

Traditional and Alternative Routes to European Tax Integration

Tax integration within the European Union can take place in many ways. In this book, various instruments which the Member States and the European Union have available to attain tax integration are discussed and their mutual relationship is studied.

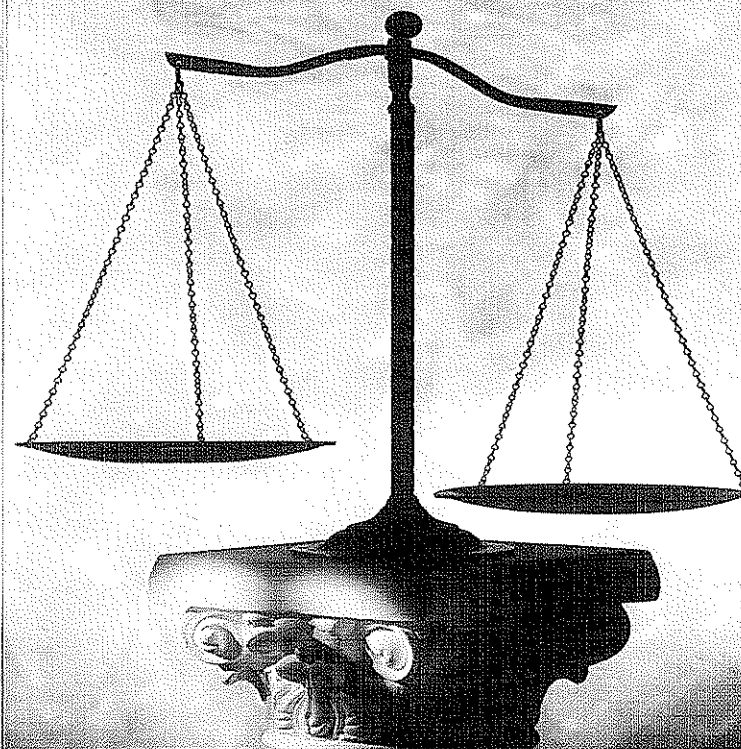
The book includes a general report drafted by the editor and is divided into seven parts focusing on (i) Sources of EU law for integration in direct and indirect taxation, (ii) Soft law: Solution or disillusion? Limits?, (iii) Infringement procedures: Another way to move things further?, (iv) Comitology, (v) Relationship between primary and secondary EU law, (vi) VAT Directive tested against primary law, and (vii) Direct tax directives tested against primary law.

The book is the outcome of the fourth annual conference of the GREIT (Group for Research on European and International Taxation). The topics of the other GREIT conferences were: "Towards a Homogeneous EC Direct Tax Law", "The State of the Art in EC Direct Tax Law" and "Legal Remedies in European Tax Law".

Contributors: Peter Aducci, Ana Paula Dourado, Joachim Englisch, Ana de la Pena, Hans Griebner, Eric C.C.M. Kemmerer, Georg Kofler, Pasquale Costantino, Daniel Sarmiento, Annette A.M. Schrauwen, Karsten Engsig Sorensen, Rita Szudacki, Maria Tenore, Adam Zalaski.

IBFD

Edited by Dennis Weber **Traditional and Alternative Routes to European Tax Integration**



Traditional and Alternative Routes to European Tax Integration

Edited by Dennis Weber

IBFD

**Traditional and Alternative Routes
to European Tax Integration**

Primary Law, Secondary Law, Soft Law, Coordination,
Comitology and their Relationship

Traditional and Alternative Routes to European Tax Integration

Primary Law, Secondary Law,
Soft Law, Coordination, Comitology
and their Relationship

Edited by
Dennis Weber

This book is based on the reports presented at the fourth annual seminar of the Group for Research on European and International Taxation (GREIT) on 25 and 26 September 2009 in Amsterdam. The conference was organized with the financial support of Loyens & Loeff.



IBFD

Visitors' address:

H.J.E. Wenckebachweg 210
1096 AS Amsterdam
The Netherlands

Postal address:

P.O. Box 20237
1000 HE Amsterdam
The Netherlands

Telephone: 31-20-554 0100

Fax: 31-20-622 8658

www.ibfd.org

© 2010 by the authors

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the written prior permission of the publisher. Applications for permission to reproduce all or part of this publication should be directed to: permissions@ibfd.org.

