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Permanent Establishments in Value Added Tax

The Role of Establishments in International B2B Trade in Services under VAT/GST Law

13

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Permanent Establishments in Value Added Tax

Why this book?
Nowadays, more than 160 jurisdictions levy a VAT/GST. Cross-border trade in services is ever-increasing. Businesses, legislatures and tax authorities thus face new challenges in the area of VAT/GST, e.g. the risk of double (non-)taxation and loss of tax revenues by aggressive tax planning.

The existing academic research on the legal consequences connected with permanent establishments in international income tax law is immense. In the economically increasingly important field of VAT/GST, the role of permanent establishments is, however, comparatively unexplored. This book aims at identifying the role and functions of permanent establishments for VAT/GST purposes, by taking into account the existing EU VAT system and the international standard stipulated in the OECD International VAT/GST Guidelines.

Similarly to income tax law, also in the area of VAT/GST, permanent establishments primarily serve as a tool to allocate taxing rights between states, particularly in the area of B2B services. The EU legislature and the ECJ at the EU level, as well as the OECD on an international level have recently begun to put more focus on the function of business establishments in VAT/GST law. The EU system does, however, not yet build on a coherent concept and still follows the more traditional “direct use method”, which involves tax planning opportunities for multinationals. The solution proposed by the OECD (“the recharge method”) has not found a comprehensive equivalent in the current EU system so far. Legal uncertainty, double taxation and non-taxation are the potential results. This is where this book steps in by analysing the concept of business establishments and the treatment of supply of services between such establishments for purposes of VAT/GST law in the light of the existing legal and tax policy framework.

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Chapter 1

Introduction

1.1. Today's VAT world

Globalization and increasing cross-border trade mean that international tax law is very much at the centre of the current political discussions at a global level. Globalization has ultimately led to the effect that large multinational enterprises (MNEs) now generate a large portion of global GDP. Companies are increasingly carrying out their business through subsidiaries or permanent establishments located in different jurisdictions or even continents. A shift from country-specific business operation models to global business models based on matrix management organizations and integrated supply chains that centralize several functions at a regional or global level has taken place. Moreover, the emergence of the digital economy has led to an increasing number of companies (MNEs as well as SMEs) providing supplies remotely to customers located in countries all over the world. Policy makers and tax authorities are confronted with more and more tax cases involving international aspects and are forced to adapt their national tax systems to the new environment on a continuing basis.

In comparison to (corporate) income tax, the impact of globalization and digitalization on indirect taxes has received less attention. The significance of VAT[1] on a global basis is steadily increasing. In the last three decades, there has been a global move towards the introduction of consumption taxes. Currently, more than 160 countries worldwide already levy a VAT-like tax.[2] The rise of VAT is not limited to OECD member countries, in fact it is among non-OECD member countries that VAT has been truly ascendant.[3] Apart from the new introduction of VAT, many states have also taken measures in recent years to increase their already existing indirect taxes by

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1. In this book, the author makes use of the terms value added tax (VAT) and goods and services tax (GST) as synonyms for the same kind of tax: a broad-based tax on final consumption by private households, levied indirectly in stages by businesses at each level of the supply chain, without causing, as a general rule, cumulative effects. *See* in more detail on the characteristics of a "VAT" sec. 2.2.2.
2. According to a study by the OECD (OECD, *Consumption Tax Trends 2016*, p. 181), 166 countries operated a VAT as of 1 Jan. 2016; including all OECD member countries and major economies (except the United States).
3. Compare in more detail James & Ecker (2017), p. 326 et seq.

increasing rates or narrowing the scope of exemptions.[4] VAT raised approximately one fifth of total tax revenues in the OECD member countries in 2016 – the all-time high.[5] VAT revenues in the European Union amounted to EUR 1,044 billion in 2016, which is about 18% of the total tax revenue[6] of all EU Member States in 2016.[7]

In the light of the increasing cross-border trade and the increasing popularity and importance of VAT, the risk of double taxation will increase in the future. In addition, tax planning structures and cases of BEPS in the area of VAT will get more and more attention. Since it is still common practice to exempt certain industries, in particular financial services, from VAT, businesses – contrary to the principle of neutrality and the objective of VAT as a consumption tax – suffer VAT costs and are hence keen on avoiding those costs to the extent possible. A closer cooperation between states is important for both businesses (in order to avoid double taxation and administrative burdens) and jurisdictions (in order to effectively tackle aggressive tax planning).

