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ARTICLE

The Case for an EU Cap on Interest on Underpaid Tax: Protecting the Internal Market

Jeroen Lammers*

This article examines whether the differences in the calculation of interest on underpaid taxes among EU Member States could conflict with or impact the functioning of the EU internal market. The analysis indicates that such a conflict exists, and that an EU minimum standard protecting taxpayers' rights is justified to remedy this while harmonizing the rules on interest accrual entirely would likely exceed the limits of the proportionality principle. The article's starting point is the recent Danish Supreme Court ruling on beneficial ownership which recommends that the Danish legislator review national rules on interest accrual in cases of prolonged tax proceedings and consider a remedy that allows disputed amounts to be deposited with tax authorities. It evaluates the international and EU legal frameworks addressing this issue and compares interest accrual rules between Member States. The article finds that these legal frameworks offer insufficient guidance. It also discusses the Danish Supreme Court's suggested remedy and asserts that it is ineffective and inefficient. Furthermore, this study demonstrates that it is not suitable as an EU minimum standard, and the latter should instead be designed as a maximum percentage of the disputed amount. This relatively simple approach is a suitable manner for realizing the intended objective as it would incentivize taxpayers to pay their tax bills on time while safeguarding their fundamental human rights wherever they are established in the EU. Moreover, it would prevent placing undue administrative burdens on either taxpayers or tax administrations and would not impede Member States' abilities to design their tax administrative procedures to fit their national tax systems and practices.

Keywords: Tax surcharges, tax penalties, interest, EU, internal market, taxpayers' rights.

1 Introduction

On 9 January 2023, the Danish Supreme Court issued its decision in two joined cases concerning beneficial ownership.[1] In addition to its relevance in this context, the decision examined whether the interest on underpaid taxes resulting from prolonged tax proceedings could accumulate to a level that would hinder taxpayers' access to legal recourse.[2] While the Supreme Court primarily considered this issue from a Danish perspective only, this article holds that the Supreme Court's concerns regarding taxpayer's rights protection in fact raise the question of whether divergent treatment of interest on underpayment across various Member States may conflict with the proper functioning of the internal market that is intended by Article 26 Treaty on the Functioning of the European Union (TFEU).

In this respect, the Danish case is of particular interest as the duration of the tax proceedings resulted in the accrued interest exceeding the principal amount in dispute. In fact, this amounted to approximately 120% of the disputed amount.[3] Additionally, the taxpayer had attempted to deposit the latter with the tax authorities earlier in the proceedings in order to prevent the interest from accruing to such high levels. However, the tax authorities denied the request due to a lack of a legal basis. As lower courts had sided with the taxpayer, it was only after the Supreme Court ruled in favour of the tax authorities that the tax liability finally materialized. It found that Danish law regarding the accrual of interest on underpaid taxes meant that interest accrued over the entire period between the final day that the disputed amount should have been paid and the date of the judgment.[4] The taxpayer could therefore only have prevented the accrual of interest by not having sought legal recourse in the first place.

Moreover, the Supreme Court found that this interpretation of Danish law did not conflict with Article 6 of the European Convention of Human Rights (ECHR) or Article 47 of the EU's Charter on Fundamental Rights

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1 *Denmark v. NetApp Denmark ApS and TDC A/S*, Jan. 2023, Supreme Court, Cases 69/2021, 79/2021 and 70/2021. BS-69/2021-HJR. ECLI:DK:HJR:2023:BS0000000048.

2 *Ibid.*, at 11–13 and 27–28.

3 *See infra* s. 3.2 for the calculation of this amount.

4 *Denmark v. NetApp Denmark ApS and TDC A/S*, *supra* n. 1, at 27.

(ECFR).[5] Nonetheless, it felt that it was necessary to address the Danish legislature in its judgment regarding the accrual of interest. The Supreme Court suggested that the outcome of this case should be considered by the legislature to determine whether the consequences of the Danish law on the accrual of interest were desirable.[6] Therefore, the Supreme Court did not strike down the existing legislation, but it rather encouraged the Danish legislature to consider a solution that would prevent such consequences from arising in prolonged tax proceedings.[7]

In light of this, the article explores several aspects related to the issue of interest on underpaid taxes. First, the article examines the right to legal protection with regard to the accumulation of interest on underpaid taxes in international (tax) law as well as the legislative role of the European Union in tax collection within Member States. Additionally, the article considers how the constitutionality of high interest burdens on taxpayers may be evaluated in several countries. The aim of exploring these aspects is to examine whether there is sufficient legal guidance on the protection of taxpayers' rights with respect to interest accrual on underpaid tax.

In this context, the article provides an analysis of the Danish legislation on interest accrual and compares these rules to those of selected other jurisdictions. Furthermore, it evaluates the overall effectiveness of the solution suggested by the Danish Supreme Court. In order to do this objectively, a basic framework is presented to assess the economic burden on taxpayers as a result of the accrued interest.

Lastly, the article considers these findings in the context of the functioning of the EU internal market. Overall, it suggests that the differences in the calculation of interest on underpaid taxes between Member States may potentially effectuate conflicts with the functioning of the internal market. As a result, it recommends that the EU legislature intervene and consider implementing an EU minimum standard ensuring that the economic burden of the interest charge on underpaid taxes cannot exceed 50% of the disputed amount. This would safeguard the protection of taxpayers' rights concerning interest accumulation on underpaid taxes.

2 Interest on underpaid taxes

In general, taxpayers are expected to pay interest and (possibly) administrative and/or tax penalties for the underpayment of taxes. In some cases, it has been argued that the accumulation of such liabilities on disputed amounts may discourage them from seeking legal recourse.[8] This may therefore be an issue of general concern.[9] Hence, this section takes the considerations of the Danish Supreme Court as its starting point. While there may not be a violation of Article 6 ECHR or Article 47 ECFR in this specific case,[10] there may be human rights-based limitations established by international and/or EU law on interest accrual in cases of prolonged tax proceedings.[11] This raises the question of whether international law and EU law provide clear guidance on the consequences of such discouragement in practice.

2.1 *Interest on Underpaid Taxes in International (Tax) Law*

Tax law can be broadly divided into the two categories of material or substantive tax law and formal or procedural tax law.[12] Material tax law encompasses the identification of tax subjects, tax objects, and the relevant tax period for collection. Formal tax law, on the other hand, governs the administrative procedures involved in tax assessment and collection.[13]

While it is quite common for material tax law to be developed at an international level, formal tax law is typically determined by individual nations.[14] Nonetheless, as supranational law holds precedence over national legislation,[15] procedural tax law must still adhere to general principles of international law.[16] Moreover, particularly

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5 *Ibid.*, at 28.

6 *Ibid.*

7 Even though the effects of the current legislation have been criticized by several authors, this approach by the Supreme Court has also been welcomed. *See* e.g., J. Buus, Om Forrentning af Visse Skatte- og Afgiftskrav, *SR-Skat 2023.0034* 40–42 (2023); and N. Winther-Sørensen, *Højesterets dom om udbytteskat og beneficial ownership*, SR-Skat 2023.0075, at 80 (2023).

8 C. O'Brien, *Protection of Taxpayer Rights in Multijurisdictional Disputes – A Stakeholder's Perspective*, Tax Notes International 375-378 at 377 (23 Oct. 2017).

9 *Also see* J. Kokott & P. Pistone, *Taxpayers in International Law: International Minimum Standards for the Protection of Taxpayers' Rights* 196 et seq. (Bloomsbury Publishing 2022). indicating that it is generally accepted that human rights protection also applies to legal persons even though the extent of it might be different.

10 *Denmark v. NetApp Denmark ApS and TDC A/S*, *supra* n. 1, at 27.

11 It is recognized that the combined impact of interest charges and additional administrative and/or tax penalties is relevant in considering whether these factors may deter taxpayers from seeking legal recourse. However, the scope of this article will be exclusively confined to examining the relevant interest charge on underpaid taxes.

12 P. Pistone, *Tax Procedures EATLP Annual Congress Madrid 6–8 June 2019,* EATLP International Tax Series Volume 8, at 3 (IBFD 2019).

13 *Ibid.*, at 3–7.

14 *See infra* ss 2.1 and 2.2.

15 *See* e.g., Kokott & Pistone, *supra* n. 9, at 31–69 for a more thorough analysis of the complexities and dynamics of the relationship between international and national law.

16 Pistone, *supra* n. 12, at 14; Kokott & Pistone, *supra* n. 9, at 203 and 206 et seq.; L. Del Frederico, *The ECHR Principles as Principles of European Law and their Implementation Through the National Legal System*, in *Human Rights and Taxation in Europe and the World* 83 (G. Kofler, M. Poiares Maduro & P. Pistone eds, IBFD 2011).

those principles dealing with legal protection are explicitly addressed in Article 6 ECHR and Article 47 ECFR.[17]

Nevertheless, variations in the application of these principles exist due to differing legal frameworks for administrative tax procedures within the EU.[18] This is because they function to balance the collective interest of tax collection with the protection of individual taxpayers' rights. However, the specific approaches differ based on each state's political and societal context.[19] Consequently, administrative tax procedures can significantly vary between EU countries.[20] The following sections therefore assess the extent to which supranational law offers clear legal guidance on interest accrual and the protection of taxpayers' rights.

2.1.1 *Applicability of Article 6 ECHR*

First, the ECHR is a crucial instrument for protecting the fundamental rights and freedoms of individuals and legal persons in Europe. Article 6 ECHR determines that 'in the determination of his civil rights and obligations or of any criminal charge everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.[21] Article 6 ECHR, thus, guarantees the right to a fair trial.[22] The wording, however, does not explicitly mention protection in the event that an undue economic burden is placed on the taxpayer resulting from interest on underpaid taxes.