Disclaimer

This publication has been carefully compiled by IBFD and/or its author, but no representation is made or warranty given (either express or implied) as to the completeness or accuracy of the information it contains. IBFD and/or the author are not liable for the information in this publication or any decision or consequence based on the use of it. IBFD and/or the author will not be liable for any direct or consequential damages arising from the use of the information contained in this publication. However, IBFD will be liable for damages that are the result of an intentional act (*opzet*) or gross negligence (*grove schuld*) on IBFD's part. In no event shall IBFD's total liability exceed the price of the ordered product. The information contained in this publication is not intended to be an advice on any particular matter. No subscriber or other reader should act on the basis of any matter contained in this publication without considering appropriate professional advice.

Where photocopying of parts of this publication is permitted under article 16B of the 1912 Copyright Act jo. the Decree of 20 June 1974, Stb. 351, as amended by the Decree of 23 August 1985, Stb. 471, and article 17 of the 1912 Copyright Act, legally due fees must be paid to Stichting Reprorecht (P.O. Box 882, 1180 AW Amstelveen). Where the use of parts of this publication for the purpose of anthologies, readers and other compilations (article 16 of the 1912 Copyright Act) is concerned, one should address the publisher.

ISBN 978-90-8722-083-9

NUR 826

Table of Contents

Preface	xiii
Chapter 0. The General Report	1
<i>Dennis Weber</i>	
0.1. Traditional and alternative routes to European tax integration	1
0.1.1. Sources of European tax law	1
0.1.2. Decision-making in fiscal affairs	2
0.2. Overview of the subjects	3
0.2.1. Part one – Sources of EU law for integration in direct and indirect taxation	3
0.2.2. Part two – Soft law: solution or disillusion? Limits?	5
0.2.3. Part three – Infringement procedures: another way to move things further?	7
0.2.4. Part four – Comitology	7
0.2.5. Part five – Relationship between primary and secondary EU law	8
0.2.6. Part six – VAT Directive tested against primary law	9
0.2.7. Part seven – Direct tax directives tested against primary law	10
Part One Sources of EU Law for Integration in Direct and Indirect Taxation	
Chapter 1. Sources of EU Law for Integration in Taxation	15
<i>Annette Schrauwen</i>	
1.1. Introduction	15
1.2. Integration in taxation and the market	16
1.3. Integration in taxation and policy goals beyond the market	20
1.4. Integration in taxation and administrative incentives	22
1.5. Enhanced cooperation as an alternative for “traditional” harmonization?	23
1.5.1. Substantive conditions	24
1.5.2. Procedural conditions	25

1.5.3. Procedural issues related to established enhanced cooperation	27
1.6. Conclusion	28
Chapter 2. Sources of EU Law for European Tax Integration: Well-Known and Alternative Legal Instruments	29
<i>Eric C.C.M. Kemmeren</i>	
2.1. Introduction	29
2.2. The establishment of <i>the</i> internal market requires European tax integration	30
2.3. Main causes for the lack of European tax integration	33
2.4. Means for European tax integration	35
2.5. Hard-law and soft-law instruments in taxation	38
2.5.1. Hard-law instruments in taxation	38
2.5.2. Soft-law instruments in taxation	41
2.6. Appropriate legal instruments to remove tax discrimination/restrictions, State aid and distortions	43
2.6.1. Appropriate legal instruments to remove tax discrimination/restrictions	43
2.6.2. Appropriate legal instruments to remove tax State aid	44
2.6.3. Appropriate legal instruments to remove tax distortions	45
2.7. Outlook: Appropriate (legal) instruments for further European tax integration	48
Part Two Soft Law: Solution or Disillusion? Limits?	
Chapter 3. The Function of EU Soft Law	53
<i>Daniel Sarmiento</i>	
3.1. The origins of soft law	53
3.2. Conceptualizing soft law	55
3.2.1. Hard law/soft law	55
3.2.2. Internal soft law/external soft law	56
3.2.3. Unilateral/bilateral/multilateral soft law	57
3.2.4. Typology and legal consequences	57