The OECD has been aware for sometime now of the increasing importance of VAT and, starting in the early 1990s, set up an international platform for countries and stakeholders to discuss the international aspects of VAT. As a result of this project, on 27 September 2016, the International VAT/GST Guidelines were adopted as a Recommendation by the Council of the OECD, adhered to by 38 countries.[8] This is, however, only the beginning: It is presumed that VAT will receive even more attention in the future; an agreement on a model convention for VAT is no longer merely a dream.

The concept of "establishment" is one of the areas where increasing international cooperation is to be expected in the coming years. The OECD International VAT/GST Guidelines dedicate a separate section to the treatment of supplies of services to entities having establishments in more than

4. OECD, *Consumption Tax Trends 2016*, p. 11; European Commission, Tax Reforms in EU Member States 2014: Tax Policy Challenges for Economic Growth and Fiscal Sustainability (2014), p. 17.
5. OECD, *Consumption Tax Trends 2016*, pp. 14 and 16.
6. Including social security contributions.
7. Source: Eurostat. A summary on tax revenue statistics can be found here: http://ec.europa.eu/eurostat/statistics-explained/index.php/Tax_revenue_statistics, accessed 13 June 2018.
8. OECD, *Recommendation of the Council on the Application of Value Added Tax/Goods and Services Tax to the International Trade in Services and Intangibles*, adopted 27 Sept. 2016, C(2016)120. The text of the Recommendation and the list of adherents is available at https://legalinstruments.oecd.org/en/instruments/350 (accessed 13 June 2018).

one jurisdiction (multiple location entities, MLEs). MLE scenarios are one of the major issues when it comes to double taxation and tax planning, which were also addressed in BEPS Action 1.[9] So far, it has not been possible to reach an international agreement on the preferred VAT treatment. To achieve a fair allocation of taxing rights between states on supplies of services provided to MLEs having no full right to input VAT credit, the definition of an "establishment" and the tax consequences connected to it are key. That is where this book steps in: It aims at thoroughly elaborating the role and function of "establishments" for VAT purposes, by relying on the EU VAT system as an example and the OECD International VAT/GST Guidelines as a benchmark and future tool for improvement and harmonization.

1.2. The "establishment" concept in an economic and legal context

There is no common term or definition for "establishment" that applies in all fields of law. In everyday usage and in commercial law the term "branch" is often seen. In the field of income tax law, the term "permanent establishment" is predominant. In the area of VAT law, the European Union and some other jurisdictions use the term "fixed establishment". All these terms – even if they are characterized by differences in their exact perameters – have a common factor: they are used as an expression of the possibility to establish a business unit abroad and, as such, they define the relationship between a non-resident business and a specific jurisdiction.[10]

Any legal definition of an "establishment" indicates at which point the relationship between a non-resident company and a jurisdiction is objectively recognizable.[11] Besides different material functions depending on the area of law, the concept of "establishment" also serves an administrative function and ensures enforcement jurisdiction:[12] the identification of an "establishment" is functionally necessary for the attribution of specific obligations to such structures, such as publicity and authorization requirements (e.g. in the financial industry). In the area of tax law, these obligations are usually the payment of tax and corresponding reporting obligations.

9. OECD, *Action 1 Final Report* (2015), Annex D.
10. Vitale (2009), p. 777.
11. Id., p. 781.
12. Vitale (2009), p. 777.

A branch and a subsidiary are both forms of secondary establishments. Businesses that would like to engage in business activities in another jurisdiction commonly can freely decide whether to set up a separate legal entity (a subsidiary) or a branch. Both legal forms may have their pros and cons in terms of administration, costs, marketing, commercial law and tax law. Tax law is only one element that may influence the business decision whether to set up a branch or a subsidiary, but it will not necessarily be the driving factor. Branches distinguish themselves from subsidiaries from a legal point of view. A branch – in contrast to a subsidiary – is a place of business with no distinct legal personality from its head office.[13] Civil law generally does not acknowledge internal transactions between a head office and its branch as actual transactions, given that such internal dealings take place within the same legal entity and do not involve a transfer of title or ownership. As a general rule, a head office and a branch cannot enter into a contractual relationship with each other from a civil law point of view, regardless of whether both are established within the same or different jurisdictions. From an economic perspective, however, there is not so much difference between parent-subsidiary transactions and head office-branch transactions.

