



Principles of Law:

Function, Status and Impact in EU Tax Law

Editor: **Cécile Brokelind**

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Principles of Law: Function, Status and Impact in EU Tax Law

Why this book?

Principles of Law: Function, Status and Impact in EU Tax Law, investigates the role and importance of unwritten sources of legislation in EU tax law, such as the principles of law. This area of legal studies shows many contradictory statements and the book serves as a platform to better understand and clarify these contradictions.

The key issue in this research is the identification of the coercive force of the principles of law, which are unwritten sources of law, in contrast to that of other, written, sources of law. The hypothesis is that principles of law take precedence over a series of written rules in the case law of the Court of Justice of the European Union (ECJ) and of the Member States domestic courts dealing with EU tax law.

In order to demonstrate this hypothesis, the contributors to this book were invited to select one principle of law and address the following questions: Does the principle of law in question have a normative or interpretative value? Does it make any difference that the Court of Justice of the European Union has declared the principles of law of “general” or “fundamental” value? When “your” principle collides with another one, how will the ECJ/domestic Supreme Court determine the order of application? If so, which principles are supported by the supreme force of law and should be referred to by the judge as a constitutional norm? What is the consequence for direct and/or indirect taxes?

This book is the outcome of the 8th GREIT conference that was held in Lund on 19 and 20 June 2013. It comprises the findings of the 20 speakers, on three main themes, investigating the use and misuse of principles, the constitutional value of principles of law, and the principles of law underlying tax systems.

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Introduction

Principium: latin for “start” (ce qui vient en premier, à l’origine)

1.1. Why bother?

The purpose of the 8th GREIT¹ conference held in Lund on 19 and 20 June 2013 was to investigate the role and importance of unwritten sources of law in EU tax law, such as the principles of law. This monograph is a published version of the reports produced for this event.

Both legislators and judges tend to rely on principles of law, for different purposes depending on the nature of the task or of the judicial review. In some states, the constitution or civil law places a formal requirement on judges to decide cases even if there is no legal rule available for interpreting the prevailing law.² May courts rely on principles of law as a source of *EU tax law*? And if so, what is the function, the status and the impact of these principles of law? Which principles are they?

At first sight, the reader may express some doubt as to why EU tax law academics should bother researching this topic; on the one hand, the debate on the limits of judicial power underlying the research questions is not new and does not belong exclusively to the tax law sphere.³ Both legal theorists and socio-legal scientists may claim precedence in the assessment of whether judicial power is justified in restricting the application of written

1. GREIT stands for Group for Research on European and International Taxation. For more information, please see <http://www.greit-tax.eu/>.

2. Article 4 of the French Civil Code (FR: Civil Code (amended 2012), National Legislation IBFD) provides for a sanction for a judge who refuses to rule due to a silent, obscure or insufficient legal provision. Article 12 of the Provisions of the Italian General Law commends the judges to decide according to the general principles of the legal order in case of doubtful meaning of the law. Article 38 of the Statute of the International Court of Justice refers to the general principles of law as a source of law. For more examples, see M. van Hoecke, *The Use of Unwritten Legal Principles by Courts*, 8 Ratio Juris 3, pp. 248-260 (1995).

3. See D. Gutmann, *Some Theoretical Thoughts on Judicial Power and Tax Law, with a Particular Focus on the ECJ*, in *A Vision of Taxes within and outside European Borders* pp. 485-494 (L. Hinnekens & P. Hinnekens eds., Kluwer Law International 2007).

law on the basis of a principle.⁴ On the other hand, there are infinite examples of reference to principles by the European Court of Justice (ECJ) when defining legal concepts, which supports our investigation. The heightened impact of the principle of abuse of law,⁵ and the defined content of the territoriality principle⁶ brought to us by the ECJ are two among numerous examples showing why EU tax law specialists should bother extracting scientific conclusions on the function, status and impact of the principles of law in EU tax law. Acknowledging the legitimate mandate of EU tax law scientists to explore this field, the next step for investigation is naturally to look at how to extract conclusions and on what issues.