3.3. The functions of soft law	57
3.3.1. Interpretative effects	58
3.3.2. Liability: Legitimate expectations and soft law	60
3.4. Judicial review of soft law	61
3.5. Stretching the functions of EU soft law	63
Chapter 4. The Code of Conduct for Business Taxation: An Evaluation of an EU Soft-Law Instrument	67
<i>Hans Gribnau</i>	
4.1. Introduction	67
4.2. The Code of Conduct for Business Taxation	68
4.3. Soft law in the European Union	71
4.3.1. Governance and soft law in the European Union	71
4.3.2. Core elements of EU soft law	74
4.3.3. The complex relationship between soft law and hard law	77
4.4. Varieties of EU soft law	80
4.4.1. Preparatory and informative instruments	80
4.4.2. Interpretative and decisional instruments	83
4.4.3. Steering instruments	84
4.5. Soft law, cooperation and public consultation	86
4.5.1. Cooperation and reciprocal commitment	86
4.5.2. Public consultation, participation and EU soft law	90
4.6. Conclusion	94
Chapter 5. Soft Tax Law: Steering Legal Pluralism towards International Tax Coordination	97
<i>Pasquale Pistone</i>	
5.1. Introduction	97
5.2. Legal pluralism and international taxation in the European Union	99
5.3. Soft international tax law	101
5.3.1. Soft international tax law and the role of the OECD	101
5.3.2. Consensus and soft international tax law: The issue of the democratic deficit	104
5.3.3. The formation of soft international tax law	106
5.3.4. Soft international tax law and customary international law	109
5.4. The use of soft law in European international taxation	111

Part Three
Infringement Procedures:
Another Way to Move Things Further?

Chapter 6. Contribution of Infringement Procedures to European Tax Integration 117

Adam Zalasiński

- 6.1. Introduction 117
- 6.2. Institutional system of the European Union and European tax integration 118
- 6.3. Infringements procedure – an outline 119
- 6.4. Processes of legal unification in the EU and infringements procedure 122
 - 6.4.1. Legislative process 122
 - 6.4.2. Law-making impact of the CJ's decisions 123
 - 6.4.3. Infringements procedure and the earlier body of the CJ's case law 126
 - 6.4.4. The effects of infringements on the law-making process in the Member States 126
- 6.5. Conclusion 127

Part Four
Comitology

Chapter 7. Comitology: An Alternative Route towards European Direct Tax Integration? 131

Peter Adriaansen

- 7.1. Introduction 131
- 7.2. Comitology: Legal framework and institutional history 132
 - 7.2.1. Delegation of powers 132
 - 7.2.2. Legal framework 132
 - 7.2.3. Comitology as an instrument for problem-solving 135
- 7.3. Comitology in the field of taxation 137
 - 7.3.1. Excise duties 137
 - 7.3.2. Mutual Assistance Directive 138
 - 7.3.3. Common Consolidated Corporate Tax Base 138
 - 7.3.4. Administrative cooperation 139
 - 7.3.5. Savings Directive 140

- 7.4. Comitology: An alternative route towards European direct tax integration? 140

Chapter 8. Review of Legality of Secondary Legislation Based on Infringements of the Rights of Free Movement 143

Karsten Engsig Sørensen

- 8.1. Introduction 143
- 8.2. Starting point: Secondary legislation has to comply with the rights of free movement 146
- 8.3. Adjusting the test used in reviewing legality 148
 - 8.3.1. Testing for customs duties and charges having equivalent effect 148
 - 8.3.1.1. First category: Non-unilateral charges 149
 - 8.3.1.2. Second category: Integrated charges 150
 - 8.3.1.3. Third category: Normal test 151
 - 8.3.1.4. Conclusion 152
 - 8.3.2. The concept of restrictions 153
 - 8.3.2.1. First category: Requiring discrimination 155
 - 8.3.2.2. Second category: Overall aim decisive 155
 - 8.3.2.3. Third category: Secondary legislation supplemented by rights of free movement 156
 - 8.3.3. Justification of restrictions 158
 - 8.3.4. Testing for proportionality 160
- 8.4. Different types of legislation 161
 - 8.4.1. Substantive content and aim of legislation 161
 - 8.4.2. Exhaustive harmonization 164
- 8.5. Conclusions 168

Part Five

Relationship between Primary and Secondary EU Law

Chapter 9. The Relationship between Primary and Secondary EU Law in Tax Law: The Legitimacy of Different Interpretation Criteria Applied to EU and National Legal Sources 171

