

A Guide to the European VAT Directives 2009

Vol. 1

Chapter 1 Sources of Community Tax Law

1.1 Introduction

This chapter considers the primary (legal) sources of Community tax law. Special attention is paid to the so-called “*acquis communautaire*”.

1.2 Primary Community law

Community law can be divided into primary and secondary rules.

The term *primary Community law* refers to provisions of the original three Treaties (ECSC, Euratom and EEC) as amended by later Treaties, such as the Single European Act, the Treaty on European Union (i.e. the Treaty of Maastricht), the Treaty of Amsterdam and the Treaty of Nice. The ECSC Treaty expired on 23 July 2002, since then the sectors coal and steel fall within the legal scope of the EC Treaty. (In 1993, the EEC was renamed the EC.)

Changes to the original Treaties were introduced by the six Acts of Accession to the ECSC, Euratom and E(E)C on the occasion of the accession of respectively the United Kingdom, Ireland and Denmark (in 1973), of Greece (in 1981), of Spain and Portugal (in 1986), of Austria, Finland and Sweden (in 1995), of Poland, the Czech Republic, Hungary, Slovakia, Lithuania, Latvia, Slovenia, Estonia, Cyprus and Malta (in 2004) and Bulgaria and Romania (in 2007). On 13 December 2007, the Treaty of Lisbon was signed. The Treaty provides for a number of significant institutional changes. If ratified by all Member States it will mark the end of a period of uncertainty about the future of the European institutions in the expanded Union (see further section 1.3.1).

Secondary Community law refers to the decisions taken by the institutions entitled to take them under the three (now two) Treaties.

These sources are discussed and examples are given below, mainly derived from European indirect tax law. It seems to be useful to start with a brief overview of “the European Treaties” (for the time being the pre-Treaty of Lisbon situation), also referred to as the “amorphous mass of the EU”.¹

1.3 The European Treaties

First of all there are (now) the two Community Treaties which established the Euratom and the EEC, the latter being renamed EC in 1993.

There is also the Single European Act which came into effect on 1 July 1987. This Treaty introduced, inter alia, a cooperation platform for the coordination of foreign policy under

¹ See R. Barents, *Het Verdrag van Amsterdam in werking*. Europese Monografie 62, Kluwer 1999.

the name European Political Cooperation; it reformulated the objective of the common market as an internal market (an area without borders) and set a deadline to realize this internal market, the well-known date of (31 December) 1992, when European indirect tax law underwent dramatic changes.

Under the Treaty on European Union (the Treaty of Maastricht of 1992) the original three Treaties underwent substantial changes, including the change of name from EEC to EC.² This Treaty also established the European Union (EU).

This Union, lacking separate legal personality, may best be seen as the organized totality of the relations between the Member States. The Union is metaphorically speaking the roof of a building with three pillars:

- I. a Community pillar, comprising the two Treaties;
- II. a second pillar formed by a common foreign and security policy (CFSP, the former European Political Cooperation); and
- III. a third pillar formed by the provisions on cooperation between the Member States in the field of justice and home affairs.

The first pillar is supranational; the two Communities are at least legally independent of the Member States and are ruled by provisions of primary and secondary Community law. The other pillars are intergovernmental; their field is controlled by the Member States. This structure can be compared with an aeroplane³, not a “Jumbo” but a “Union” formed by a Community body and two intergovernmental wings.

It should be noted that the two organizations, EC and Euratom, with their common structures and institutions remain in place. The European Union is not synonymous with the EC, although in common language (or confusion of tongues) only reference is made to the EU.

The Treaty of Amsterdam was welcomed in 1997 with the words: “It was a difficult birth, but it is a beautiful baby.” This Treaty came into effect on 1 May 1999, but introduced no new elements to the process of integration in Europe. It did, however, make over 140 changes to the EC Treaty and renumbered the Articles.

The Treaty of Nice agrees on items which are indispensable for the extension of the EU, such as the division of powers between the Member States (the weighted votes), the number of members of the European Parliament per country and the restricted seize of the Commission. It came into force on 1 February 2003.