However, it is established that Article 6 should constitute a right that is 'practical and effective'.[23] Accordingly, for the right of access to be effective, an individual must have a clear, practical opportunity to challenge an act that interferes with his rights. Furthermore, case law suggests that the ECtHR recognizes that financial barriers may hinder the effective exercise of the right to a fair trial.[24] In *Stankov v. Bulgaria*, the ECtHR considered that high and inflexible court fees, particularly in comparison to court fees in other EU Member States, amounted to a disproportionate restriction of the right of access to a court.[25]

To determine if similar protection also extends to interest accrual in a prolonged tax proceeding, it is first important to determine if it should be considered as criminal or civil as different requirements may apply.

Whether proceedings involve a criminal charge is not only dependent on the issue of whether the conduct is regarded as criminal in national law. In the context of the ECHR, the term 'criminal charge' carries a distinct connotation while the ECtHR applies the 'Engel criteria' to determine this. These are, first, the classification of the proceedings according to domestic law; second, an assessment of the nature of the offense in question; and third, an evaluation of the severity of the penalty that has been imposed.[26]

As a general rule, case law demonstrates that the ECtHR tends to regard tax proceedings as *civil* rather than *criminal* if interest, surcharges, and similar penalties that may be imposed do not have a punitive objective under national law.[27] There are also cases, however, that suggest that, under certain conditions, the ECtHR does accept that tax related fines can be classified as a criminal

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[17] Article 47 ECFR will not be discussed separately in this article as the rights protected in the ECHR and the EU Charter of Fundamental Rights overlap. The scope of Art. 47 is wider than that of Art. 6 (1) of the ECHR as it enables individuals to challenge a measure affecting any right conferred to them by the law of the EU in its entirety and not only in respect of the fundamental rights guaranteed in the charter. However, the charter rights that correspond to the ECHR rights are given the same meaning and scope as those laid down in the ECHR in accordance with Art. 53 of the ECFR. This implies that the guarantees provided by the ECHR apply similarly within the European Union. *See* Commentary of the Charter of the Fundamental Rights of the European Union, Jun. 2006 (2006), at 359 et seq.; and European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Law Relating to Access to Justice* 17 (2016).

[18] Pistone, *supra* n. 12, at 26; *Also see* Kokott & Pistone, *supra* n. 9, at 83 et seq. for a more general analysis on legal principles concerning the rule of law and legal certainty, proportionality, and fairness and how these principles are applied in different regions in the world.

[19] Pistone, *supra* n. 12, at 24. In this context, *also see* P. Baker & P. Pistone, *BEPS Action 16: The Taxpayers' Right to an Effective Legal Remedy Under European Law in Cross-Border Situations*, 25 (5–6) EC Tax Rev. 335–345, at 345 (2016), doi: 10.54648/ECTA2016033; and European Commission, *Guidelines for a Model for a European Taxpayer's Code* (2016), https://taxation-customs.ec.europa.eu/system/files/2016-11/guidelines_for_a_model_for_a_european_taxpayers_code_en.pdf (accessed 16 Nov. 2023).

[20] R. Attard, *Can Procedural Human Rights Apply to Tax Matters? A Thought-Provoking Question*, in *Tax Procedures EATLP Annual Congress Madrid 6–8 Jun. 2019* 145–147 (P. Pistone ed., EATLP International Tax Series Volume 8, IBFD 2019).

[21] Article 6(1) ECHR.

[22] Council of Europe / European Court of Human Rights, Guide on Art. 6 of the European Convention on Human Rights – Right to a Fair Trial (Civil Limb) (31 Aug. 2022).

[23] ECtHR, *Bellet v. France*, no. 23805/94, 4 Dec. 1995, paras 36 and 38; ECtHR, Zubac *v.* Croatia, no. 40160/12, 5 Apr. 2018, para. 77; *Also see* Council of Europe / European Court of Human Rights, *supra* n. 22, at 30–31.

[24] ECtHR, *Airey v. Ireland*, no. 6289/73. 9 Oct. 1979, paras 24–26. The ECtHR considered that the convention is intended to safeguard rights that are practical and effective, in particular the right of access to a court. In *Airey v. Ireland* that meant that Art. 6 § 1 may sometimes compel the state to provide the assistance of a lawyer when such assistance proves indispensable for an effective access to a court. Regarding the issue under discussion in this article, the question is whether a state may be compelled to not let interest on a tax liability accrue to levels that are prohibitive to seeking legal recourse.

[25] ECtHR, *Stankov v. Bulgaria*, no. 68490/01 (12 Oct. 2007), para. 67.

[26] ECtHR, *Engel and Others v. Netherlands*, no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (8 Jun. 1976); ECtHR, *Öztürk v. Germany*, no. 8544/79 (21 Feb. 1984); *Also see* Council of Europe / European Court of Human Rights, Guide on Art. 6 of the European Convention on Human Rights – Right to a Fair Trial 10 (Criminal Limb) (31 Aug. 2022).

[27] ECtHR, *J.B. v. Switzerland*, no. 31827/96 (3 Aug. 2001); European Commission on Human Rights. First Chamber. *Riener v. Bulgaria*, no. 28411/95, admissibility decision of 12 Apr. 1996, para. 2 ('It is true that the applicant was ordered to pay also interest on the principal amount due. […] It was not a fine under domestic law and its payment was enforceable only through [civil action]. Therefore, the proceedings at issue did not concern the determination of a criminal charge within the meaning of Art. 6 (Art. 6) of the Convention'); *Also see infra* s. 2.4 on the question of whether EU Member States generally have a punitive and deterrent objective vis-à-vis interest on the underpayment of taxes. In this respect, it is noteworthy that, even though the accrual of interest is not usually meant to be punitive, a deterrent aim does seem common.

charge within the terms of the ECHR.[28] The leading case in this respect is *Bendenoun v. France.*[29] In it, the French Government applied the Engel criteria and stated that the tax surcharges imposed were not considered criminal penalties under French law nor was the conduct of the applicant considered a criminal offense. Finally, it argued that the severity of the penalties was not such to warrant a classification as a criminal proceeding.[30] Nevertheless, the ECtHR first considered that the applicable French law automatically applies certain tax surcharges in the event of noncompliance by any taxpayer. Second, the tax surcharges were not intended as pecuniary compensation for damage but as punishment to deter reoffending. Third, as the surcharges were applied under a general rule, their purpose was both deterrent and punitive. Finally, in this specific case, the surcharges amounted to a substantial sum, and failure to pay them could result in the taxpayer being liable for imprisonment.[31] The ECtHR concluded that, while none of these factors alone was decisive, 'together and cumulatively they made the "charge" in issue a "criminal" one within the meaning of Article 6 para. 1 (Art. 6-1), which was therefore applicable'.[32]

In a subsequent case, the arguments put forth by the applicants suggesting that the tax penalties should be regarded as criminal proceedings while the underlying tax assessment should not be treated as such were dismissed by the ECtHR. The court held that the tax assessment and tax penalties were interconnected in such a way that it was not feasible to separate the issues to which Article 6 applied from those to which it did not. The ECtHR considered tax penalties under the civil penalty regime.[33]

Case law therefore suggests that, while tax proceedings are not excluded as being considered as criminal proceedings, a criminal charge typically is not an issue. When this point is accepted, the applicability of Article 6 ECHR depends on whether the proceedings concern the determination of civil rights and obligations.[34] Established case law suggests that Article 6 ECHR is not easily applicable to tax proceedings as the existence of an individual's tax obligation with respect to the state falls exclusively under public law and therefore does not concern a civil right.[35] In this respect, however, it is of value to point out that, in the *Ferrazzini* case, Judge Bonello expressed his dissenting opinion, contending that the judgment had misinterpreted the term 'civil rights' and that tax proceedings would fall under the protection of Article 6 ECHR.[36]:

> It is not open to doubt that the obligation to pay taxes directly and substantially affects the pecuniary interests of citizens and that, in a democratic society, taxation (its base, payment and collection as opposed to litigation under budgetary law) is based on the application of legal rules and not on the authorities' discretion. Accordingly, in my view Article 6 should apply to such disputes unless there are special circumstances justifying the conclusion that the obligation to pay taxes should not be considered "civil" under Article 6 § 1 of the Convention.[37]

Furthermore, the reasonableness of the length of proceedings is to be assessed on four variables: The complexity of the case, the taxpayer's conduct, the competent authorities' conduct, and what is at stake for the taxpayer.[38] Establishing the reasonableness of the length of the proceedings therefore occurs on a case-by-case basis. In criminal cases, there appears to be a generally applied rule that more than five years might be considered unreasonable,[39] yet, the ECtHR has also allowed longer periods in several tax cases.[40] In civil proceedings, however, a similar five-year maximum does not seem to apply.[41] Thus, case law also appears to suggest that Article 6 ECHR likely does

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[28] P. Baker, *Should Article 6 ECHR (Civil) Apply to Tax Proceedings?*, 29 (6–7) Intertax 205–211, at 209–210 (2001), doi: 10.54648/339667.

[29] ECtHR, *Bendenoun v. France*, no. 12547/86 (24 Feb. 1994).

[30] *Ibid.*, para. 45.

[31] *Ibid.,* para. 47.

[32] *Ibid.*; *Also see* Council of Europe / European Court of Human Rights, *supra* n. 26, para. 39.