Ana Paula Dourado

- 9.1. Legal sources and levels of analysis involved 171

9.2. The relevance of the literal element of interpretation of EU secondary legislation, taking as example the <i>Gaz de France</i> case	175
9.3. The relevant elements on interpretation of secondary EU law in the light of primary EU law: A case of originalism in interpretation?	179
9.4. Reconciliatory interpretation based on originalism: Assessment of its value	181
9.5. The Merger Directive, the Interest-Royalty Directive and allocation of taxing rights versus exercise of taxing rights	183
9.6. Other parameters of interpretation of EU secondary law in tax matters	186
9.6.1. Derogations and transitional regimes	186
9.6.2. Optional rules versus clear, precise and unconditional rules	188
9.7. Partial versus full harmonization and concluding remarks	188
Chapter 10. The Influence of Primary Law on the Interpretation of Secondary Law in the Field of EU Citizenship and Direct Taxation: "Whatever works"...	191
<i>Rita Szudoczky</i>	
10.1. Reconciliatory interpretation of secondary law with primary law	191
10.2. Cases on EU citizenship	194
10.2.1. Introduction	194
10.2.2. Art. 21 of the TFEU and the directives concerning residence rights	196
10.2.3. Students	199
10.2.3.1. Cases concerning the Students Directive	199
10.2.3.2. Cases concerning Directive 2004/38	205
10.2.4. Job-seekers	209
10.2.4.1. Cases decided under the primary law freedoms	209
10.2.4.2. Cases concerning Directive 2004/38	211
10.2.5. Assessment of the cases concerning EU citizenship	212
10.3. Cases on direct taxation	215
10.3.1. Introduction	215
10.3.2. Cases concerning the Parent-Subsidiary Directive	217
10.4. Conclusion	225

Part Six	
VAT Directive Tested against Primary Law	
Chapter 11. VAT and General Principles of EU Law	231
<i>Joachim Englisch</i>	
11.1. Introduction	231
11.2. The "principle" of proportionality	235
11.3. Equality principle	238
11.3.1. Fiscal neutrality	239
11.3.2. Consumption tax principle	245
11.3.3. Legal presumptions, generalizing classifications and lump-sum rules	248
11.3.4. Compensation of advantages and disadvantages	250
11.3.5. Inherent limits to equality at the borders of harmonization	251
11.4. Freedom rights	254
11.4.1. Fundamental rights of the taxable person	254
11.4.2. Fundamental rights of the intended final taxpayer: The final consumer	257
11.5. Legal certainty, legitimate expectations and the prohibition of retroactivity	258
11.5.1. General requirements	258
11.5.2. Non-retroactivity and legitimate expectations	260
11.6. Formal legality of taxation	263
11.7. Conclusion	265
Chapter 12. VAT and the EU Internal Market: The Paradoxes of Harmonization	267
<i>Rita de la Feria</i>	
12.1. Introduction	267
12.2. VAT: A tax at the centre of internal market policy	268
12.3. Hierarchy of EU norms and the role of the CJ post-harmonization	274
12.3.1. Hierarchy of EU norms	274
12.3.2. Hierarchy of EU norms applied to VAT	276
12.3.3. Role of the CJ post-harmonization	282
12.4. (In)compatibility of VAT law with the EU internal market	284
12.4.1. The concept of EU internal market	285

Table of Contents

12.4.2. Why the current VAT law is incompatible with the internal market	291
12.4.2.1. Historical arguments	294
12.4.2.2. Practical arguments	296
12.4.2.2.1. Inter-jurisdictional issues	298
12.4.2.2.2. VAT rates	299
12.4.2.2.3. Non-deductible input tax	301
12.4.2.2.4. Public-sector bodies	302
12.4.2.3. Jurisprudential arguments	303
12.4.3. CJ approach: VAT versus direct taxation	306
12.5. Conclusion: The constitutional function of the CJ	307

Part Seven

Direct Tax Directives Tested against Primary Law

Chapter 13. Fundamental Freedoms and Directives in the Area of Direct Taxation 311

Georg Kofler and Mario Tenore

13.1. Introduction	311
13.2. Fundamental freedoms, direct tax directives and national implementation	322
13.2.1. Overview	322
13.2.2. Situations outside the subjective or objective scope of a directive	326
13.2.3. Substantive prerequisites for the application of a directive	334
13.2.4. Member States' exercise of options granted in a directive	339
13.3. Different treatment within the directives	351
13.4. Third-country issues	356
13.5. Conclusion	359
List of Authors	361