Some scholars have already discussed the role of *principles of law* in the field of comparative tax law.⁷ Moreover, the *general principles* of EU law have been richly commented upon, especially in order to explain their origins and to classify them.⁸ Regarding *EU tax law*, handbooks and treaties refer to the legal principles and to the *general principles* of EU law as a valid source of law.⁹ The well accepted and justified gap-filling function of these general principles of EU law is not so controversial.¹⁰ However, doctrinal debate in EU tax law usually boils down to analysing the judicial

4. For an account of discussions between legal theorists, see G. Lawson, *A Farewell to Principles*, Iowa Law Review, pp. 893-903 (1996/97), and for political science A. Grimmel, *Integration and the Context of Law: Why the European Court of Justice Is Not a Political Actor*, Les Cahiers Européens de Sciences Po, no. 3 (2011).

5. Many relevant publications on this topic should be mentioned here, starting with R. de la Feria and S. Vogenauer's publication *Prohibition of Abuse of Law* (Hart Publishing 2011), providing further references to major publications in EU tax law on this principle.

6. For a recent comment on the impact of such a principle in EU tax law, see J. Monsenego, *Taxation of Foreign Business Income with the European Internal Market – An Analysis of the Conflict between the Objective of Achievement of the European Internal Market and the Principles of Territoriality and Worldwide Taxation* (Intellecta Infolog 2011).

7. J. Avery Jones, *Tax Law: Rules or Principles?*, 17 Fiscal Studies 3, pp. 63-89 (1996). F. Vanistendael, *Legal Framework for Taxation in Tax Law Design and Drafting*, vol. 1, ch. 2 (V. Thuronyi ed., International Monetary Fund 1996).

8. For instance, T. Tridimas, *The General Principles of EU Law*, second edn, European Law Library (Oxford University Press 2006); X. Groussot, *Creation, Development and Impact of the General Principles of Community Law: Towards a Jus Commune Europaeum* (Lund University Press 2005); J. Hettne, *Rättsprinciper som styrmedel – Allmänna rättsprinciper i EU:s domstol* (Norstedts Juridik 2008). For a ground article, see K. Lenaerts & J.A. Gutiérrez-Fons, *The Constitutional Allocation of Powers and General Principles of EU Law*, 47 Common Market Law Review 6, pp. 1629-1669 (2010).

9. B. Terra & J. Kajus, *A Guide to the European VAT Directives* pp. 21-88 (IBFD 2013); B. Terra & P. Wattel, *European Taxation*, 6th edn, pp. 48 et seq. (Kluwer 2012); M. Helminen, *EU Tax Law: Direct Taxation* sec. 1.3.2. (IBFD 2009), Online Books IBFD.

10. Article 19 of the Treaty on European Union (TEU) empowers the ECJ with the duty to interpret and apply the Treaties and “the law”, including the general principles, according to B. Terra & J. Kajus, *A Guide to the European VAT Directives*, Introduction to VAT, p. 21 (IBFD 2010).

activism of the ECJ in the field of taxation, where the lack of written legislation (direct taxation) makes recourse to the *general principles* of EU law necessary.¹¹ The present publication is not meant to repeat or complete the previously mentioned debates, but rather to merge all this knowledge into one piece of reflection in the field of tax law.

Indeed, the purpose of this book is to reflect on how legal problems can be solved without applying a provision of a code or a statute in tax law cases. This is certainly a problem for the ECJ in the field of direct taxation, as demonstrated throughout the 20 years of case law it has rendered, but also for national judges in need of a rationale, when the domestic tax law is not clear enough in support of their rulings. As noted in doctrinal comments, courts tend to rely on principles and guidelines as “reasoned arguments” to justify or legitimize their decisions.¹² Therefore, it seems appropriate in order to fulfil this purpose, to include in our research all kinds of principles ranging from the EU general principles applied in EU tax law by the ECJ, to the structural principles underlying tax systems which are used by domestic courts in search of a legal basis for their decisions. In the bigger picture, this book contributes to the discussion on the definition of EU tax law and what it encompasses. For this purpose, some research questions need to be asked and an adequate method for fulfilling the task has to be chosen (section 1.4.), after suggesting a definition (section 1.2.) and explaining the several theories that already deal with principles of law (section 1.3.). In other words, the research task is to know whether and if so how, principles of law and unwritten sources of law have a coercive effect.

