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 CJEU in EC Direct Tax Law" and "Legal Remedies in European Tax Law".

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.
Table of Contents

Preface xiii

Chapter 0. The General Report 1

Dennis Weber

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

Annette Schrauwen

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
Eric C.C.M. Kemmeren
2.1. Introduction 29
2.2. The establishment of the 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
Daniel Sarmiento
3.1. The origins of soft law 53
3.2. Conceptualizing soft law
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

Hans Gribnau
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
Pasquale Pistone
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

Adam Zalasinski

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
   6.4.1. Legislative process 122
   6.4.2. Law-making impact of the CJ’s decisions 122
   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?

Peter Adriaansen

7.1. Introduction 131
7.2. Comitology: Legal framework and institutional history
   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
   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

Karsten Engsig Sorensen

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
   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

Ana Paula Dourado

9.1. Legal sources and levels of analysis involved 171
Table of Contents

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

Rita Szudoczky
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

Joachim Englisch
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

Rita de la Feria
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
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 Szudoczy 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. 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 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). 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-Hohorst6 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 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 both by 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): they will bind the European Union, as long as they do not violate any fundamental principles and/or rights of the European Union.11

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,12 and on the compatibility of a directive with the EC Treaty in Gaz de France,13


5. See note 3.


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 Kociot delivered on 16 July 2009, Case C-352/08, Modehuis A. Zwijnenburg BV.


11. See note 1.

12. See the references in note 1.


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, 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 e.g. 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. 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.

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

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.

Taking into account that in direct tax issues or in VAT, neither tax directives nor regulations 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.

In Gaz de France, the Parent-Subsidiary Directive 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)
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 been 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 Zithopia [2001] ECR I-6797, Para. 25; Océ Van der Grinten, Para. 45; and Case C-446/04 Test Claimants in the Fill 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, AthinaikiZithopia, 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