Preface

The research published in this book was conducted by the Group for Research on European and International Taxation (GREIT). The GREIT comprises a network of academics specialized in EU and international tax law. The Group conducts independent expert research into the development of European and International Taxation. Members of the Board, and initiators, of the GREIT are Cécile Brokelind (University of Lund), Ana Paula Dourado (University of Lisbon), Pasquale Pistone (Vienna University of Economics and Business) and Dennis Weber (University of Amsterdam).

Every year the GREIT organizes a GREIT Seminar. The 2009 Annual GREIT Seminar was held at the Royal Netherlands Academy of Arts and Sciences in Amsterdam, on 25 and 26 September 2009. The seminar was organized by the Amsterdam Centre for Tax Law (ACTL). The title of the seminar was "Traditional and Alternative Routes to European Tax Integration". The papers written by the various speakers at the seminar appear in this book. This is now the fourth book that has been published by the IBFD further to the GREIT annual seminars. The other three publications are: "Towards a Homogeneous EC Direct Tax Law", edited by Cécile Brokelind (GREIT Seminar Lund 2006); "The Acte Clair in EC Direct Tax Law", edited by Ana Paula Dourado and Ricardo da Palma Borges (GREIT Seminar Lisbon 2007); and "Legal remedies in European Tax law", edited by Pasquale Pistone (GREIT Seminar Salerno/Cetera 2008).

I wish to extend my thanks to the authors, members of the panel, speakers and moderators, all of whom contributed in the form of a paper and in the form of the presentations and discussions during the seminar. A special word of thanks goes to Rita Szudoczky of the ACTL, with whom I coordinated the seminar and the content of the book, and to Caroline van Barneveld-Prins for her necessary secretarial support. I also extend my thanks to Margaret Nettinga for the editing of this book, to the Royal Netherlands Academy of Arts and Sciences for putting this historic location at our disposal, to Loyens & Loeff for sponsoring the seminar, and to the IBFD for again publishing this GREIT research and its generous offer of dinner at the Dylan hotel, one of the most elegant locations in Amsterdam.

(Art. 288 Para. 3 TFEU) and/or primary law, although to a certain extent implying a hierarchical relationship because of the supremacy of EU Law principle, can turn out to be an issue of internal legal pluralism.³ Assume that under a national direct tax regime there is withholding tax on savings, which is consistent with the constitutional requirement of bank secrecy and that under the savings Directive⁴ the Member State exchanges information. A complex dispute regarding the hierarchy between a national constitution and the EU law could arise if the Member State's constitution and the constitutional courts do not accept supremacy of EU law over the constitution and a solution has to be reached by acceptance of the EU law by the national constitutional court on the basis of legal pluralism (pluralism of different and co-existing orders⁵). Or let us assume that an anti-abuse clause would be required by the national constitution (or the interpretation given to it) in order to assure the principle of equality, whereas it would be deemed to be incompatible with the TFEU, because it restricts one or more fundamental freedoms or an harmonized field: imagine the facts in the *Elisa* case or *Lankhorst-Hohorst*⁶ or even *Cadbury Schweppes*,⁷ or the ones in *Modehuis A. Zwijnenburg BV*.⁸ If a directive harmonizes "administrative charges" in the context of a regulatory activity, according to the principles of objectivity, transparency and proportionality, an issue can be raised on whether there is margin for a Member State to create a tax (i.e. based on ad

3. On constitutional pluralism, see Miguel Poiras Maduro, "Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism", in Jeffrey L. Dunoff and Joel P. Trachtman (eds.), *Ruling the World, Constitutionalism, International Law and Global Governance*, Cambridge University Press, New York, 2009, pp. 356 et seq.; "Contrapunctual Law: Europe's Constitutional Pluralism in Action", in Neil Walker (ed.), *Sovereignty in Transition*, 2003, p. 501 et seq.; Matthias Kumm, "Who Is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice", 36 (1999) *Common Market Law Review*, p. 356 et seq.; Samantha Besson, "From European Integration to European Integrity: Should European Law Speak with Just One Voice?", 10 (2004) *European Law Journal*, p. 257 et seq.; Jan Komárek, "European Constitutional Pluralism and the European Arrest Warrant: In Search of the Limits of 'Contrapunctual Principles'", (2007) *Common Market Law Review*, pp. 9 et seq.

4. Council Directive 2003/48/EC of 3 June 2003 on Taxation of savings income in the form of interest payments.

5. See note 3.

6. CJ, 12 December 2002, Case C-324/00, *Lankhorst-Hohorst v. Finanzamt Steinfurt*.

7. CJ, 12 September 2006, Case C-196/04, *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*.

8. Opinion of Advocate General Kokott delivered on 16 July 2009, Case C-352/08, *Modehuis A. Zwijnenburg BV*.

valorem criteria).⁹ If not all costs can be covered by charges based on the proportionality principle – or equality between costs and benefits – and a Member State creates a payroll tax to cover some of those costs, because under its constitutional principles a tax – i.e. a levy organized according to the ability-to-pay principle – would be more adequate to finance some of the costs, there can be a conflict with the EU directive or even the TFEU. Although the constitutionality of rulings on direct tax issues have never been raised before a constitutional court, there would be good arguments to do so from a national perspective – in the same way as the meaning of fees and taxes have been raised both before constitutional courts and the CJ (e.g. *Modelo SGPS* case¹⁰). I am not claiming that these issues should have been raised, but that they could have been raised, similarly to what has happened in other legal domains.

Moreover, any international agreement – the GATT, for example – has to be complied with by both the Member States and the EU secondary law. Whereas in the former case, it is a national issue of the constitutional hierarchy of sources; in the latter, it is an issue of the relationship between EU law and international treaties (see the *Kadi* case¹¹): they will bind the European Union, as long as they do not violate any fundamental principles and/or rights of the European Union.¹²

Taking into account the above general framework, the relationship between secondary and primary EU law implies different types and levels of analysis, depending on the concrete situation. For example, in respect of direct taxes, the CJ has ruled on the compatibility of domestic law with a directive and the EC Treaty (simultaneously) – for example in the *Burda* case,¹³ and on the compatibility of a directive with the EC Treaty in *Gaz de France*,¹⁴

9. CJ, 16 October 2003, Case C-363/01, *Flughafen Hannover-Langenhagen GmbH und Deutsche Lufthansa AG*; CJ, 13 February 1996, Case C-197/94 and C-252/94, *Bautiaa et Soci t  Francaise Maritime*; CJ, 27 October 1998, Case C-4/97, *Manifattura Italiana Nonwoven SpA, v. Direzione regionale delle entrate per la Toscana*, Para. 19; Opinion of Advocate General Fennelly delivered on 18 June 1998, Case C-4/97, Para. 13 et seq.; CJ, 18 January 2001, Case C-113/99, *Herta Schmid v. Finanzlandesdirektion f r Wien, Nieder sterreich und B rgerland*, Para. 19.

10. CJ, 24 September 2000, Case C-134/99, *IGI-SA*; CJ, 26 September 2000, Case C-19/99, *Modelo SGPS*.

11. See note 1.

12. See the references in note 1.

13. CJ, 26 June 2008, Case C-284/06, *Finanzamt Hamburg-Am Tierpark v. Burda GmbH*.

14. CJ, 1 October 2009, Case-247/08, *Gaz de France – Berliner Investissements SA v. Bundeszentralamt f r Steuern*.

but the compatibility of both domestic law and a directive with the Treaty has not been raised so far.

Although national courts have been willing to refer cases involving the interpretation and validity of secondary law,¹⁵ it seems that there is no uniformity of interpretation criteria for assessing the compatibility of domestic law with primary EU Law and secondary EU law with primary EU law.

Let me recall that the review of legality and validity of legislative acts adopted by the EU institutions is under the exclusive competence of the CJ. Most cases are reviewed under the preliminary rulings mechanism (Art. 267 TFEU) and the Commission seems reluctant to bring an action regarding the review of the aforementioned acts under Art. 263 (2) of the TFEU which can be declared void with *erga omnes* effects and ab initio by the CJ if that is the case (Art. 264 TFEU, applied in the same way by the CJ as Art. 267 TFEU). According to settled case law, the legal acts of the EU institutions are presumed to be lawful and produce legal effects until such time as they are withdrawn, declared void in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality.¹⁶ In contrast, in respect of the compatibility of domestic legislation with EU legislation, a referral to the CJ can be made under Art. 267 or an infringement procedure raised by the Commission (Art. 258 TFEU) or by another Member State (Art. 259 TFEU), and in respect of the former, the CILFIT doctrine applies.