1.2. What is a principle of law?

As mentioned in the subtitle of this chapter, the etymological definition of the word principle indicates what comes first: at the origin. However, and in the context of the present research, we understand a principle as an accepted unwritten source of law by the judges, or as a benchmark for legislators to carry out reforms. The idea is that principles are usually understood as different from “rules”, in the sense that the former are rather *directional*

11. General principles of EU law remain the sole valid source of EU law on the basis of which the ECJ may find domestic direct tax law provisions in breach of the internal market rules provided for in the Treaty on the Functioning of the European Union (TFEU).

12. T. Koopmans, *Judicial Activism and Procedural Law*, European Review of Procedural Law, p. 78 (1993).

whereas the latter *decisional*. Besides, their coercive force, which will be discussed in this monograph, tends to depend upon their function and classification in the hierarchy of norms.

The contextual background of the definition of a principle is highly relevant. As mentioned in academic debate, the definition may vary upon the legal culture under scrutiny.¹³ The debate on “rules v. principles” originates in common law, and, as observed by Dworkin,¹⁴ a choice is left to the academic science in defining a principle:

We might treat legal principles the way we treat legal rules and say that some principles are binding as law and must be taken into account by judges and lawyers who make decisions of legal obligation.

We might, on the other hand, deny that principles can be binding the way some rules are. We could say ... that he who judges reaches beyond the rules that he is bound to apply for extra-legal principles he is free to follow if he wishes.

He also mentions: “if a principle of law is enforceable with force, it is a law. Rules apply or do not apply at all (all or nothing): if two rules conflict with each other, only one applies. Principles do not apply and can never conflict with each other, they have a weight”.

The question is whether we can apply these general words on principles of law, in EU tax law, where the legal tradition is quite different, and where some of the general principles of EU law are as coercive as the law itself since they are mentioned in the EU treaties themselves. In any event, the debate about the coercive force of a principle of law merits a short tribute to Dworkin’s reflections before going on to the core issues of this monograph, to which the definition of a principle is linked.

1.3. Theories

Legal science, as all science, is a collective enterprise in which different practices fertilize each other.¹⁵

The key issue in this research deals with identifying the *coercive* force of the principles of law, which are usually unwritten sources of law, in comparison to that of other, written sources of law. This investigation calls into

13. Van Hoecke, *supra* n. 2, at p. 249.

14. R. Dworkin, *Taking Rights Seriously* p. 29 (Harvard University Press 1978).

15. A. Peczenick, *A Theory of Legal Doctrine*, 14 *Ratio Juris* 1, p. 103 (2001).

question the concept of legal pluralism, developed by legal sociologists and social anthropologists to describe the multiple layers of law, usually with different sources of legitimacy, that exist within a single state or society. In this context, we need to know what the authority of a principle of law is. How should a judge apply or disregard a principle of law in his legal argumentation when contrasted with the manner in which other rules are applied? The hypothesis is that when deciding cases in EU tax law, courts should consider the principles of law as *coercive norms*.

There may be several methods, each potentially suitable for demonstrating this hypothesis. Before selecting an appropriate method, one must take account of some of the theories¹⁶ and models of adjudication and of the schools of jurisprudence already developed in search of an answer to these questions.