Over the last few decades, direct tax law has increasingly followed an economic perspective and treats permanent establishments similarly to subsidiaries, in particular when it comes to the allocation of taxing rights at the international level.[14] However, this approach and development in direct tax law can not be applied to VAT without close consideration and adaption. Where, under income tax law, the object of taxation is the income and profits of a person in a certain period, under VAT law, the consumption of goods and services is taxed based on individual transactions. Since it is linked to transactions, VAT seems to have a stronger link to civil law than income tax does.[15] This difference between the two taxes will be of relevance in several sections of this book.

1.3. Structure of this book

Due to necessary limitation of its scope, this book does not address all issues related to “establishments” in VAT, but focuses on the area of the supply of services. International trade in services is steadily increasing and services

13. Charlet & Koulouri (2009), p. 708; *see also* the Opinion of AG Léger, *FCE Bank* (C-210/04), point 46: “By definition a branch is simply a place of business with no legal personality”.
14. Charlet & Koulouri (2009), p. 705; Van Norden (2011), p. 36; Reimer (2014), p. 4.
15. *See* Charlet & Koulouri (2009), p. 704.

are increasingly provided remotely. Moreover, exemptions in VAT leading to input VAT costs for businesses and tax revenues for states usually apply in the service sector, particularly in the financial services industry. The international trade in services is thus of significant importance for the allocation of tax revenues between states. As goods are as a rule physical items,[16] they can be tracked and traced more easily than services. The allocation of taxing rights on the supply of goods is linked to the physical location and the movement of goods.[17] The "establishment" concept is hence not a key element when discussing the VAT treatment of goods.[18]

This book does not comprehensively address the VAT treatment of supplies of services to non-taxable persons and end-consumers (B2C) either, focusing instead on the supply of services between businesses (B2B). Nowadays, jurisdictions agree that the most suitable proxy for allocating taxing rights between states in a B2C scenario is the end consumer's usual residence and, for on-the-spot supplies, the place of actual performance.[19] For reasons of necessary limitation of its scope, the role and function of establishments for B2C supplies is, hence, not the central theme of this book but is only addressed to the extent necessary to discuss the relevance of the "establishment" concept for B2B rules.

The research in this book is structured as follows:

To systematically evaluate the current legal system applicable to "fixed establishments" under the EU VAT regime and to work on alternative solutions, it is necessary to identify evaluation criteria. This is discussed in chapter 2, which discusses the relevant legal and tax policy framework applicable to VAT law. The first part of chapter 2 addresses the legal framework in EU law relevant to the harmonization of VAT. Particular attention is given to those rules of primary law that have an effect on establishments in VAT, namely the freedom of establishment, the principle of equal treatment, other fundamental rights laid down in the ECFR, the principle of legal certainty, the principle of proportionality and the obligation to fight fraud and abuse. Besides the requirements under EU law, the legal relevance of the OECD International VAT/GST Guidelines is also discussed. The second part of chapter 2 addresses the tax policy principles underlying a VAT system, which are in particular: the aim of VAT in terms of taxing consumption and its theoretical justification (benefit principle, economic allegiance, ability to

16. *See* the definition in art. 14(1) VAT Directive.
17. *See* arts. 20-23 and 30-42 VAT Directive.
18. Charlet & Koulouri (2009), p. 706.
19. OECD, *International VAT/GST Guidelines* (2017), para. 3.113 and Guideline 3.6.

pay) and the relevance of these principles for B2B transactions and establishments. A significant part of the chapter is also dedicated to the neutrality principle, which is often referred to as the key underlying principle of VAT. The results of these general sections provide the basis for the more specific analyses in chapters 3, 4 and 5.