15. Involving directives: e.g. CJ, 9 August 1994, Case C-51/93, *Meyhui NV v. Schott Zwiesel Glaswerke AG*; CJ, 5 October 2004, Case C-475/01, *Commission of the European Communities supported by United Kingdom of Great Britain and Northern Ireland v. Hellenic Republic (ouzo case)*; CJ, 7 February 1985, Case 240/83, *Procureur de la République v. Association de défense des brûleurs d'huiles usagées (ADBHU case)*; CJ, Case-247/08, *Gaz de France*, cit.; CJ, 14 December 2004, Case C-434/02, *Arnold André GmbH & Co. KG*; and Regulations: CJ, 20 April 1978, Joined Cases 80 and 81/77, *Henri de Ramel and others*.

16. See, e.g., CJ, 13 February 1979, Case 101/78, *Granaria BV v. Hoofdproduktschap voor Akkerbouwprodukten*, Paras. 4-5; CJ, 1 April 1982, Case 11/81, *Firma Anton Dürbeck v. Commission of the European Communities*, Para. 17; CJ, 26 February 1987, Case 15/85, *Consorzio Cooperativo d'Abbruzzo v. Commission of the European Communities*, Para. 10; CJ, 15 June 1994, *Commission of the European Communities v. BASF AG e al.*, Case C-137/92 P, Para. 48; CJ, 8 July 1999, Case C-245/92 P, *Chemie Linz GmbH v. Commission of the European Communities*, Para. 93; Case C-475/01, *Commission v. Greece (ouzo)*, cit., Para. 18. See also Georg Kofler, "The Relationship between the Fundamental Freedoms and Directives in the Area of Direct Taxation", (2009) *Diritto e Pratica Tributaria Internazionale*, n. 2, pp. 474-475.

Moreover, the review of legality is based on general principles of administrative law as it has been built in national law: for example, the Council or the Commission has to state the grounds on which an act is adopted (Art. 296 (2) TFEU) and the Court has been recognizing discretionary powers to the EU legislator and its interpretation of the then EEC/EC Treaty.¹⁷

Taking into account that in direct tax issues or in VAT, neither tax directives nor regulations¹⁸ have been declared void by the CJ so far, the following pages are aimed at analysing whether the CJ is using different interpretation criteria depending on whether the issue involves a Member State's source of law or EU secondary law. In case I conclude that a divergence has been occurring, I will discuss whether there is a legitimate justification for such discrepancy. I will then discuss whether different types of rules within the EU secondary legislation (clear, precise and unconditional, indeterminate or optional rules, or authorizing exceptional regimes) determine whether it is a question of compatibility of secondary law with primary law or a question of compatibility of domestic law with the Treaty.

9.2. The relevance of the literal element of interpretation of EU secondary legislation, taking as example the *Gaz de France* case

In *Gaz de France*, the Parent-Subsidiary Directive¹⁹ was under scrutiny, and the first question referred to the CJ concerned the interpretation of "a company of a Member State". It was discussed whether Art. 2 (a) in conjunction with point (f) of the Annex to Directive 90/435 included in the meaning of "a company of a Member State" a French "société para actions simplifiée" for the years prior to 2005 – in other words, for the years where such companies were not expressly foreseen in the Directive. In its original drafting, the interpretation of which was submitted to the Court in *Gaz de France*, Art. 2 (a) read that a company of a Member State "shall mean any company which takes one of the forms listed in the annex hereto" and (f)

17. Paul Craig/Gráinne de Búrca, *EU Law, Text, Cases, and Materials*, 4th edn., Oxford, 2008, pp. 538 et seq.

18. See, CJ, 25 June 1997, Case C-114/96, *Kieffer and Romain Thill*.

19. Council Directive of 23 July 1990 on the common system of taxation applicable to the case of parent companies and subsidiaries of different Member States (90/435/EEC) as amended by various Council Directives pursuant to the accession of new Member States and by Council Directive 2003/123/EC, of 22 December 2003.

of the Annex (List of companies referred to in Art. 2 (a)) enumerated the companies under French law.