Generally speaking, legal theory¹⁷ focuses on the work of society's coercive normative institutions and questions the nature of law as well as the implications of its institutional and structural characteristics.¹⁸ Academic lawyers hold various kinds of discourse about law. Some of them divide those who work in the law into two clear categories: professional legal theorists and those lawyers who work with doctrines in specific branches of the law. Others point to the lack of autonomous legal theory and for the need to borrow theoretical discipline from the social sciences or humanities.¹⁹ For instance, legal theorists study the different types of argumentation that legal participants actually use when employing legal reasoning, which can be of use to understand adjudication.²⁰

16. The Oxford Dictionary defines theory as a supposition or a system of ideas intended to explain something, especially one based on general principles independent of the thing to be explained, e.g. Darwin's theory of evolution.

17. Legal theory (*philosophie du droit*) is meant here as the study and analysis of the fundamentals of the law, whereas the theory of law (*théorie du droit*) deals more with the why and how of the law.

18. See H. Dagan & R. Kreitner, *The Character of Legal Theory*, Cornell Law Review, pp. 671-691, at p. 672 (2011).

19. For instance, Richard Posner defines legal theory as the study of the law from the outside, *The Decline of Law as an Autonomous Discipline*, Harvard Law Review, pp. 761-779 (1987).

20. S.J. Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed*, Michigan Law Review, Working Paper no. 77 (2007).

While the topic of this conference is by no means directed exclusively towards legal theory or sociology²¹ or political science,²² it may be of interest for the reader to observe some legal scholars abandoning the notion of a legal theory and borrowing theoretical discipline from the social sciences or from humanities. These theories may also conveniently validate the present investigation on the question of whether and if so in what way principles of law and unwritten sources of law have a coercive effect. The views vary broadly depending on which legal theory the commentator relies on to support his statements.

The most common theories referred to are legal naturalism, legal positivism, legal realism and in-between theories such as Dworkin's interpretivism. Diametrically opposing naturalism,²³ the positivist legal school advocates the use of the literal meaning of the law as the basis for adjudication, and does not sanction the judiciary exercising discretion and attempting to reconstruct a law that would otherwise lead to an absurdity.²⁴ According to this theory, the use of principles of law as an unwritten source of law is of no use to the courts. A principle does not exist as a valid legal norm and the norm is conceptually independent of morality. The judge may not fill in with reference to a principle, that which the law lacks. Positivism that is engaged only looking at the plain facts precludes moral grounds for interpreting the law. It denies judges the possibility of deviating from statutory texts where they disagree with the result. Law is a normative phenomenon and as such must be distinguished from other normative phenomena arising from empirical considerations of social science or from ethics or theology. From

21. To broaden perspectives on law is the legal sociologist's task.

22. For an interesting presentation of judicial activism from a political science perspective, see A. Grimm, *Integration and the Context of Law: Why the European Court of Justice Is Not a Political Actor*, Les Cahiers Européens de Sciences Po, no. 3 (2011).

23. It is impossible not to think of Dworkin's words on these distinctions: "Everyone likes categories, and legal philosophers like them very much. One label is particularly dreaded: No one wants to be called a natural lawyer. Natural law insists that what the law is depends on what it should be. This seems metaphysical or at least vaguely religious ... In any case, it seems plainly wrong. If the crude description of natural law I just gave is correct, that any theory that makes the content of the law sometimes depend on the correct answer to some moral question is a natural law theory, then I am guilty of natural law". *Natural Law Revisited*, University of Florida Review, pp. 165-188 (1982).

24. For a description of the strictly legal conception of the law's normativity and positivism, see T. Spaak, *Kelsen and Hart on the Normativity of Law*, Stockholm Institute for Scandinavian Law 1957-2010, Feschrift till Jes Bjarup, pp. 397-414 (2005). See also G. Lawson, *A Farewell to Principles*, Iowa Law Review, pp. 893-903 (1997) complaining about how principles undermine the law.

this perspective, the use of pure legal theory is of no help in answering the current research questions, unless the aim of the analysis is to demonstrate the absence of any binding force attributable to principles of law.

Realism on the other hand is based on the premise that the actual role of the courts is that of lawgiver for particular cases. In this way, the prediction of judges' decisions is of central interest, and not so much their justification. According to the realists, positivists fail to pay enough attention to the gap between rules and rights and duties, and realists fill in the gap with sociology.