[33] ECtHR, *Georgiou v. United Kingdom*, no. 40042/98, admissibility decision of 16 May 2000. *Also see* Baker, *supra* n. 28, at 210, considering that this judgment, which views the tax assessment and tax penalty as interconnected, could have implications in certain countries where it is customary to combine a penalty assessment with an assessment for additional underdeclared tax. In such cases, appealing against the tax penalty and tax assessment would result in Art. 6 applying to the entire proceedings.

[34] ECtHR, *Ferrazzini v. Italy*, no. 44759/98 (12 Jul. 2001), paras 20 and 29. The *Ferrazzini* judgment was confirmed in ECtHR, *Jusilia v. Finland*, no. 73053/01 (23 Nov. 2006), para. 29.

[35] *Georgiou v. the United Kingdom, supra* n. 33. *Also see* European Union Agency for Fundamental Rights and Council of Europe, *supra* n. 17, at 27.

[36] *Human Rights and Taxation in Europe and the World* 398–400 (G. Kofler, M. P. Maduro & P. Pistone eds, IBFD 2011).

[37] *Ferrazzini v. Italy, supra* n. 34, at 16.

[38] Council of Europe/European Court of Human Rights, *supra* n. 22, at 107–111.

[39] P. Baker, *Taxation and the European Convention on Human Rights*, British Tax Review, 211–377, at 306–307 (2000).

[40] There are several examples of tax cases where very long criminal proceedings were not deemed unreasonable. This was owing to the complexity of the case in ECtHR, *Hozee v. the Netherlands*, no 21961/93, 22 May 1998, paras, 50–55, and, due to that the delay, were not due to the conduct of the tax authorities in ECtHR, *HH v. the Netherlands*, no 23229/94 (1 Jul. 1997), paras 43–54. *Also see* Kokott & Pistone, *supra* n. 9, at 267.

[41] ECtHR, *Georgiou v. the United Kingdom*, no. 40042/98, admissibility decision of 16 May 2000; Baker, *supra* n. 39, at 307.

not offer much protection with respect to the duration of (civil) tax proceedings.

As mentioned above, this article does not intend to determine whether the accrual of interest conflicts with Article 6 per se as a more comprehensive analysis of this question is necessary and falls beyond the scope of this article. It suffices here to conclude that case law suggests that there is a general reluctance to apply Article 6 ECHR in tax proceedings.[42] Thus, similar arguments might hold regarding interest on the underpayment of a tax liability. Moreover, even if it was considered that the issue that the economic burden from the interest charge might discourage taxpayers from seeking legal recourse could intrinsically warrant the application of Article 6 ECHR, it is not immediately apparent that said interest charge would be deemed to hinder the effective exercise of the right to a fair trial.

2.1.2 *OECD Model Tax Convention on Income and on Capital*

A second example that international tax law does not offer a distinct answer can be deduced from the Commentary on Article 25 of the OECD Model Convention.[43] The commentary addresses the issue that taxpayers might incur a significant economic burden as interest accrues on an open tax liability while awaiting the decision in a mutual agreement procedure.[44] The OECD Model specifically states in this regard:

> Contracting States should seek to adopt flexible approaches to provide relief from interest accessory to the tax liability that is the object of a mutual agreement procedure request. Relief from interest would be especially appropriate for the period during which the taxpayer is in the mutual agreement process, given that the amount of time it takes to resolve a case through the mutual agreement procedure is, for the most part, outside the taxpayer's control. Changes to the domestic law of a Contracting State may be required to permit the competent authority to provide interest relief agreed upon under the mutual agreement procedure.[45]

Moreover, it is considered that interest payments should not be imposed in a way that effectively discourages taxpayers from initiating a mutual agreement procedure because of the cost and the cash flow impact that this would involve.[46] To avoid this 'payment of outstanding […] interest should not be more onerous to taxpayers in the context of the mutual agreement procedure than they would be in the context of taxpayer initiated domestic law review'.[47] Interestingly, this part of the commentary suggests that, if interest is due under national rules, a similar interest burden would not be found to be unduly burdensome with regard to a mutual agreement procedure.

Consequently, the national rules are the benchmark against which the question of whether the accrual of interest is unduly burdensome must be measured under Article 25 of the OECD Model Convention.[48] Thus, the abovementioned *flexible approaches to provide relief* may not extend beyond the burden of interest payments incurred in purely domestic situations.

2.1.3 *EU Tax Dispute Resolution Directive*

The issue of a lack of international guidance on the protection of taxpayers' rights in connection with interest accrual is further exemplified by EU law.

In this regard, it is first important to note that the EU has the competence to legislate in the area of administrative tax procedures. According to the Treaty on European Union (TEU) and the TFEU, the EU's competences are limited by the principle of conferral.[49] The EU can only adopt legally binding acts in an area for which the Member States have conferred a (shared) competence to the EU. Generally, taxation is viewed as such between Member States and the EU.[50] Moreover, Article 115 TFEU suggests that this competence, in principle, extends to administrative tax procedures when they directly affect the functioning of the internal market.[51]

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[42] *Also see infra* s. 2.2 on the constitutional decisions in several Member States that appear to underline this observation.

[43] This commentary also applies to the UN Model Double Taxation Convention between Developed and Developing Countries (2017). *See* UN Model Convention, Art. 25, B. Commentary on the paragraphs of Art. 25, at para. 12.

[44] OECD, *Model Tax Convention on Income and on Capital* (2017), Commentary on Art. 25, para. 49.3.

[45] *Ibid.*

[46] OECD, *supra* n. 44, Commentary on Art. 25, para. 49.4.

[47] *Ibid.*

[48] This underscores the earlier made assertion in s. 2.1. that formal tax law is effectively determined primarily on a national level.

[49] The principle of conferral asserts that the EU is a union of its Member States and that its competences are explicitly conferred on it by these states. Thus, for areas where they have not agreed to confer or share the competence, the jurisdiction of such areas remains with the Member States. Of note in this respect is that, when the Union enacts legislation in a given area, the competence for this area is automatically transferred to it. *See* Arts 4 and 5 TEU, http://data.europa.eu/eli/treaty/teu_2012/oj; and Arts 3 through 7 TFEU and Protocol (No 2) on the application of principles of subsidiarity and proportionality, http://data.europa.eu/eli/treaty/tfeu_2012/oj.

[50] Articles 4 and 115 TFEU.

[51] Unlike for indirect taxes (Art. 113 TFEU), the TFEU does not specifically peremptorily request that direct taxes be harmonized. Instead, Art. 115 TFEU provides for the council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee to issue directives for

Despite this competence, the EU appears to focus primarily on European tax rules with regard to material tax law. The main objective is to encourage the development and coordination of fair, efficient, and growth-friendly tax policies. This includes administrative coordination between Member States such as through the automatic exchange of information.[52] However, the EU typically does not assume a direct role in setting rules on the collection of taxes or administrative tax procedures and leaves procedural tax law predominantly a domestic responsibility. [53]

This observation is reinforced by the council directive on tax dispute resolution mechanisms.[54] It does not specifically address the issue of interest and administrative penalties in dispute resolution. Instead, Article 15(4) stipulates that the final decision of the dispute resolution under the directive shall be implemented in accordance with the Member State's national law.[55] This demonstrates that it does not aim to establish a uniform approach to ensure that the calculation of interest and administrative penalties does not discourage taxpayers from seeking dispute resolution. In fact, the Tax Dispute Resolution Directive does not appear to acknowledge that domestic formal law, by itself, could constitute an impediment for taxpayers to seek legal recourse. Alternatively, it may assume that legal action would be available to challenge such a national rule if it did. In any event, it emerges that, also under the Tax Dispute Resolution Directive, national rules are the benchmark against which the question of whether the accrual of interest might be unduly burdensome is measured.[56]

2.2 *The Constitutionality of High Interest Burdens on Taxpayers*

The preceding analysis indicates that international tax law lacks clear guidance on the matter of interest charges on underpaid taxes in combination with the protection of taxpayers' rights. This notwithstanding, the issue of whether the interest burden can become so substantial that taxpayers may find it prohibitively expensive to contest tax assessments has also generated constitutional debates in several countries. Consequently, the following discussion examines the potential for national constitutional courts to offer guidance that is relevant to taxpayers in the EU.

For instance, in Germany, it has been contended that the underpayment rate's excessive level compared to the market rate raises constitutional concerns.[57] Given the potentially protracted nature of complex tax procedures, taxpayers must choose judiciously whether to assume the risk of additional interest. Nevertheless, applicable German case law indicates that even proceedings lasting for up to ten or twelve years are not deemed unlawful or unreasonable and thus not in conflict with the German Constitution.[58]

In Switzerland, the combined issue of interest accrual and prolonged tax proceedings has also provoked questions of constitutionality. However, as interest rates are enshrined in law and Swiss constitutional jurisdiction is very limited, the Swiss courts have refused to hear such complaints.[59] Thus, federal statutes must be applied even when they conflict with the Swiss Constitution.

Similarly, in Spain, the issue of the difference between the underpayment rate and the much lower overpayment rate was referred to the constitutional court.[60] It was contended that this disparity violated the equality principle. Moreover, as the additional interest would be a penalty imposed without an offense, it was contended it was in conflict with the principle of legality in criminal law.[61] The Spanish Constitutional Court ruled that the divergence between the rates was not unreasonable given the taxpayer and administration's imbalanced positions as

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the approximation of such laws, regulations, or administrative provisions of the Member States that directly affect the establishment or functioning of the internal market. It is therefore clear that the mandate of Art. 115 TFEU includes formal law, but, in practice, the EU legislature is much more focused on other areas of tax law.

52 For example, the Directive on Administrative Cooperation in the Field of Taxation (DAC) and its subsequent amendments (DAC2-DAC8). The consolidated text as of 1 Jan. 2023: Council Directive 2011/16/EU of 15 Feb. 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC is retrieved from, http://data.europa.eu/eli/dir/2011/16/2023-01-01.