1.3.1 The Revision Treaty and the Constitution for Europe

At the Nice European Council in December 2000, a declaration on the future of the Union, the Nice Declaration, was adopted. The aim of this Declaration was to pursue institutional reform beyond the results of the 2000 Intergovernmental Conference (IGC 2000). It set out three steps for this reform: the launch of a debate on the future of the European Union, a Convention on institutional reform, the implementation of which was agreed by

² The “E” for economic was omitted, since the Community also concerns itself with non-economic objectives, such as social, cultural and environmental policies.

³ See Barents, op. cit.

the Laeken European Council in December 2001, and finally the convening of an IGC in 2004.

According to the Laeken Declaration, which created it, the aim of this Convention was to examine four key questions on the future of the Union: the division of powers, the simplification of the Treaties, the role of the national parliaments and the status of the Charter of Fundamental Rights.

The inaugural meeting of the Convention was held on 28 February 2002, and, according to the Laeken Declaration, its work finished in July 2003, presenting a draft single constitutional text. This document served as the starting point for the IGC negotiations.

At their meeting on 18 June 2004, Heads of State or Government gave their agreement to the texts of the Agreement on the Constitutional Treaty. The IGC 2004 that had to give its final agreement has largely taken on board the Convention's proposals. In the end, even though the Intergovernmental Conference introduced a large number of editorial modifications, the real changes were limited to a "somewhat lesser ambition" with regard to the scope of qualified majority voting.⁴

Several Member States' parliaments, however, had made ratification conditional upon an affirmative popular vote. This went wrong by the "non" and "nee" in the French and Dutch referenda.

After a period of reflection the (now) 27 Member States agreed on a non-constitutional Revision Treaty (also known as 'constitution light'), all the same still containing largely the content of the 2004 Constitution proposal, notably the long overdue institutional reforms, but meticulously avoiding constitutional symbols, such as the word Constitution, a European flag, a European Hymn, references to a European identity or tradition, or to even hardly objectionable principles as representative and participatory democracy. Especially devoid of meaning is the repeal of the 2004 plan to make explicit in the EC Treaty that EC law takes precedence over national law, as this does not in any way change the scope or force of the ECJ's case-law postulating such precedence. The same is true for the repeal of the 2004 plan to incorporate the already existing EU Charter of Fundamental Rights (see section 2.3.1) into the EC Treaty, since that Charter was already, still is, and will continue to be applied by the ECJ as if it were Treaty law, more so since the Revision Treaty expressly provides that the EU recognizes the Charter and that it has the same legal force as the Treaty itself (except for the UK, and Poland which have derogating Protocols).

In short: the European Constitution may formally be dead; substantively it is very much alive. However, in a popular vote Ireland rejected the 2007 Revision Treaty. Another Irish plebiscite has been announced for autumn 2009.

⁴ On Friday, 29 October 2004, Heads of State or government and Ministers of Foreign Affairs of 29 European countries and the Presidents of the European Institutions attended in Rome the ceremony with regard to the signing of the Treaty and the Final Act establishing a Constitution for Europe. The Treaty and the Final Act was signed by the 25 Member States of the European Union. The candidate countries Turkey, Bulgaria and Romania signed the Final Act. Croatia did not sign the Final Act, but attended the ceremony. The signing of the Treaty took place at Campidoglio in the Sala Degli Orazi and Curiazi, the same room in which the six original member countries – France, Germany, Italy, the Netherlands, Belgium and Luxembourg – signed the Treaty establishing the European Community in 1957.

If ratified by all Member States, the Revision Treaty will not change much in the tax field. A new provision will be added to Article 58 EC allowing individual Member States to restrict fiscally capital movement with third States. Another possibly substantive change will be that at the end of Article 93 EC, the words ‘... within the time limit laid down in Article 14’ will be replaced by ‘... and to avoid distortion of competition’, which means that indirect taxes must not only be harmonized to the extent necessary for the functioning of the internal market, but also to the extent necessary to ensure a level playing field on that internal market. We are not sure whether such level playing field was not already necessary for the present functioning of the internal market. Further, the order of the Articles 94 and 95 EC will be reversed, but that does not change anything for taxation: a unanimous decision will still be required for all EC tax measures, whether direct or indirect.