According to Dworkin and his successors, the law includes principles, which are necessary to derive rights and duties, and are standards for deciding which rules apply. Whereas rules apply in whole or not at all, principles apply all at once and may even contradict each other. The judge in his or her "performative" role is in charge of choosing the correct answer to the questions he or she has identified on the basis of rules and principles indistinctively. The principles tend to form part of a rule of law as they help justify it and flow from the "inner morality of law". The realist conception of law acknowledges the delicate balance between power and reason, and extends its analysis to the reasons given by law carriers and to the law's means, ends and consequences. It also allows an institutional vision of law, extending the study of the coercive force of the law to all kinds of carriers such as lawyers, in-house counsel, tax advisors or other actors deferent to the symbolic power of law.²⁵ This method seems particularly appropriate to determine whether and if so how a principle of law is binding, especially for whom and with what consequences. The use of other theories and legal discourse involving social sciences such as the law and policy approach or even the socio-historical approach is also possible from this perspective.

Additionally, since the present work involves EU law, the comparative legal approach may also present an interesting alternative to the positivist or realist legal methods. In EU law, an extensive literature devoted to constitutional pluralism and comparative constitutional law flourishes.²⁶ The underlying research performed in this field tends to find legitimacy in the courts' decisions through the theory of adjudication. In this field, scholars

25. Dagan & Kreitner, *supra* n. 18, at p. 684.

26. M. Poiares Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in *Sovereignty in Transition* pp. 501-537 (N. Walker ed., Hart Publishing 2003); M. Kumm, *Who Is the Final Arbiter of Constitutionality in Europe?*, CMLR, p. 356 (1999); N. Walker, *The Idea of Constitutional Pluralism*, *Modern Law Review*, vol. 65, pp. 317-359 (2002).

usually rely on comparative law methods, which are adequate to deal both with legal pluralism and the interdependence of the EU legal order with other legal orders. Usually these studies focus on the methods of interpretation used by the ECJ showing a “certain systemic understanding of the normative preferences and institutional constraints” within the EU legal order.²⁷ Under this theory of adjudication, the ECJ applies a teleological interpretation of the rules, and refers to the general principles of law common to the Member States as an expression of legitimacy of the EU legal order. The independent normative claim of the EU legal order when confronted with national constitutional courts or issues needs to be legitimized, and the ECJ uses a principle-based approach to fill the gap in this incomplete legal order, as well as to pay due respect to the common legal traditions on the basis of which these principles have emerged. The study of this legal pluralism usually follows a realistic approach to the legal phenomenon and acknowledges that the interpretation of legal rules is only properly understood in the light of the interplay between courts and other actors. The studies of the general principles of EU law commonly rely on social science or on socio-legal theories or approaches.²⁸ The criticism of the judicial activism of the ECJ from the positivist school is also interesting to that end. The project may also consider the actors implementing these principles (not only the judges but also the tax lawmakers) and the impact of the principles arising at court on the hard-core law.

1.4. Methods and research questions

In order to fulfil the task of the research, there may be several approaches, and a choice has to be made between either a quantitative or a qualitative method. In the absence of a specific statistical measure appropriate to this field, the reporters have performed an empirical analysis of the function, status and impact of one principle of their choice. There was never any intention to focus on all principles applicable to EU tax law or to national tax law, and the reporters were asked not to deal with the question of the origins of “their” principle; an issue which is probably already, and adequately, covered elsewhere. The reporters were also instructed to set aside the question of the classification of the principles, as they were not requested to provide a hierarchy of norms in general. Besides, this issue has also received adequate treatment elsewhere.

27. M. Poiares Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, Working Paper WPLS08-02, 5 Feb. 2008, p. 2, and referring to an article published in 1 *European Journal of Legal Studies* 2 (2007).

28. See, for instance, Tridimas, *supra* n. 8; Groussot, *supra* n. 8.

The reporters were therefore directed towards the following issues, which were identified as central to the value of this contribution, and for guidelines for the qualitative analysis performance.