53 *See* European Union, *Taxation. Towards Fair, Efficient and Growth-Friendly Taxes*, https://european-union.europa.eu/priorities-and-actions/actions-topic/taxation_en (accessed 16 Nov. 2023); Pistone, *supra* n. 12, at 3–7.

54 Council Directive (EU) 2017/1852 of 10 Oct. 2017 on tax dispute resolution mechanisms in the European Union, http://data.europa.eu/eli/dir/2017/1852/oj.

55 Council Directive (EU) 2017/1852, Art. 15(4).

56 In this context, also *see* European Commission, *supra* n. 19, at 14.

57 K. D. Drüen & P. J. Butler, *Chapter 18: Germany*, in *Surcharges and Penalties in Tax Law 2015 EATLP Congress Milan 28–30 May 2015* EATLP International Tax Series Volume 14, 366 (R. Seer & A. L. Wilms eds, IBFD 2015).

58 Bundesfinanzhof, 13 Sep. 1991, IV B 105/90, https://research.wolterskluwer-online.de/document/18773023-be4a-4ad0-a7f8-3588621f1163 (accessed 16 Nov. 2023); and Bundesfinanzhof, 27 Apr. 2016, X R 1/15, https://www.bundesfinanzhof.de/en/entscheidungen/entscheidungen-online/decision-detail/STRE201610164/ (accessed 16 Nov. 2023).

59 M. Beusch, *Chapter 28: Switzerland*, in *Surcharges and Penalties in Tax Law. 2015 EATLP Congress Milan, 28–30 May 2015* , EATLP International Tax Series Volume 14, 648–649 (R. Seer & A. L. Wilms eds, IBFD 2015).

60 It is of value to mention that, at the time of the dispute, the legal interest rate was considerably lower than the market rate. Even though the legal rate of underpayment was higher than the legal rate of overpayment, both rates were still below the market rate which meant that taxpayers could (still) realize a benefit by delaying the payment of their taxes.

61 A. López Díaz, *Chapter 26: Spain*, in *Surcharges and Penalties in Tax Law. 2015 EATLP Congress Milan, 28–30 May 2015* , EATLP International Tax Series Volume 14, 595 (R. Seer & A. L. Wilms eds, IBFD 2015).

timely payment is more important for the tax administration than the individual.[62] Additionally, the court determined that the penal principle of legality did not apply since the charged interest was not a sanction, although it acknowledged that the interest had a deterrent purpose in addition to a compensatory one.[63] These examples illustrate concerns that relatively high interest burdens on taxpayers may impact their decisions to contest tax assessments. However, courts in various jurisdictions seem to either conclude that these interest burdens are not subject to constitutional scrutiny or that they do not conflict with constitutional rights or the underlying legal principles.

Denmark lacks a constitutional court, and in the *Netapp* case, the Supreme Court does not comment on the constitutionality of the Tax Collection Act statutes on interest accrual. It merely confirms the Danish tax authorities' interpretation of the interest rules as they were applied. Nevertheless, the Danish Supreme Court observed the following with respect to these statutes and their implementation: 'At the same time, the Supreme Court finds that there is reason for the legislature to consider whether consequences of the Tax Collection Act such as in this case […] are desirable'.[64]

This statement indicates that, despite the Danish tax authorities correctly applying the Danish Tax Collection Act, the Supreme Court has concerns about the regulations' implications in cases where tax proceedings are particularly protracted. Consequently, it recommends that the legislature considers amending the Tax Collection Act accordingly. Interestingly, the Supreme Court suggests a specific approach to resolving the issue, stating that the consequences should be assessed in connection with the question of whether disputed amounts should have a right to deposit – even if the taxpayer has won the case in lower courts – to halt interest accrual.[65]

This section thus illustrates that also national discussions on the constitutionality of undue economic burdens due to the interest charges on underpaid taxes offer little guidance with respect to, for example, a minimum level of taxpayers' rights protection. Hence, what follows is an analysis of the Danish regulations on interest charges on underpaid and overpaid taxes followed by a high level comparison of the same regulations in certain jurisdictions.

2.3 *Danish Rules on Interest on Underpaid Taxes*

In accordance with general practice, Denmark requires taxpayers to pay interest charges in the event of an underpayment of taxes. The legal basis for interest accrual in this regard is provided under section 7 of the Danish Tax Collection Act. This article stipulates that interest charges are applicable both in cases when payment is delayed and when a deferral of payment has been granted. The interest charge is calculated on a monthly basis commencing from the latest due date of payment until the amount is fully paid.[66] The percentage employed in the calculation of the interest charges for underpayment is established annually and is intended to reflect the prevailing market interest rate.[67]

It is important to note that the accrued interest charge, per se, is not considered to be punitive. Rather, it serves primarily to offset any potential liquidity benefits a taxpayer might enjoy by delaying payment.[68] Furthermore, the amount due in accordance with section 7 of the Tax Collection Act is not deductible as it does not qualify as an interest charge under Danish tax law. As a result, it should be regarded as a surcharge.[69]

The actual interest rate pursuant to section 7(1) of the Tax Collection Act is determined on a monthly basis and consists of a base rate and a supplement rate. The base rate is published each year on December 15 preceding the year in which the base rate is to take effect. In accordance with section 7(2) of the Tax Collection Act, the supplement rate is fixed at 0.7 percentage points. The following is an overview of the applicable interest rates on underpaid taxes since 2014.[70]

Notes

62 STC 76/1990 of 26 Apr. 1990, LG 4 A, https://www.boe.es/buscar/doc.php?id=BOE-T-1990-12127 (accessed 16 Nov. 2023).

63 *Ibid.*

64 Denmark *v.* NetApp Denmark ApS and TDC A/S, *supra* n. 1, at 28.

65 *Ibid.*

66 Pursuant to s. 7(1) of the Tax Collection Act.

67 Pursuant to s. 7(2)(3) of the Tax Collection Act.

68 SKAT, *Den Juridiske Vejledning. A.D.8 Renter og gebyr ved forsinket eller manglende betaling* (2023), https://info.skat.dk/data.aspx?oid=2286295 (accessed 16 Nov. 2023); J. Bolander & I. L. Jeppesen, *Chapter 15: Denmark*, in *Surcharges and Penalties in Tax Law. 2015 EATLP Congress Milan, 28–30 May 2015* (Eds R. Seer & A.L. Wilms), EATLP International Tax Series Volume 14, 290–291 (IBFD 2015).

69 Bolander & Jeppesen, *supra* n. 68, at 291.

70 *See* Skatteministeriet, *Rentesatser efter opkrævningsloven 2002–2018* (2017), https://skm.dk/tal-og-metode/statistik/arkiv/rentesatser-efter-opkraevningsloven-2002-2018 (accessed 16 Nov. 2023); and SKAT, *Den Juridiske Vejledning. A.D.8.1 Renter og gebyrer efter opkrævningsloven* (2023), https://info.skat.dk/data.aspx?oid=2290071 (accessed 16 Nov. 2023).

Year	*Interest Rate per Month*	*Approx. Effective Rate per Year*[71]
2014	0.8%	10.1%
2015	0.8%	10.1%
2016	0.8%	10.1%
2017	0.8%	10.1%
2018	0.7%	8.7%
2019	0.7%	8.7%
2020	0.7%	8.7%
2021	0.7%	8.7%
2022	0.7%	8.7%
2023	0.7%	8.7%

In accordance with section 8 of the Tax Collection Act, the Danish tax authorities may, under certain circumstances, exempt taxpayers from the aforementioned interest rates if applying the rules might lead to an unreasonable result. [72] However, this provision is typically applied in a very restrictive manner,[73] and such special circumstances are limited to two situations.[74] First, exemptions may be granted in cases of sudden and unforeseeable events outside of the taxpayer's control provided that the outstanding amount is paid promptly after such events. Second, if the payment deadline is exceeded by only a few days and if it is the first instance of delayed payment or if there are mitigating circumstances, an exemption may be granted. For example, an exemption could be granted if a taxpayer is taken ill suddenly, and the delay is relatively brief.[75]

In Denmark, payments to and from the tax authorities are typically processed through the taxpayer's tax account, also known as the Skattekonto.[76] This account is held by the tax authorities and is dedicated to each taxpayer. If there is an outstanding balance – a tax liability – the interest rules described above will apply. However, if there is a credit balance – when the tax authorities owe the taxpayer money – no interest will be calculated.[77] It is important to note that the tax account is not intended to hold significant credit balances. In accordance with Danish rules, if the credit balance exceeds the maximum amount of Danish kroner (DKK) 200,000, the tax authorities will transfer the amount to the taxpayer's bank account within five days.[78]

A taxpayer is generally required to make two payments to the tax authorities each year based on a preliminary corporate income tax assessment that are collected through the taxpayer's tax account.[79] The calculation of this preliminary assessment is based on the average taxable profit of the preceding three years. If the actual taxable profit for the year exceeds the profit calculated in the preliminary assessment resulting in an underpayment of tax, an interest charge is imposed in accordance with the aforementioned rules. Similarly, if the preliminary tax is not paid by the due date, interest accrues in accordance with the same rules. In the event of an overpayment, such as in the case that the taxable profit is lower than the calculated preliminary assessment, compensatory interest is paid to the taxpayer for the overpaid amount of tax.[80] Notably, the interest on overpaid tax is calculated on an annual basis as opposed to monthly and is based on the yearly average rate for certificates of deposits at the Danish National Bank. Furthermore, any interest received is not included in the taxpayer's taxable income.[81]

The following is an overview of the applicable interest rates on overpaid taxes since 2014.

