation of EU customs law: ECJ judgments of 28 April 1999, *Mövenpick Deutschland*, Case C-405/97, paragraph 18; and of 16 September 2004, *DFDS*, Case C-396/02, paragraph 28:

- “The explanatory notes (...) may be an important aid to the interpretation of the scope of the various headings but do not have legally binding force (...).
- > Political declarations of intent (examples):
- Code of Conduct for Business Taxation adopted by the Council of Economics and Finance Ministers on 9 March 1998
  - BEPS project by the Commission

12

## D. The impact of soft law on EU tax law

> Guidelines for the exercise of discretion (example):

- - Assessment by the Commission on the compatibility of an aid measure (see ECJ judgment of 17 September 2009, *Commission v Koninklijke FrieslandCampina*, Case C-519/07 P)

[Article 107(1) TFEU:

“Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.”]

13

## D. The impact of soft law on EU tax law

→ Soft law may establish a self-commitment of the relevant institution giving rise to legitimate expectations deserving protection.

14

## Attachment

- Requirements for legislation

Article 242 TFEU:

The Council, acting by a simple majority shall, after consulting the Commission, determine the rules governing the committees provided for in the Treaties.

15

## Attachment

- Requirements for court proceedings before the ECJ

Article 258 TFEU:

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

16



## Attachment

### Article 259 TFEU:

A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

17

## Attachment

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.

### Article 265 TFEU:

Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established. This Article shall apply, under the same conditions, to bodies, offices and agencies which fail to act.

18

## Attachment

The action shall be admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within three months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion.