Traditional and Alternative Routes to European Tax Integration

x integration within the European Union can take place in many ways. In this ook, various instruments which the Member States and the European Union ave available to attain tax integration are discussed and their mutual lationship is studied.

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

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

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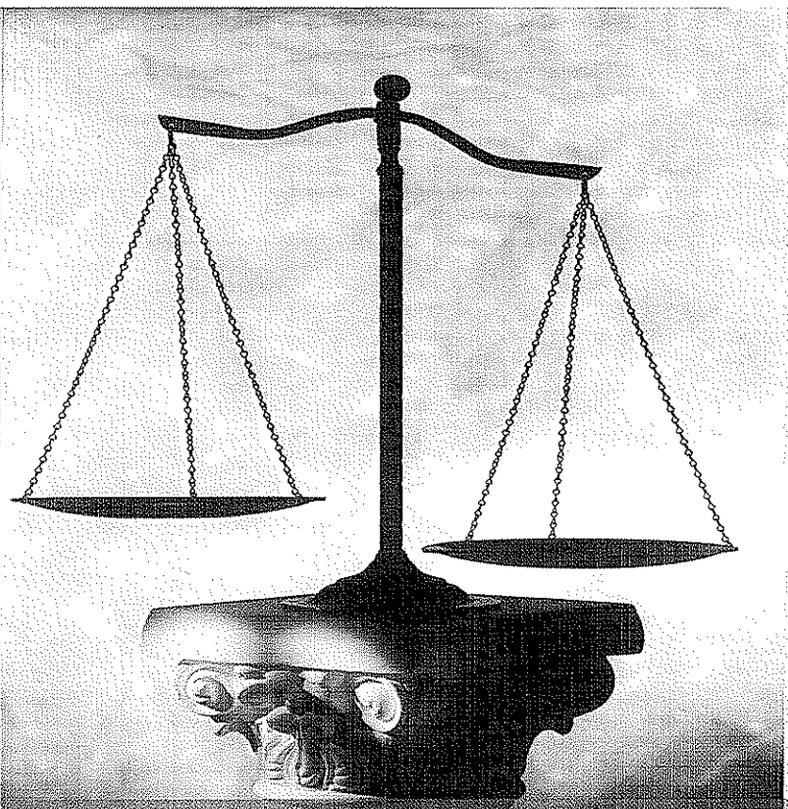

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Traditional and Alternative Routes to European Tax Integration

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

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.

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

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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 Directive[4] 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 orders[5]). 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 Poiares 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.; Mattias 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 Overseals 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* case[10]). 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* case[11]): 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 Societé Française 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 für Wien, Niederösterreich und Bürgenland*, 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 für 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'Abbruzo 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 July1999, 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 regulations[18] 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 Directive[19] 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 "societé 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 "societé para actions simplifié" 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