Chapter 3 sets out the allocation of taxing rights between states in a VAT context. The underlying principles and their particular relevance for B2B supplies of services is elaborated with specific focus on the "establishment" concept and with reference to the legal and tax policy framework as discussed in chapter 2.

In chapter 4, the EU VAT system applicable to "establishments" with a focus on B2B trade in services is thoroughly analysed. The assessment of the status quo is divided into four main subsections: the definition of the term "fixed establishment", the relevance of fixed establishments for the scope of VAT, the relevance of fixed establishments for the allocation of taxing rights, and the relevance of fixed establishments for the rules on input VAT credit. In all sections, the existing legal basis is interpreted in the light of the historical, systematic and teleological background and the approach by the ECJ is critically assessed. Areas of legal uncertainty, risks in terms of double taxation and opportunities for tax planning are identified. As a result of the necessary limitation in its scope, this book does not extensively address all provisions where the "fixed establishment" concept is used in the EU VAT Directive (e.g. MOSS system, invoice rules), but focuses on a selective range of provisions that are of major importance in an international setting.

Chapter 5 sets out the way forward. The basis of this *de lege ferenda* analysis is the shortcomings identified in chapter 4 on the one hand and the proposed alternatives in the OECD International VAT/GST Guidelines, particularly the recharge method, on the other. The discussion focuses on the preferred definition of "establishment" for VAT purposes and the preferred VAT treatment of supplies of services to MLEs. These are the core areas of interest where the EU VAT system and the international framework still lack consistency.

Chapter 6 provides an overall conclusion of the issues discussed and the preferred way forward.

Chapter 2

Setting the Scene

2.1. Legal framework

2.1.1. Sources of law

Legal constraints on the design of a VAT system may be inferred from international law and EU law. Domestic constitutional law might also be a point of reference. Due to the fact that the effects of constitutional law may vary from jurisdiction to jurisdiction, this layer of law is not addressed comprehensively within this book. However, very similar rights may also be inferred from the Charter of Fundamental Rights of the European Union (ECFR) which is taken into account.

EU law may be distinguished in primary, secondary and tertiary law. EU primary law includes provisions stipulated in the treaties (TFEU, TEU and the ECFR) and unwritten general principles developed by the ECJ.[20] With regard to written EU primary law, the fundamental freedoms and the fundamental rights are of particular importance when designing VAT rules. Moreover, some general principles developed by the Court also need to be taken into account. In particular, this involves the principle of legal certainty, the principle of proportionality and the general anti-abuse and anti-fraud principle. Besides, it is worth noting that the ECJ, for the purposes of VAT, constantly emphasizes the neutrality "principle". In contrast to the former group of principles, the latter is not part of EU primary law and cannot serve as a standard for review. The neutrality principle does however serve as a guiding tool for legal design and interpretation. Thus, for systematic reasons, within this study the neutrality principle is dealt with under the tax policy framework rather than the legal framework.[21]

EU secondary law consists of the harmonization measures enacted by the Council and the Parliament. Harmonization measures in indirect taxation are based on article 113 of the TFEU requiring that the harmonization "is

20. On the creation and effects of such general unwritten principles by the ECJ as part of EU primary law, *see* Weber & Sirithaporn (2014), sec. 11.1.1. For criticism on the function of principles, *see* Vanistendael, *The Role of (Legal) Principles in EU Tax Law* (2014), sec. 3.
21. *See* sec. 2.2.7.

necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition". Decisions of the Council – which the Parliament cannot block in the area of tax law – need to be made unanimously, which, due to the great number of Member States, presents major hurdles in the harmonization process.[22] EU secondary law may take the legal form of a directive, regulation or decision. The harmonization of VAT in the European Union has until now been predominantly based on directives (currently applicable: Directive 2006/112/EC),[23] although article 113 of the TFEU would also allow the issuance of a regulation.[24] In contrast to EU primary law and regulations, directives are, as a general rule, not directly applicable, but have to be implemented into domestic law by the Member States.[25] Directives have to respect and be in line with primary law.[26]

EU tertiary law – a term that has only been in use for a few years[27] – encompasses those EU measures that are dependent on secondary law and that supplement (delegation acts) or clarify (implementing acts) EU secondary law provisions. The legal foundation for tertiary acts is to be found in article 290(1) of the TFEU for delegation acts and article 291(2) of the TFEU for implementing acts. Article 291(2) of the TFEU is of greater relevance in VAT.[28]