Notes

[71] Calculation by the author: The effective interest rate per month (r) is calculated with the following formula: $r = (1 + i/n)^n - 1$. In this formula, i represents the stated interest rate, and n represents the number of compounding periods per year. The effective interest rate per month (r) is subsequently calculated as the effective yearly rate (r_t) by using the formula $r_t = (1 + r)^n - 1$.

[72] Section 8 (1)(4) of the Tax Collection Act.

[73] Lovforslag nr. L 196, Folketinget 2021–22, *Forslag til Lov om ændring af kildeskatteloven, opkrævningsloven, selskabsskatteloven og forskellige andre love* 44 (2022), https://www.ft.dk/ripdf/samling/20211/lovforslag/l196/20211_l196_som_fremsat.pdf (accessed 16 Nov. 2023).

[74] Section 4 of the Executive Order on the Collection of Taxes and Fees etc (BEK nr 731 af 21 Jun. 2013), https://www.retsinformation.dk/eli/lta/2013/731 (accessed 16 Nov. 2023).

[75] Lovforslag nr. L 196, *supra* n. 73, at 44.

[76] Sections 24–30c of the Tax Collection Act on the settlement and collection of tax.

[77] Section 16c (3) of the Tax Collection Act.

[78] Section 16c (5) and (6) of the Tax Collection Act.

[79] Payments occur on Mar. 1 and Nov. 1 pursuant to s. 29b (5) Announcement of the Corporation Tax Act (LBK nr 1241 af 22 Aug. 2022). *Also see* SKAT, *Den Juridiske Verjledning. C.D.10.4 Acontoskatteordningen for selskaber og fonde* (2023), https://info.skat.dk/data.aspx?oid=2049059 (accessed 16 Nov. 2023).

[80] Section 29b (5) of the Announcement of the Corporation Tax Act; *Also see* SKAT, *Den Juridiske Vejledning. C.D.10.4.9.5 Procentsatser for tillæg og godtgørelse* (2023), https://info.skat.dk/data.aspx?oid=2049086 (accessed 16 Nov. 2023).

[81] Section 29b (13) of the Announcement of the Corporation Tax Act.

Year	*Effective Interest Rate per Year*[82]
2014	1.1%
2015	0.1%
2016	0.1%
2017	0.1%
2018	0.1%
2019	0.1%
2020	0.1%
2021	0.1%
2022	0.4%
2023	tbd

2.4 *Comparing Denmark to Other Jurisdictions*

Most jurisdictions have a system in place that allows charging interest in the case of underpayment.[83] This is generally not intrinsically intended as a penalty but rather functions as a mechanism to discourage taxpayers from withholding payment. In many cases, jurisdictions also compensate interest in the case of overpayment by the taxpayer; however, it is not uncommon for the reimbursement interest rate to be (much) lower than that calculated for underpayment.[84] The Danish effective interest rate compared to that of other jurisdictions is relatively high, and the difference between underpayment and overpayment rates is relatively large, but neither is particularly exceptional. The table below provides an overview of the range in applicable interest rates in several jurisdictions and illustrates the comparison between under- and overpayment rates.[85]

EU Member States	*Underpayment Rate*	*Overpayment Rate*
Austria[86]	2%-pt over market rate	2%-pt over market rate
Belgium[87]	4% legal rate	4% legal rate
Denmark[88]	0.7%-pt over monthly market rate (corresponds to minimum of 8.7% p/y)	Average rate on certificates of deposits in Danmark's National bank
Finland[89]	2%-pt over market rate	2%-pt under market rate
France[90]	0.2% monthly legal rate (corresponding to 2.427% p/y)	0.2% monthly legal rate (corresponding to 2.427% p/y)
Germany[91]	0.5% monthly legal rate (corresponding to 6.168% p/y)	0.15% monthly legal rate (corresponding to 1.815% p/y)
Netherlands[92]	10,5% minimum legal rate (for CIT)	4% legal rate
Poland[93]	200% of the market rate (Lombard loan interest rate)	200% of the market rate (Lombard loan interest rate)

Notes

[82] The precise calculation of the interest on overpaid tax is (also) dependent on whether payments of the preliminary tax assessment have been made timely pursuant to s. 29b (6) of the Announcement of the Corporation Tax Act. In the interest of brevity, however, this article will assume that full compensatory interest is available to the taxpayer in the case of an overpayment of taxes. The same is assumed in the assessment of the suggested solution of depositing disputed amounts as discussed *infra* s. 3.2.

[83] C. Waerzeggers, C. Hillier & I. Aw, *Designing Interest and Tax Penalty Regimes*, IMF Technical Note 1/2019, IMF Legal Department 201, at 1 (2019); OECD, *Tax Administration in OECD Countries: Comparative Information Series (2004)* (OECD Publishing 2004), paras 36–37.

[84] Waerzeggers, et al., *supra* n. 83, at 5. The authors highlight best practices that commonly involve setting the rate for underpayment higher than commercial lending rates whereas the rates for overpaid taxes are usually at or below commercial lending rates. The authors also emphasize that the rates should not be set excessively high to avoid being punitive as such interest charges could then resemble tax penalties.

[85] It is beyond the scope of this article to provide an in-depth and comprehensive comparative analysis of the rules in all of the EU Member States on the accrual of interest and the treatment of late payments. The listed aspects are therefore meant to be illustrative of notable differences between Member States rather than exhaustive.

[86] Section 205 Bundesabgabeordnung, https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40246307/NOR40246307.html (accessed 16 Nov. 2023).

[87] Section 414, §1, Wet Inkomstenbelasting (WIB) 1992.

[88] *See supra* s. 2.3.

[89] VERO/SKATT, *Back Taxes – Instructions for Payment,* (no date), https://www.vero.fi/en/individuals/payments/back-taxes/if-a-payment-is-late/ (accessed 16 Nov. 2023).

[90] Section 1727 Code des Impôts, https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000044992184#:~:text=Version%20en%20vigueur%20depuis%20le%2001%20janvier%202022,-Modifi%C3%A9%20par%20LOI&text=I.,d'un%20int%C3%A9r%C3%AAt%20de%20retard (accessed 16 Nov. 2023).

[91] Sections 227 and 238 Abgadeordnung, https://www.gesetze-im-internet.de/ao_1977/__227.html (accessed 16 Nov. 2023), and, https://www.gesetze-im-internet.de/ao_1977/__238.html (accessed 16 Nov. 2023).

[92] Sections 30ha and 30hb Algemene Wet Rijksbelastingen, https://wetten.overheid.nl/BWBR0002320/2023-01-01 (accessed 16 Nov. 2023).

[93] Sections 56§1 and 78 Ustawa z dnia 29 sierpnia 1997 r. Ordynacja podatkowa (Tax Ordinance Act), https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19971370926/U/D19970926Lj.pdf (accessed 16 Nov. 2023).

EU Member States	*Underpayment Rate*	*Overpayment Rate*
Portugal[94]	5% legal rate	4% legal rate
Spain[95]	3.75% legal rate	3.75% legal rate
Sweden[96]	125% of market rate with a minimum of 1.25%	56% of market rate with a minimum of 0%

Non-EU Countries	*Underpayment rate*	*Overpayment rate*
Norway[97]	2.15%-pt over market rate	market rate
Switzerland[98]	4% legal rate	4% legal rate (0% if payments are made voluntarily)
United States[99]	3%-pt over market rate (5%-pt over market rate for large corporations)	2%-pt over market rate (0.5%-pt over market rate if amount exceeds USD 10,000)

There are notable variations in other jurisdictions' interest accrual rules compared to the Danish regime. For instance, Belgium has a rule that halts the accrual of interest on disputed amounts when the tax authorities fail to respond within a period of six months until a decision is reached.[100] In the United States, interest on underpayments ceases when US Internal Revenue Service (IRS) errors delay appropriate resolution of the case. Furthermore, the US tax authorities have the discretion to reduce or eliminate the interest charge if it is deemed to have become excessive.[101]

More generally, the differences in the discretion granted to tax authorities among respective national legislations are noteworthy. While most of the jurisdictions permit tax authorities to exercise discretion in determining the tax assessment, the same level of discretion is not always given concerning interest accrual.[102] Furthermore, there appears to be a meaningful correlation between applicable interest rates and the level of tax authority discretion. When the interest accrual on an underpayment is based on rates comparable to market rates, there tends to be less latitude for discretion.[103] Likewise, this is also true when rates are set in legislation.[104]

Correspondingly, there appears to be a greater margin of freedom for tax authorities' discretion in respect to national legislations if the underpayment rates are significantly higher than the market rate. Additionally, the correlation between the extent that discretion can be applied and the level of the underpayment rate seems to increase as the differential between the underpayment rate and overpayment rate increases.[105]

It could be argued that the latter observation is in accordance with the fact that, even though the accrual of interest is not meant to be punitive, it serves beyond preventing liquidity benefits in many jurisdictions.[106] Moreover, there are only a few countries where the overpayment rate is almost equal to the underpayment rate. Consequently, in some jurisdictions, taxpayers may feel that the burden of interest accrual falls more heavily on them than on the tax authorities. The issue therefore revolves around the division of risk, i.e., who should bear the risk of underpayment?

Notes

94 Sections 35 and 44 Lei Geral Tributária, https://dre.pt/dre/legislacao-consolidada/decreto-lei/1998-34438775 (accessed 16 Nov. 2023).

95 Section 26 Ley 58/2003, de 17 de diciembre, General Tributaria, https://www.boe.es/buscar/act.php?id=BOE-A-2003-23186 (accessed 16 Nov. 2023).