Function

Does the principle of law of your choice have *normative* or *interpretative* value? If one considers the hierarchy of the sources of law (either in one's own legal system or in EU law), where *shall* the law be applied (by the judge) or *should* it be applied or *may* it be applied, where should the principle of law be placed? This classification borrowed from Peczenick as a legal positivist²⁹ may be challenged by the reporter who may find it more appropriate to discuss the normative effects of the principles in a different framework. In other words, what happens when the principle in question is not present in the domestic law in dispute at court? As Advocate General Tesouro mentions in Case C-367/96 (*Kefalas*):

23. ... the elaboration of a general principle at Community level does not necessarily require that the principle exist in all the national legal systems or that it be subject to the same conditions and application criteria. These are principles which must be incorporated in the Community order and which, therefore, acquire their own autonomy in function of the structure and the objectives of that order.

There are several functional classifications proposed that may be of help for your comments. For instance, principles may be *structural* (as hidden axioms of the logical structure of the legal system) and provide for institutional support to the law, most of the time derived from written sources (good faith principle, *pacta sunt servanda*, impartiality of the judge), and used *praeter legem*. By contrast, some other principles can be *ideological*, and are non-legal values or norms with no institutional support, which restrict the application of some legal rules or correct them (reasonableness, prohibition of abuse of rights) and are used *contra legem*.³⁰ The latter category is naturally appealing for comment and discussion.

The traditional classification between operative, complete and regulative function of EU law principles may also be taken into consideration by the reporters to comment on the coercive force of the principle they deal with.

29. A. Peczenik, *A Theory of Legal Doctrine*, 14 Ratio Juris 1, p. 78 (2001): "All courts and authorities must use applicable statutes. When performing legal reasoning, one should use precedents, and – in some countries – legislative preparatory materials as authority reasons, if any are applicable. When performing legal reasoning, one may use, inter alia, the writings in legal doctrine and foreign law."

30. Functional classification proposed by Van Hoecke, *supra* n. 2, at pp. 251-253.

Status

Does it make any difference that the ECJ has declared the principles of law to be of “general” or “fundamental” value? If so, which principles are supported by the supreme force of law and should be referred to by the domestic judge as constitutional norms? What is the consequence of the differences revealed in the case law for direct and that of indirect taxes (harmonized)? Is there any particular case involving tax law and decided on the basis of a general principle that you have focused upon that may be challenged as a valid source of law under the positivist or the realist (or any other) legal theories? Underlying these questions is the issue on the role of the ECJ as supreme adjudicator in tax cases, which has been debated for a long way back in EU tax literature.³¹

Impact

Which cases at the ECJ/constitutional/domestic court have applied the principle in question as a “source of law” or as a ground of a judicial decision? Why? Is there a discussion on how the principle in question deviates from a written source of law or gives legitimacy to the rule of law?³² Another possible perspective of your work lies in the need for the tax lawmakers to consider these principles and the question is therefore, which principles are they bound by?

1.5. Outline of the book

After this questionnaire was sent to the reporters, and the principles selected, the conference was organized around three kinds of issues: (i) a general presentation of the use and misuse of principles of law by the judges; (ii) the analysis of principles with a constitutional value; and (iii) the structural principles underlying the national tax systems or VAT-related principles. This is the structure that this monograph will also follow in order to present the reports discussed in Lund on 19 and 20 June 2013.

31. See, for instance, F. Vanistendael, *The Role of the European Court of Justice as the Supreme Judge in Tax Cases*, 5 EC Tax Review 3, pp. 114-122 (1996).

32. See, for instance, the comment of Koopmans, *supra* n. 12, at p. 78: “The importance of a reasoned argument increases as courts tend to rely on principles or on broad guidelines rather than on specific paragraphs of legal provision. Many new problems simply cannot be solved by just applying a provision to be found in the code or in the statute books: judges often resort to principles of law. But principles don’t fall from heaven, except perhaps in a very metaphorical sense, they have to be found and elaborated, and there is only one way to that by reasoned argument”, reproduced by Terra & Kajus, *supra* n. 9, at p. 27.