At the international level, cooperation in the VAT area is still in its early stages. There is currently no international legal framework[29] comparable to the one for income tax law. However, since the 1990s, the OECD has

22. Note though that art. 116 TFEU would also allow for a harmonization by adopting directives, with majority voting in the area of VAT subject to the important condition that non-harmonization "is distorting the conditions of competition in the internal market and that the resultant distortion needs to be eliminated". This legal basis has not been successfully used in the area of VAT so far.
23. VAT Directive, pp. 1-118.
24. This is a remarkable difference from the area of direct tax law, where art. 115 TFEU only permits the adoption of directives.
25. However, according to settled case law, a person can also directly rely on a directive provision subject to three conditions: (i) the time period for implementing the relevant provision in domestic law has expired, (ii) the provision is unconditional and sufficiently precise, and (iii) the respective provision of the directive is in favour of the taxable person. Some of these criteria have recently been disputed (*see*, inter alia, with reference to other case law: *Pfeiffer and Others* (C-397/01 to C-403/01), para. 108; *GMAC* (C-589/12), paras. 29 and 39; *Schönimport Italmoda and Others* (C-131/13) and others, para. 54 et seq.; *Larentia + Minerva* (C-108/14 and C-109/14), paras. 48-50). *See* in more detail with further references Spies, *CJEU* (2017), pp. 101-105.
26. *See* in more detail sec. 2.1.2.1.
27. Using this term, for example, Englisch (2010), p. 264.
28. *See* in more detail sec. 2.1.2.3.
29. Compare, however, the proposed text for a VAT/GST Model Convention developed by Ecker (2013).

been devoting more attention to the VAT area. The adaption of a first set of International VAT/GST Guidelines as an OECD Recommendation in September 2016 was a very remarkable step in the direction of increased cooperation and harmonization of domestic VAT systems, and might also lead to hard law measures in the long run. Although the VAT/GST Guidelines are still of soft law character, their relevance to and effect on international relations should not be underestimated.[30] In the following sections 2.1.2. to 2.1.11., the legal effects of these different sources of law for the specific area of VAT are analysed in more detail.

2.1.2. Hierarchy of EU norms

2.1.2.1. Primary law versus secondary law

When designing and interpreting VAT provisions in EU law, the hierarchy of norms has to be considered. Both secondary and tertiary law have to be in line with EU primary law. Moreover, a relationship of subordination also exists between tertiary law and secondary law.

According to the prevailing opinion and settled case law, EU legislature – although not formally addressed in the wording of the TFEU – is also bound by primary law, in particular the fundamental freedoms,[31] the principle of equal treatment and the fundamental rights.[32,33] The number of cases in which the Court has been asked to assess whether a directive is invalid due to an infringement of primary law, however, is very limited compared to the overall amount of case law.[34] The Court, as a rule, presumes that EU legislation is lawful (in preliminary ruling and infringement proceedings) and analyses the compatibility of secondary law with primary law only when specifically asked to do so.[35] As the number of cases dealing with this issue is low, it is also no surprise that the number of cases in all fields of law

30. *See* in more detail sec. 2.1.10.
31. Landmark case: *Rewe-Zentral* (Case 37/83), para. 18; confirmed in, inter alia, *Denkavit Nederland* (Case 15/83), para. 15; *Meyhui* (C-51/93), para. 11; *Kieffer and Thill* (C-114/96), para. 27; *Swedish Match* (C-210/03), para. 59; *Alliance for Natural Health* (C-154/04 and C-155/04), para. 47; *Schmelz* (C-97/09), para. 50. Compare in more detail De la Feria (2010), pp. 282-284.
32. *See*, inter alia, *Parliament v. Council* (C-540/03), paras. 2-23; and 52 et seq.; *Idéal Tourisme* (C-36/99), paras. 36-40; *Puffer* (C-460/07), paras. 52-62; *Digital Rights Ireland Ltd* (C-293/12 and C-594/12).
33. The prohibition on State aid does not apply to the EU legislature (*see* sec. 2.1.4.).
34. *See* in more detail Spies, *CJEU* (2016), pp. 140-150.
35. *Commission v. Greece* (“*Ouzo*”) (C-475/01), para. 18 and the case law cited therein.