96 Chapter 65, ss 3 and 4 Skatteförfarandelagen, https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/skatteforfarandelag-20111244_sfs-2011-1244 (accessed 16 Nov. 2023).

97 Norwegian Tax Administration, *Interest Rates on Refunds, Underpaid Tax and Outstanding Tax* (2022), https://www.skatteetaten.no/en/rates/interest-rates-on-refunds-under paid-tax-and-outstanding-tax/ (accessed 16 Nov. 2023).

98 Section 4 Zinssatzverordnung EFD, https://www.newsd.admin.ch/newsd/message/attachments/67351.pdf (accessed 16 Nov. 2023).

99 Sections 6621 (a)-(c), 6622, and 6404(e)-(g) Internal Revenue Code, http://uscode.house.gov/browse/prelim@title26/subtitleF&edition=prelim (accessed 16 Nov. 2023).

100 Pursuant to s. 414 (2), Wet Inkomstenbelasting (WIB) 1992; *Also see* J. Malherbe, B. Peeters & G. Galéa, *Chapter 13: Belgium*, in *Surcharges and Penalties in Tax Law. 2015 EATLP Congress Milan, 28–30 May 2015*, EATLP International Tax Series Volume 14, 236 (R. Seer & A. L. Wilms eds, IBFD 2015).

101 Pursuant to s. 6404(e)-(g), Internal Revenue Code; *Also see* IRS, *Taxpayer Bill of Rights 10: The Right To a Fair and Just Tax System*, in *Taxpayer Bill of Rights*, Publication 1 (Rev. 9–2017) Catalog Number 64731W Department of the Treasury (2017), https://www.irs.gov/newsroom/taxpayer-bill-of-rights-10 (accessed 16 Nov. 2023); and S. W. Mazza, L. Lederman & S. R. Johnson, *Chapter 31: United States*, in *Surcharges and Penalties in Tax Law. 2015 EATLP Congress Milan, 28–30 May 2015* EATLP International Tax Series Volume 14, 756 (R. Seer & A. L. Wilms eds, IBFD 2015).

102 Compare, Pistone, *supra* n. 12, footnote 76 stating that, to reflect the non-transactional nature of taxation, no discretionary powers exist at all in Spain and Portugal.

103 There appears to also be an economic rationale to this as this means that the financial gain of underpayment is more or less directly counteracted by the accrued interest.

104 Compare Spain and Portugal and, to a lesser extent, Switzerland.

105 Compare the Netherlands and, to a lesser extent, Finland.

106 K. D. Drüen & P. J. Butler, *Chapter 6: Interest in Light of the Proportionality Principle*, in *Surcharges and Penalties in Tax Law. 2015 EATLP Congress Milan, 28–30 May 2015* EATLP International Tax Series Volume 14, 97 (R. Seer & A. L. Wilms eds, IBFD 2015); Waerzeggers, et al, *supra* n. 83, at 5.

There generally appears to be a direct link between the possibility to reduce the interest accrual for the taxpayer and the degree of *the burden* of the interest that is transferred to the individual. As such, many jurisdictions have mechanisms that enable the risk of underpayment to be shifted away from the taxpayer and towards the jurisdiction if the delay cannot be reasonably attributed to the taxpayer's actions.[107] Vice versa, such mechanisms are less likely when the rates of under- and overpayment are almost equal.[108]

However, this general link is absent in Denmark. Despite the relatively high applicable underpayment rate there and the large differential between overpayment and underpayment rates, effectively no mechanisms exist to reduce interest accrual in situations where the interest burden on the taxpayer becomes unreasonable.[109] Thus, it could be argued from this perspective that Denmark is an outlier compared to the other jurisdictions discussed here.

2.5 *Intermediate Conclusion*

The accrual of interest on underpayment is often found to go beyond the mere absorption of liquidity benefits. Interestingly, it remains ambiguous to what extent the interest charge on underpaid taxes can exceed a mere compensatory purpose as there is a lack of (international) legal guidance in this regard. The recent International Monetary Fund (IMF) Technical Note also does not provide substantial information on the appropriate interest rate differential between underpaid and overpaid taxes or the acceptable range for them.[110] Consequently, implementing limitations on interest computation may serve as a suitable tool for preventing an excessively high interest burden arising from prolonged administrative proceedings. Such limitations can also deter tax authorities from deliberately extending them in order to maximize revenue from interest payments.[111] It is important to note here that the IMF Technical Note includes a sample provision in the appendix suggesting that the total amount of interest due should not exceed the total amount of the tax liability.[112] However, there is no further clarification as to why this paragraph is included in the sample provision or how the IMF arrived at this particular maximum.

Regardless, the analysis demonstrates that jurisdictions typically do not have such a provision in their national legislation. Instead, several jurisdictions have other mechanisms in place to prevent unjust interest burdens that generally consider whether the delay can be reasonably attributed to the taxpayer's actions.

Notably, Denmark lacks an effective mechanism for preventing undue interest burdens. Moreover, the Danish Supreme Court has proposed that the legislature address this issue not by determining the division of risk of whether the taxpayer or tax authorities should bear the risk of underpayment but by allowing the taxpayer to deposit the entire disputed amount with the tax authorities for the duration of the tax proceedings. Therefore, the Danish Supreme Court recommends a remedy that differs from the approach commonly used in many other Member States, as well as from the remedy in the IMF Technical Note. This raises the question of whether the suggested remedy is more effective than the more widely adopted approach based on the division of risk. This issue is further examined below.

3 Assessing the economic burden of interest on underpaid taxes

Without the instrument of interest, taxpayers could realize an unintended gain by simply not paying their taxes that are due. It is therefore essential to note that this article holds that interest should generally be calculated based on the period between the time when the tax debt becomes due and when it is paid. Simply eliminating interest on underpayments should not be considered a viable option to prevent unduly high interest burdens on taxpayers.

However, it is worth considering that taxpayers may have various reasons for not paying their taxes on time. These can range from simple late payments to deferred payments and even to criminal tax evasion. Moreover, it may be due to the actions of the taxpayer, the tax authorities, or both. For example, if the tax authorities fail to adhere to specific deadlines for making decisions, it could be argued that part of the period over which interest is calculated is attributable to their actions. As mentioned

Notes

[107] Compare, e.g., R. Immonen & J. Lindgren, *Chapter 16: Finland*, in *Surcharges and Penalties in Tax Law. 2015 EATLP Congress Milan, 28–30 May 2015*, EATLP International Tax Series Volume 14, 327 (R. Seer & A.L. Wilms eds, IBFD 2015); J. A. Booij, S. Hemels & C. Bikkers, *Chapter 22: The Netherlands*, in *Surcharges and Penalties in Tax Law. 2015 EATLP Congress Milan, 28–30 May 2015* , EATLP International Tax Series Volume 14, 495 (R. Seer & A. L. Wilms eds, IBFD 2015); B. Folkvord, *Chapter 23: Norway*, in *Surcharges and Penalties in Tax Law. 2015 EATLP Congress Milan, 28–30 May 2015* , EATLP International Tax Series Volume 14, 510–511 (R. Seer & A. L. Wilms eds, IBFD 2015).

[108] Compare, e.g., L. Ayrault & A. Maitrot de la Motte, Chapter 17: France. In *Surcharges and Penalties in Tax Law. 2015 EATLP Congress Milan, 28–30 May 2015* , EATLP International Tax Series Volume 14, 348 (R. Seer & A. L. Wilms eds, IBFD 2015); A. Nita & A. Światłowski, *Chapter 24: Poland*, in *Surcharges and Penalties in Tax Law. 2015 EATLP Congress Milan, 28–30 May 2015* , EATLP International Tax Series Volume 14, 351 (R. Seer & A. L. Wilms eds, IBFD 2015); N. Aguiar, *Chapter 25: Portugal*, in *Surcharges and Penalties in Tax Law. 2015 EATLP Congress Milan, 28–30 May 2015* , EATLP International Tax Series Volume 14, 567 (R. Seer & A.L. Wilms eds, IBFD 2015); and Pistone, *supra* n. 12, at 3.

[109] Compare, *Denmark v. NetApp Denmark ApS and TDC A/S*, *supra* n. 1, at 28 on that the Danish Supreme Court states that SKAT correctly interprets the Danish Tax Collection Act regarding the accrual of interest on underpayment.

[110] Waerzeggers, et al., *supra* n. 83.

[111] Drüen & Butler, *supra* n. 106.

[112] Waerzeggers, et al., *supra* n. 83, at 14.

earlier, the question of the accrual of interest can be viewed from the perspective of neutralizing an unintended benefit or determining who should bear the risk of that benefit materializing. While the former is an objective measure of the amount of interest due, the latter also involves assessing the proportionality of who should bear the burden of that amount.[113]

To determine the issue of proportionality, it is vital to assess the actual economic burden that a taxpayer may face.[114] This is also the rationale behind the suggestion made by the Supreme Court to allow a taxpayer to deposit disputed amounts. Therefore, to make such an assessment, a reference point is required that provides a comparative economic burden in the situation where the taxpayer would have paid their taxes on time. The following paragraphs present a basic framework that can enable such a comparison.

3.1 *A Framework for Determining the Economic Burden on Taxpayers*

In general, it might be argued that jurisdictions that calculate interest based on rates that are equal to or closely related to those rates that apply in the market are the least likely to encounter the issue of proportionality. The reason for this is that the economic burden for a taxpayer would be the same regardless of having the tax authorities or any third party as a creditor.