The reporters' findings are summarized in brief hereafter, in the same order as the conference proceeded. The journey starts with the function, status and impact of general principles of EU law applied in the field of tax law, in J. Hettne's report "European Legal Principles and National Legal Challenges". Hettne (Associate Professor of EU Law at the University of Lund and Senior Researcher at the Swedish Institute for European Policy Studies (SIEPS)) highlights several problems linked to the use of general principles of law, among others the risk that national courts undermine the uniformity and effectiveness of EU law, as these principles are not recognized or applied in the same way in every Member State. F. Vanistendael (Professor, KU Leuven) then proceeds with an overview of the nature of principles specific to tax law, those applied in the field in EU tax law and the question of a hierarchy between the principles. He concludes that the principles' function is to protect taxpayers against arbitrary decisions at the legislative and judicial level, and thereby achieve justice. These wise words lead us to the application of the Charter of Fundamental Rights and the reflection of X. Groussot (Professor of EU Law, Lund University) on the judgments in *Åkerberg Fransson* and *Melloni* from 26 February 2013, as clarifying or diluting the application of the *ne bis in idem* principle. Groussot investigates the interaction between domestic, EU and European Convention on Human Rights (ECHR) sources of law dealing with this principle to show how differently judges rely on the principle in their rulings. P. Pistone (Professor, WU Wien, IBFD) focuses more generally on the protection of human rights in tax matters and aims at determining the actual boundaries and positive dimension of such rights in EU law in the light of the general and specific provisions contained in the EU Charter of Fundamental Rights, including the ones that are exclusively addressed to EU institutions.

The second panel of the conference was instructed to reflect on principles with a constitutional value. E. Traverso (Tax Law Professor, Louvain) and A. Pirlot (doctoral student, Louvain) bring to the *principle of fiscal sovereignty* a new light, raising the question of the limits it brings to the transfer of taxing powers to the European Union and how the principle is in balance when the fundamental freedoms are at stake. The contribution of R. Pålsson (Tax Law Professor, Gothenburg) offers an in-depth review of the *principle of equality in taxation*, and submits that the comparability of two situations underlying this principle can never be objective, and relies on social constructions, resulting from subjectively chosen criteria, causing to some extent problems of legitimacy and transparency. G. Maisto (Associate Professor Catholic University of Piacenza – Maisto e Associati) chose to focus on the *principle of effectiveness*, its relevance and role in the ECJ's case law on direct tax, and considers to what extent this principle

overrides the principle of *res judicata* requiring a revision of final judgments. In his turn, P.J. Wattel (European Tax Law Professor, Amsterdam) scrutinizes the *right to effective judicial protection*, as a general principle of EU law, enacted under article 47 of the Charter of Fundamental Rights, in tax and non-tax cases, and in the ECHR, concluding that taxpayers enjoy a well-functioning protection in both legal systems reinforcing each other's case law on this issue. A.P. Dourado (Professor, Faculty of Law, Lisbon) then analyses the potential and actual impact of the legality principle on EU tax law. D. Weber (European Tax Law Professor, Amsterdam) and T. Sirithaporn (doctoral student, Amsterdam) analyse the principles on *legal certainty* and *legitimate expectations* in the case law of the ECJ and their impact as a complement in the difficult legislative drafting process in EU direct tax law. Then G. Kofler (Professor of Tax Law at the University of Linz), scrutinizes the *principles of direct applicability and direct effect* especially in the case of defective implementation of (tax) directives. The contribution of A. Zalasinski (EU Commission) deals with the meaning and impact in direct tax law of the principle of proportionality, as a tool to enhance the protection of Member States' sovereignty.