where the Court has determined that a directive provision was incompatible with EU primary law is very limited.[36] The VAT Directive has also been (unsuccessfully) challenged before the ECJ a few times. One can clearly infer from the cases that EU legislature enjoys more leeway compared to the domestic legislatures of the Member States when their enactments are tested against EU primary law, in particular when it comes to the requirements under the principle of equal treatment (*see* section 2.1.6.), the prohibition on State aid (*see* section 2.1.5.) and the fundamental freedoms (*see* section 2.1.3.).

2.1.2.2. Secondary law versus tertiary law

Tertiary law has to respect primary law and secondary law.[37] The legal foundation for tertiary law is to be found in article 290(1) of the TFEU for delegation acts and article 291(2) of the TFEU for implementing acts. Both articles require there to be in existence a basic legal act in secondary law in order for the tertiary law to be effective.[38] Both provisions lead to a cooperation between the legislative and executive power at EU level (also referred to as "comitology").[39]

36. *See also* Eskildsen (2011), p. 116. Most cases whereby a provision of secondary law has been declared invalid were based on procedural errors (*see* e.g. *Commission v. Parliament and Council* (C-43/12) and several were based on an infringement of fundamental rights (e.g. data protection right: *Digital Rights Ireland Ltd* (C-293/12 and C-594/12). There is no judgment where the Court annulled an act of tertiary law as invalid due to a conflict with primary law.

37. Hofmann (2009), p. 482 et seq.; Nettesheim (2017), art. 291, para. 58.

38. On the historical background to both articles, *see* in more detail Hofmann (2009), p. 491 et seq.

39. Upon a closer look, however, "comitology" only refers to those situations where implementing powers are conferred on the Commission (which is the rule), not the Council (on the term and institution of "comitology", *see* in more detail Adriaansen (2010), p. 131 et seq.). As in the area of VAT implementing powers are conferred on the Council (art. 397 VAT Directive), "comitology" is not the right term to be used in VAT (similarly, *see* Englisch (2010), p. 265). In this respect it is also worth noting that art. 291(3) TFEU is not relevant for VAT. This provision gives the Council and the European Parliament the possibility to lay down a legal framework in which the Member States can control implementing measures by the Commission. This power to control is exercised by Regulation (EU) No. 182/2011 of the European Parliament and of the Council of 16 Feb. 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers. According to the wording of art. 291(3) TFEU, however, this control mechanism is limited to implementing powers conferred on the Commission and does not apply to implementing powers conferred on the Council.

So far, article 291(2) of the TFEU has been of greater relevance in VAT. For implementing acts, it allows implementing powers to be conferred on the Commission or the Council if "uniform conditions for implementing legally binding Union acts are needed". According to the ECJ, article 291(2) of the TFEU only allows these powers to be used to "provide further detail in relation to the [normative] content of the legislative act".[40] In delimitation of article 290(1) of the TFEU, these implementing measures cannot "supplement or amend" elements of the respective secondary law.[41] An implementing measure cannot "derogate" from the corresponding legislative act.[42] Such a derogation would not be lawful.[43] From 2014, the Court has been applying a two-level testing scheme, in order to evaluate whether implementing measures are within the limits of article 291(2) of the TFEU and the respective basic legislative act. First, it needs to be assessed whether the implementing measures "comply with the essential general aims pursued by the legislative act". Second, one has to evaluate whether the measures "are necessary or appropriate for the implementation of that act, without supplementing or amending it".[44] The derogation from the basic legislative act will also be found to be harmful, if the supplements or amendments concern "non-essential elements" of the legislative act only.[45]

In the rare cases in which the Court has been asked to rule on the validity of implementing measures, the Court has not found any unlawfulness.[46] In particular, the Court decided in 2014 that a measure is still an implementing measure within article 291(2) of the TFEU and not a delegated act within article 290(1) of the TFEU, if the principles, which are further defined in