This means that it would not make a difference for taxpayers to (1) pay their taxes on time and borrow the same amount to invest in their company from a third party or (2) 'borrow' that amount by not paying their tax bill and investing said amount in their company.[115] By increasing the interest burden on monies borrowed from the tax authorities over those from third parties, the effective economic burden of the former becomes higher than of the latter. The effect of this is that the incentive for a taxpayer to pay their tax bill on time increases. The question is however how substantial the difference between market rates and the underpayment rate can be before it becomes disproportionately burdensome. For example, an incredibly effective economic incentive for having taxpayers pay their taxes would be the extreme case in which the interest rate was 100%. However, most would likely agree that this would be disproportionate.[116]

It is important to add here that there can still be a difference in the economic burden on the taxpayer even when the market rates and underpayment rates are the same. For example, many jurisdictions, including Denmark, do not consider the interest on underpaid taxes to be deductible under the corporate income tax.[117] As interest payments to third parties can be deducted from corporate profits in most cases, this difference should be considered with respect to the proportionality of the economic burden that is placed on the taxpayer.

In addition, a second element to consider regarding the proportionality of this is the desired level of deterrence. Compare the situation of when a taxpayer simply defaults on their payments with the situation in which a deferral of payment is granted because the taxpayer has sought legal recourse. Intuitively, it might be generally agreed upon that the reason to deter a taxpayer from simply choosing not to pay should be greater than the reason to discourage a taxpayer from deciding to initiate legal action. The reason for underpayment, therefore, should be considered when determining the proportionality of the economic burden placed on the taxpayer.

In practice, however, it is not common for jurisdictions to differentiate the economic burden of interest accrual depending on the desirability of the action causing the underpayment. Instead, most (EU and non-EU) jurisdictions depend on mechanical rules with the possibility to reduce the economic burden on the taxpayer should it become unreasonable. Some jurisdictions do have mechanisms in place to compensate for if the delay is attributable to the taxpayer or the tax authorities, but here also their application is typically at the discretion of the tax authorities.[118]

The elements presented above form a framework based on which it can be determined whether the (risk of the) effective economic burden should be placed on the taxpayers or the tax authorities by assessing (1) the level of the economic burden, (2) to whom delays in the

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[113] Compare, *supra* s. 2.4.

[114] In assessing the economic burden on the taxpayer, this and the subsequent sections focus solely on the relevant interest charge to ensure a fair comparison. It is acknowledged that, besides the interest charge, there may be other administrative and/or tax penalties that are applicable, and both the interest charge and additional penalties may serve as deterrents. Moreover, the combined impact of these measures is relevant, and the distinction between compensatory measures and penalties is fundamental. Nonetheless, it is assumed, when determining the economic burden of the interest charge on taxpayers, that the deterrent effect of the interest does not exceed a reasonable level, as indicated in Waerzeggers, et al., *supra* n. 83.

[115] It is important to note that, particularly in times of very low market rates, an interest rate for overpayment above the market rate serves as an incentive for taxpayers to deliberately overpay and thus use the tax authorities to realize a risk-free return thereby effectively reducing the economic burden of a market-based loan. This would constitute an unfair competitive advantage over companies that do not (have the ability to) overpay.

[116] In addition, the surcharge would likely be thought to include a punitive element as it exceeds a reasonable level. *See* Waerzeggers, et al., *supra* n. 83.

[117] *See* s. 7 (1) of the Tax Collection Act. Vice versa, interest received on overpaid taxes is not included in the taxable income pursuant to s. 29B (13) of the Announcement of the Corporation Tax Act.

[118] In both instances, this might raise questions on the consistency with which such mechanisms are applied, especially if there is a lack of transparency regarding the process for when and/or conditions under which such discretionary powers are used.

proceedings are attributable, and (3) the desirability of deterring certain actions. As outlined above, Denmark mechanically calculates a relatively high (non-deductible) interest rate on underpayments while there is no effective mechanism in place to reduce the economic burden of this in the event that it is unreasonably high. However, the Supreme Court's suggestion could offer a remedy for such cases. Thus, based on this framework, it can be assessed if the solution of depositing funds at the tax authorities to prevent the mechanical calculation of interest is an effective measure for reducing the economic burden to a proportionate level.

3.2 *Assessing the Option of Depositing Disputed Amounts*

From the Danish Supreme Court case, it follows that Netapp Denmark ApS has won its legal challenges against the original tax assessment of the Danish tax authorities (hereinafter: SKAT) at the lower courts. However, as the Supreme Court ruled in favour of SKAT, the (corrected) tax assessment in the amount of DKK 158,450,880 is subject to interest from 1 October 2010 until the date that it is paid.[119] Assuming Netapp paid the tax debt on the date of the Supreme Court's judgment, that means that an amount of interest accrued in excess of DKK 190,000,000. As this amount is non-deductible for tax purposes, the total economic burden placed on the taxpayer equals this amount that is equal to approximately 120% of the disputed amount.

To compare economic burdens, it is assumed that the taxpayer could also have deposited the disputed amount with the tax authorities and that doing so that would prevent interest from being calculated even if a procedure was lost at the highest instance.[120] Furthermore, it is assumed that the deposited amount is provided by a third-party creditor. In this situation, two interest charges would have to be considered. The first is the interest that would be due to a third-party lender, and the second is the interest that is received based on overpaid taxes. The combined net cost of these would form the economic burden on the taxpayer of this counterfactual.

The interest rate on a ten-year business loan between 2010 and 2013 fluctuated between 4% and 5% per annum.[121] The interest accrued would thus amount to about 66% of the principal sum or approximately DKK 105,000,000.[122] However, as it would likely be deductible for corporate income tax purposes, the economic burden would be equal to approximately DKK 82,000,000 or 52% of the disputed amount. Based on the interest rates for overpayment between 2014 and 2022, the compounded receivable interest on the deposited amount would be approximately DKK 9,000,000.[123] As this amount is not included in the taxable income, this would directly reduce the effective economic burden to about 46% of the disputed amount.

An economic burden of about 46% is considerably less than an economic burden of about 120%. Whether the former would also have instigated the Danish Supreme Court to urge the legislature to reconsider the consequences of the Danish interest rules cannot be known. Therefore, it is difficult to say whether 46% should be considered proportionate or at least non-prohibitive for taxpayers to seek legal recourse. Given that the taxpayer in this specific case thought depositing the funds would have been an acceptable solution, it may be assumed that a burden of 46% could be thought of as non-prohibitive.

As for the second element of the framework, it goes beyond the scope of this article to assess to what extent any delays specific to the *Netapp* case should be attributable to the taxpayer or the tax authorities. It can be deduced from the judgment that the Danish Supreme Court, at least, did not find reason to comment on this aspect. For that reason, it will be assumed here that it cannot be known if the Supreme Court's suggested remedy – even though it is mechanical in nature – can effectively account for both the objective excessiveness of the amount of interest due and the proportionality of who should bear the burden of it. It can be reasoned, though, that this remedy does not allow for much adjustment if it does not adequately account for the question of proportionality.

In assessing the third element of the framework, an important consideration regarding the suggested solution and its corresponding economic burden is the expectations that the taxpayer has for winning the case. Under the current rules, had the Supreme Court ruled in favour of Netapp Denmark ApS, there would have been no tax liability and therefore no interest due. However, in the hypothetical scenario where the disputed amount was deposited and the Supreme Court delivered a favourable verdict to Netapp Denmark Aps, the taxpayer would still have to bear the economic burden of about 46% of the disputed amount. The question is therefore, if it is

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[119] Denmark *v* Netapp ApS and TDC A/S, *supra* n. 1, at 28.

[120] Alternatively, it could be imagined that the interest compensation on the deposited amount would be offset against the interest accrued on the disputed amount in case the procedure was lost at the highest instance – as was the case in the *Netapp* case.

[121] *See* Danmarks Nationalbank, *Monetary Review, 2012 4th Quarter – Part 1.* Danmarks Nationalbank, 74 (2012), https://www.nationalbanken.dk/en/publications/Documents/2013/01/Mon_Rev_1_Del_2012.pdf (accessed 16 Nov. 2023).

[122] Assuming a 4% annual rate and by calculating the compounded interest payable using the formula $r_t = (1 + r)^n - 1$.

[123] Based on the same timeline as in the *NetApp* case.

assumed that an economic burden of 46% of the disputed amount in lost cases is acceptable, would the same hold for an economic burden of 46% of the disputed amount in won cases? It is apparent this is a hefty insurance fee and one that not all taxpayers might readily agree to as it is likely that most of them would expect to have a decent chance of winning their case.

Therefore, depositing the amount with the tax authorities might only be an acceptable (proportionate) solution in those cases when the taxpayer expects to lose. However, if the case is successful at the Supreme Court, the economic burden of depositing the funds would be infinitely higher than in the situation where the taxpayer would have elected not to deposit the disputed amount.

A guaranteed cost of 46% of the disputed amount regardless of the outcome is thus a very bad option for taxpayers that expect to win their cases. Consequently, as the depositing option is merely voluntary, the taxpayer would once again have to face the risk of a 120% economic burden on the disputed amount if the highest court's decision unexpectedly turned out to be unfavourable. Such an option for the taxpayer would be the equivalent of what in chess is known as *zugzwang.*[124] For that reason, this article holds that the third element of the presented framework is not satisfied and, thus, the suggested remedy is not effective and efficient for an unduly high economic burden on the taxpayer pursuant to the current Danish rules on the accrual on interest on the underpayment of tax.

4 Protecting the internal market

Irrespective of the assessment of the suggested remedy above, it is important to consider whether any purely domestic resolution to this issue would be acceptable. Given the degree of the differences of the applicable rules on interest on underpayments between Member States, the European dimension of potential prohibitive effects on taxpayers to seek legal recourse cannot be overlooked.