The current consolidated version of the Directive expressly enlarges the scope of “a company of a Member State”, because most Member States now include the expression “and other companies constituted” or “incorporated under” or “in accordance with national law” and sometimes add “subject to ... corporate tax” or similar expressions. Current letter (f) of the annex, besides foreseeing the “société par actions simplifiée”, contains the expression “and other companies constituted under French Law subject to French corporate tax”.

Moreover, according to (4) of the current Preamble, the scope of the Directive should be extended to other entities which can carry out cross-border activities in the Community and which meet all the conditions laid down in that Directive.

The relevant issue is whether in the original version of the Directive any or some interpretation tools allowed overcoming a literal interpretation of Art. 2 (a) and the respective Annex which according to such method adopted an exhaustive enumeration of the types of companies falling under the scope of the Directive. In other words, the issue is whether in the *Gaz de France* case, the Court (and the Advocate General) could and/or should have decided differently from what they did, and could have allowed the same meaning as the one in the current Preamble and in the aforementioned typical expressions used in almost every letter in the Annex.

It can be further asked whether the fact that the “société para actions simplifiée” did not exist at the time the Directive was passed in its original version reinforced the argument that those companies were not foreseen because they could not be foreseen and not because the Community legislator did not want to include them in the scope of the Directive. I expected that the Court would not limit itself to a literal interpretation of the Directive, because it had consistently argued in favour of the predominance of the teleological interpretation of the Directive in other previous cases involving the analysis of domestic law and its compatibility with the Directive.

In fact, it is settled case law that the wording, the objectives and the scheme of the Parent-Subsidiary Directive are the relevant elements of interpretation of the Directive. According to the Court, in several cases involving interpretation of the Parent-Subsidiary Directive, “it is necessary to take account of the wording of the provision on which a ruling on interpretation

is sought, as well as the objectives and the scheme of the directive” (see, to that effect, Case C-27/07, *Banque Fédérative du Crédit Mutuel*, Para. 22, Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit and Others* [1996] ECR I-5063, Paras. 24 and 26, and Case C-375/98 *Epson Europe* [2000] ECR I-4243, Paras. 22 and 24).

It is also settled case law that the aim of the Directive is to eliminate any disadvantage to cooperation between companies of different Member States as compared to national cooperation, more precisely to ensure tax neutrality of the distribution of profits distributed by a subsidiary in a Member State to a parent company in another Member State, by seeking to eliminate economic double taxation of those distributed profits.

According to the Court, “in that regard, it should be borne in mind that, as is particularly apparent from the third recital in the preamble thereto, the aim of the directive is to eliminate, by introducing a common system of taxation, any disadvantage to cooperation between companies of different Member States as compared with cooperation between companies of the same Member State and thereby to facilitate the grouping together of companies at Community level” (Case C-27/07, *Banque Fédérative du Crédit Mutuel*, Para. 23, *Denkavit and Others*, Para. 22; *Epson Europe*, Para. 20; Case C-294/99 *Athinaiki Zithopiia* [2001] ECR I-6797, Para. 25; *Océ Van der Grinten*, Para. 45; and Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, Para. 103). “The directive seeks thus to ensure the neutrality, from the tax point of view, of the distribution of profits by a subsidiary established in one Member State to its parent company established in another Member State” (Case C-27/07, *Banque Fédérative du Crédit Mutuel*, Para. 24). “The directive aims thus to avoid double taxation, in economic terms, of profits which a subsidiary established in one Member State distributes to its parent company established in another Member State, in other words, to avoid taxation of distributed profits, first, in the hands of the subsidiary and, then, in the hands of the parent company” (Case C-27/07, *Banque Fédérative du Crédit Mutuel*, Para. 27, *AthinaikiZithopiia*, Para. 5).

The previous quoted paragraphs of the Court’s judgments would imply that in *Gaz de France* the aim of eliminating double taxation of distributed profits by a subsidiary of a Member State to a parent company of another Member State would involve covering in its scope all companies incorporated under a Member State’s law and subject to corporate income tax in that state, independently of their being enumerated in the Annex. The Advocate General considered that the purpose of Art. 2 (a) of the Parent-Subsidiary