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40. *Commission v. Parliament and Council* (C-427/12), paras. 39 and 52; *Parliament v. Commission* (C-65/13), para. 43; *see* on this aspect also Opinion of AG Cruz Villalón in *Parliament v. Commission* (C-65/12), points 38-42.
41. *Commission v. Parliament and Council* (C-427/12), para. 38; *see* the wording in art. 290(1) TFEU itself: "A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act"; *see also* Communication from the Commission, Implementation of Article 290 of the Treaty on the Functioning of the European Union, COM(2009) 673 final, p. 3.
42. *Deutsche Tradax* (Case 38/70), para. 11; *Compagnie continentale* (Case 58/70), para. 15.
43. Hofmann (2009), p. 491; *see* e.g. *Parliament v. Council* (C-303/94); *Parliament v. Council* (C-355/10).
44. *Parliament v. Commission* (C-65/13), para. 46.
45. Id., at para. 45; *Commission v. Parliament and Council* (C-88/14), para. 31.
46. *Commission v. Parliament and Council* (C-427/12), paras. 44-54; *Parliament v. Commission* (C-65/13), paras. 48-93; *see also* the earlier case *Eridania Beghin-Say* (C-103/96), para. 20 et seq.

the implementing measure, can already be derived from the basic act.[47] In earlier judgments, however, the Court has also annulled implementing acts.[48] Inter alia, in a judgment handed down in 1996, the Court found an implementing directive in the area of agriculture "illegal in the light of the basic directive", since it did not comply with the aim of the basic act and modified its scope.[49] In a judgment in 2012, the Court invalidated an implementing decision in the area of border controls with the argument that it introduced new essential elements.[50] This case law proves that tertiary law has to respect secondary law and that the Court is also willing to annul an act of tertiary law in the event of a conflict with its basic act.[51] Whether an act of tertiary law is, however, unlawful, is subject to a case-by-case analysis, which has to take into account the context and aim of the specific basic act. To a certain extent, this evaluation may also be subject to political dynamics. Note additionally, that in a number of cases the ECJ has also pointed out that an act of tertiary law has to be interpreted in line with the basic act as far as possible.[52] This interpretative approach may avoid an invalidation.

47. *Commission v. Parliament and Council* (C-427/12), paras. 44-54. Also in 2014, the Court upheld an implementing decision conferring further implementing powers as regards the free movement of workers on a third party (the European Coordination Office), although the AG had partly argued differently. *Parliament v. Commission* (C-65/13), paras. 48-93; Opinion of AG Cruz Villalón in *Parliament v. Commission* (C-65/12), points 69-79.

48. *Cousin* (Case 162/82); *Parliament v. Council* (C-303/94); *Parliament v. Council* (C-355/10).

49. *Parliament v. Council* (C-303/94).

50. *Parliament v. Council* (C-355/10).

51. Note though, that this case law did not specifically concern art. 291(2) TFEU, which was only introduced by the Lisbon Treaty, but its predecessor in art. 202, third ident EC Treaty. Art. 202, third ident EC Treaty – in contrast to arts. 290(1) and 291(2) TFEU – did not distinguish between delegation acts and implementing acts, but regulated "powers for the implementation" in general terms only. According to the prevailing opinion, art. 291(2) TFEU – on which the IR in VAT is based – serves as the main predecessor to art. 202, third ident EC Treaty, whereas art. 290(1) TFEU added a new feature to the Treaty (*see* in more detail Hofmann (2009), p. 494 et seq.; Opinion of AG Cruz Villalón in *Commission v. Parliament and Council* (C-42/12), points 32 et seq.). The case law handed down on tertiary acts based on art. 202, third ident EC Treaty should therefore still be of relevance when interpreting and applying art. 291(2) TFEU (similarly, *see* Hofmann (2009), p. 491).

52. *See* in particular *Compagnie continentale* (C-58/70), para. 12: "Since Regulation No 473/67 uses the expression 'levy fixed in advance' without defining it more precisely, it must be understood in the same sense as that in which it is used in the basic Regulation No. 120/67, which Regulation No 473/67 is intended to implement"; moreover: *Köster* (C-25/70), para. 14 et seq.; *Eridania Beghin-Say* (C-103/96), para. 20 et seq.

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