The EU internal market may be adversely affected if the rules on interest calculation on the underpayment of taxes diverge substantially between Member States even if the economic burden is not prohibitive for seeking legal recourse. If the differential between the economic burden resulting from the interest calculation between Member States is big enough, this would create a de facto barrier for free establishment within the EU. If this is the case, this conflicts with the notion of an internal market without internal frontiers as meant in Article 26 TFEU.

4.1 *Subsidiarity and Proportionality*

As argued above, there is no compelling reason why the EU could not enact legislation regarding procedural tax law. In fact, this section maintains that it would be imprudent to excessively rely on the overarching articles in the TFEU, Article 6 ECHR, Article 47 ECFR, and/or principles of law that are more general as a means to safeguard taxpayers' rights. As is demonstrated, while these principles enshrined in international law must be reflected in national formal tax regulations, there are significant differences in how various jurisdictions apply them in concrete situations regarding the protection of taxpayers' rights.[125]

Similarly, Kokott and Pistone argue for a global minimum standard for the protection of taxpayer's rights through an International Charter of Taxpayer's Fundamental Rights.[126] However, such a Charter would still consist of mostly overarching principles. This article suggests that its overall efficacy could be reinforced by introducing EU minimum standards with respect to specific issues. This could be particularly beneficial in those instances when it is unclear if the ECHR offers direct protection or when concrete international legal guidance is currently lacking given that the issue of protecting taxpayers' rights is approached from a perspective that the economic burden in cross-border situations should not surpass that in national settings.[127]

When both international supranational institutions and national constitutional courts offer little guidance for the minimal levels of legal protection taxpayers should enjoy, there is a risk that national rules on these issues will develop within a very wide margin. This has been demonstrated to be the case above with the issue of interest accrual on the underpayment of taxes.[128]

Moreover, because of the variation in each of the Member States' approaches, it is not directly apparent if all of them have remained within the acceptable margins of taxpayers' rights protection with regard to interest on underpayments. In fact, the empirical evidence arguably demonstrates that the Member States' power to achieve an EU-wide minimum level of taxpayers' rights protection on their own is insufficient. Thus, collective action from the EU is needed to achieve this goal. Furthermore, even if it was the case that all Member States have stayed within an acceptable margin, it can be argued that the differential in the potential size of the interest charge for taxpayers if they find themselves in prolonged tax

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[124] Zugzwang is a situation wherein one player is put at a disadvantage because their obligation to make a move will mean they will have to worsen their position, often decisively so.

[125] *See supra* s. 2.1.

[126] Kokott & Pistone, *supra* n. 9, at 508 et seq.

[127] *See supra* s. 2.1.

[128] *See supra* s. 2.4.

proceedings could be conflicting with the right of free establishment in the EU. An EU-wide minimum standard on the underpayment of interest would thus be both a necessary and suitable measure to prevent an overly substantial differential between interest charges. This means that an EU directive offering a minimal level of protection with respect to the interest accrual on underpaid taxes may be justified when taking into account both the subsidiarity and the proportionality principles.[129]

This article therefore holds that the judgment from the Danish Supreme Court peremptorily requests the Danish legislature to prompt the EU to adopt legislative measures. In this regard, EU legislation should solely focus on ensuring a minimum level of protection and not attempt to entirely harmonize the rules on interest accrual. Expanding EU legislative ambitions beyond this minimum level would belie the nature of administrative tax procedures and the importance of finetuning them to the broader national tax system and its practices. As emphasized, they are an essential instrument for striking a reasonable balance between the broad collective interest of collecting taxes while simultaneously safeguarding the fundamental rights of individual taxpayers.[130] This balance is not the same across Member States as both political needs and concerns differ.[131] Therefore, an EU-wide harmonization of the rules on interest accrual would exceed the limits of the proportionality principle, while setting an EU minimum level of protection against unduly high economic burdens resulting from the accrual of interest on underpaid tax would not.

4.2 *Designing an EU Minimum Standard on Interest Accrual*

As emphasized above in the Danish context, depositing the disputed amount in order to prevent an unduly high economic burden on taxpayers may not be the most effective solution.[132] In an EU-context, this is even more apparent as all Member States would have to accommodate such an option in their legal systems which would likely considerably complicate the administrability of domestic tax systems. An easier and arguably preferable solution over depositing the disputed amount may be to simply set a maximum percentage to which the economic burden of a disputed amount might accrue.[133] Assuming that a maximum economic burden of, for example, 50% of the disputed amount would generally not deter taxpayers from seeking legal recourse, such a maximum would likely be much easier to apply in practice than introducing an entirely new set of procedures and regimes across Member States.

Moreover, such a maximum would inherently only apply in cases for which the legal proceedings take extraordinarily long which means that this could also serve as an incentive for the government to speed up proceedings as much as possible if the maximum is (about to be) reached. This means that such an alternative both strengthens taxpayers' rights with regard to the access to legal recourse and acts as a safeguard with regard to the time that a taxpayer must wait for a definitive decision regarding the procedure.

Finally, such a minimum level of protection aligns with the suggestion in the IMF Technical Note.[134] However, as demonstrated in the assessment of the economic burden on the taxpayer, a maximum of 100% would carry a considerably higher economic burden than depositing the amount with the tax authorities as suggested by the Danish Supreme Court. Arguably, the risk of a 100% interest charge in protracted tax proceedings could still be considered prohibitive. This may be particularly true in the EU as the ECJ serves as the last resort in disputes on (the principles of) EU law. Inherently, such disputes are likely to extend over many years as exemplified by the joined cases 69/2021, 79/2021, and 70/2021. Therefore, this article suggests that a 50% maximum would be more appropriate as a minimum level of protection within the EU instead of 100% as suggested by the IMF.

This approach would meet all three conditions of the discussed framework above. As previously examined, this framework can be employed to ascertain whether the risk of the effective economic burden should lie with the taxpayer or the tax authorities by assessing (1) the level of the economic burden, (2) to whom delays in the proceedings are attributable, and (3) the desirability of deterring certain actions.[135]

First, implementing this approach would guarantee that the economic burden on the taxpayer does not become unreasonably high thus preventing hindrances

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[129] *See* TFEU, Art. 5; TFEU Protocol (no 2) on the application of the principles of subsidiarity and proportionality; *Also see* T. Harbo, *The Function of the Proportionality Principle in EU Law*, 16(2) Eur. L. J. 165 et seq. (Mar. 2010), doi: 10.1111/j.1468-0386.2009.00502.x. for further analysis with regard to the application of the proportionality principle.

[130] Pistone, *supra* n. 12, at 24.

[131] Attard, *supra* n. 20, at 145–147.

[132] *See supra* s. 3.2.

[133] Such a maximum would only apply in the case of prolonged tax proceedings. In the unlikely event that there was a case where the interest charge would exceed 50% of the amount because the taxpayer simply defaulted on payment, said maximum should not apply.

[134] Waerzeggers, et al., *supra* n. 83, at 14.

[135] *See supra* s. 3.1.

for taxpayers seeking legal recourse. Additionally, for the majority of cases, the incentive for taxpayers to pay their tax liability on time would remain unaffected as the maximum percentage would only be relevant in situations with excessively prolonged durations.

Second, this approach would rebalance the risk of underpayments between taxpayers and the tax authorities in a manageable and cost-effective manner with minimal budgetary impacts. In fact, setting a limit that the interest charge cannot exceed 50% of the disputed amount offers a high level of legal certainty and clarity while also being a measure that can be relatively easily incorporated into all Member States' legal systems. Furthermore, it is likely to have a positive impact on reducing the duration of prolonged tax procedures as the maximum interest charge introduces an implicit incentive for tax authorities to conclude procedures before reaching the maximum limit. However, this approach would be applied in a mechanical manner and would have no impact on cases in which the interest charge does not exceed 50% of the disputed amount. Therefore, it could be argued that an additional discretion-based mechanism would still be appropriate to address remaining situations where the interest charge might be considered unreasonable.

Third, this approach effectively ensures that taxpayers are not deterred from seeking legal recourse, particularly in cases in which principles of EU law are in dispute. In such situations, it could be argued that it is often more in the state's interest to pursue a case all the way to the ECJ to settle a legal issue concerning EU law principles. Therefore, it may be reasonable for the state to potentially bear a larger part of the economic burden of the interest charge in these cases.

5 Conclusion

It is demonstrated that the differential between national rules on the interest on underpaid taxes and those between the national solutions to prevent that the resulting interest charge could deter taxpayers from seeking legal recourse may conflict with the fundamental freedoms governing the EU internal market. Moreover, the article establishes that the suggested solution by the Danish Supreme Court diverges from the generally applied approach based on the division of risk of who should bear the economic burden of the interest charge. Depositing the disputed amount is also deemed an inefficient and ineffective remedy as it would effectively primarily benefit those taxpayers that expect to lose their case.

Consequently, the article asserts that an EU measure to ensure a minimum level of protection with respect to the accrual of interest on underpaid taxes is important to ensure the proper functioning of the internal market. It also complements the international legal guidance to ensure proper protection of taxpayers' rights in this regard.

Moreover, it is suggested that ensuring such a minimum level of protection by limiting the economic burden of the interest accrual to a maximum percentage of the disputed amount is suitable for realizing the intended objective. Such an EU minimum standard would incentivize taxpayers to pay their tax bills in a timely manner while safeguarding their fundamental human rights wherever they are established in the EU. Moreover, it would prevent placing undue administrative burdens on either taxpayers or tax administrations and would not impede on Member States' abilities to design their tax administrative procedures to fit their national tax systems and practices.