Turning to the third panel of the conference, M. Simonek (Professor of Swiss and International Tax Law at the University of Zurich) starts with the principle of good faith as a constitutional principle of the Federal Swiss Constitution, encompassing the prohibition of abuse of rights, of contradictory behaviour and ensuring legitimate expectations, suggesting principle of good faith could be a source of inspiration for the European Union. Then O. Henkow (Associate Professor, Department of Business Law, Lund) takes us into the VAT world in respect of the "*accessorium sequitur principale*", commonly used by the ECJ to determine the tax object (i.e. the principal obligation), but which, as a principle, is of arguable value. Next, and still in the field of VAT, M. Papis (doctoral candidate Department of Business Law, Lund) looks at whether the *principle of neutrality*, which is not granted the value of a constitutional principle by the ECJ, is an expression of the principle of equal treatment, the value of which is constitutional, and she explores this apparent tension in depth. M. Helminen (Professor of International Tax Law, Faculty of Law, Helsinki) then brings us back to direct taxation, considering whether a *principle prohibiting double taxation* under EU law can be found in the ECJ's case law, in cases involving the direct tax directive, fundamental freedoms and human rights. S. Hemels (Professor of Tax Law, Erasmus University, Rotterdam) succeeds in showing that there are good reasons to listen to Hart and Rawls who developed *fairness* as a principle of law, which could run counter to the principle of prohibition of abusive practices, and of legitimate expectations as developed by

the ECJ in its case law on direct taxes. The principle of *ability to pay* is next considered by J. Englisch (Professor of Public Law and Tax Law at the University of Muenster) who investigates its ethical foundations and its inclusion – or not – in the principle of equality that underlies the foundations of most tax systems in the world. Then D. Gutmann (Professor of Tax Law at the Sorbonne Law School, Paris) shows us how the consistency of a legal order is dependent upon the way the domestic tax administration applies principles – or not – and upon the challenge of implementing them within administrative decisions.

All these reports show that the principles in question give birth to individual rights or any legally protected interest, and that they influence their material, personal and temporal scope, with a relative strength depending on the principle studied. Some principles (neutrality, fairness, prohibition of double taxation) have had some bearing on taxpayers' rights although they reflect an underlying societal value rather than a fundamental human right. Some others have had a much deeper impact on the extent of taxpayers' rights, especially those dealing with procedural rights such as effective judicial protection, or access to court, as perhaps they are rather rights than principles.

In conclusion, it can be said that the reports highlight the need for further research on the interaction between the different layers of law on the basis of which taxpayers may base their claims. The lack of doctrinal agreement that principles of law and even general principles of law are reliable as providing a free-standing legal basis in a positivist sense, is somewhat symptomatic of the field of research. The difficulty also arises from the fact that the legal terminology in the Treaty on European Union (TEU) (article 6(1)) cannot provide a clear indication of the legal consequences associated with a particular category, i.e. rights, freedoms, principles.³³ Doubts about the justiciability of general principles seem therefore to be legitimate especially in a field such as tax law, which involves a strong reliance on the written rule of law. The reports have tried to make it clear that the status, function and impact of the principles of law in the field of tax law are not clear without reference to the more general legal framework in which the principle in question was born and has evolved. This is especially true for the general principles dealing with human rights, and their relationship with domestic constitutions, with the ECHR and with the EU Charter.

33. For a similar conclusion in the field of EU labour law, and the equality in employment matters, see C. Semmelmann, *General Principles in EU Law between a Compensatory Role and an Intrinsic Value*, 19 *European Law Journal* 4, pp. 457-487 (2013).

Consequently, this leads us to further investigate how EU tax law evolves in the context of constitutional pluralism and how different rules interact with each other in material fields of law, which the next GREIT conference will address.

Cécile Brokelind (Professor, Department of Business Law, Lund)

Contact

IBFD Head Office
Rietlandpark 301
1019 DW Amsterdam
P.O. Box 20237
1000 HE Amsterdam, The Netherlands
Tel.: +31-20-554 0100 (GMT+1)
Fax: +31-20-620 8626
Email: info@ibfd.org
Web: www.ibfd.org



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