A Guide to the European VAT Directives

Introduction to European VAT 2016
Integrated Texts of the VAT Directive (including the implementing Regulation) and of the former Sixth VAT Directive

Volume 1/2

Ben Terra – Julie Kajus
Why this book?
Published annually, this handy two-volume set provides a comprehensive overview of the most essential parts of VAT Directives in Europe. It serves as a textbook for advanced students of tax law and/or Community law and as a reference book for (indirect) tax law or Community law practitioners.

Volume 1: Introduction to European VAT
This volume offers a systematic survey of the implications of the legal principles on indirect tax matters and VAT rules of the EU in force and a discussion of the case law of the Court of Justice of the EU in indirect tax matters, particularly in VAT. It is divided into two parts: (I) General subjects and (II) European VAT. Following a general introduction on VAT as fiscal phenomenon, the European VAT is discussed as provided for in the Sixth VAT Directive as replaced by Council Directive 2006/112/EC on the common system of VAT. VAT issues are illustrated by excerpts of decisions of the Court of Justice. The changes by the VAT package are included, and all chapters and references are updated with the changes by the Lisbon Treaty.


On 14 December 2015, the Commission adopted the proposal for a Directive amending the VAT Directive with regard to the duration of the obligation to respect a minimum standard rate (COM(2015) 646). The proposed change in Article 97 of the VAT Directive is included.

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1.1 Introduction

This chapter considers the primary (legal) sources of EU tax law. Special attention is paid to the rules based on the Treaty of Lisbon.

1.2 Primary law

EU law can be divided into primary and secondary Union law.

Until 1 December 2009, the date the Treaty of Lisbon came into effect, the term primary Community law was used referring 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 Single European Act, which came into effect on 1 July 1987, introduced, inter alia, a cooperation platform for the coordination of foreign policy under 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.¹ This Treaty also established the European Union (EU).

The ECSC Treaty expired on 23 July 2002. Since then the sectors coal and steel fall within the legal scope of now the Treaty on the Functioning of the European Union (TFEU).

The Treaty of Maastricht Union, lacking separate legal personality (in contrast to the present Union, see Article 47 Treaty on European Union (TEU) and Declaration 24 annexed to the Final Act of the Intergovernmental Conference, see section 1.3), was, 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.

¹. The “E” for economic was omitted, since the Community also concerned itself with non-economic objectives, such as social, cultural and environmental policies.
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 agreed on items which are indispensable for the extension of the European Union, 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.

Changes to the Treaties were introduced by the seven Acts of Accession 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), Bulgaria and Romania (in 2007) and Croatia (in 2013).

On 13 December 2007, the Treaty of Lisbon, abolishing the European Union's three-pillar structure, was signed providing that the European Union will be founded on the Treaty on European Union as amended and on the Treaty on the Functioning of the European Union, replacing the EC Treaty. The TEU and the TFEU are referred to as “the Treaties”. The two Treaties have the same legal value. The Union replaces and succeeds the European Community (Article 1 TEU). The Treaty provides for a number of significant institutional changes (see further section 1.3.1).

**Primary EU law** now consists of the Treaties and its Protocols – including the Charter of Fundamental Rights, which has the same legal value as the Treaties – and the Euratom Treaty.

**Secondary EU law** refers to the decisions taken by the institutions entitled to take them under the Treaties.

These sources are discussed and examples are given below, mainly derived from European indirect tax law. We start with a brief overview of the Lisbon Treaty and the institutional framework of the Union.

### 1.3 The Lisbon Treaty

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

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2. The Euratom Treaty remains in force; for a consolidated version see OJ 2010, C 84, p. 01.
implementation of which was agreed by 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 the 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 Convention finished its work 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.

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 (then) 27 Member States agreed on a non-constitutional Revision Treaty (hereinafter referred to as the Lisbon Treaty), 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 and references to a European identity or tradition, or to even hardly objectionable principles such as representative and participatory democracy. Especially devoid of meaning is the repeal of the 2004 plan to incorporate the already existing EU Charter of Fundamental Rights (see section 2.3.1) into the TFEU, since that Charter was already, still is, and will continue to be applied by the Court of Justice as if it were Treaty law, more so since the Revision Treaty (Article 6 TEU) expressly provides that the European Union recognizes the Charter and that it has the same legal force as the Treaty itself (except for the United Kingdom, and Poland which have derogating Protocols).3

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.

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3. The Czech Republic also has an opt-out – secured by the Euro-sceptic Czech President Vaclav Klaus as a condition for signing the Lisbon Treaty. He wanted a guarantee that his country would not be exposed to property claims by Germans expelled from the then Czechoslovakia after World War II.
After Dublin won guarantees that the Treaty would not infringe on its sovereignty in the areas of taxation, family issues and State neutrality another Irish plebiscite gave overwhelming support in autumn 2009.

The Treaty entered into force on 1 December 2009.

The Lisbon Treaty does not change much in the tax field. A new provision is added to Article 58 EC (now Article 68 TFEU) allowing individual Member States to restrict fiscally capital movement with third States. Another possibly substantive change is that at the end of Article 93 EC (now Article 113 TFEU), the words “…within the time limit laid down in Article 14” are 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 functioning of the internal market before the Lisbon Treaty became effective. Further, the order of the Articles 94 and 95 EC is reversed (now Articles 114 and 115 TFEU), but that does not change anything for taxation: a unanimous decision is still required for all EU tax measures, whether direct or indirect.

1.3.1 The institutional framework

At this place it seems to be useful to give a brief overview of the institutions (taking into account the changes by the Lisbon Treaty). The institutional system of the European Union is unique in the world. There are seven institutions:

– the European Parliament;
– the European Council;
– the Council (not to be confused with the European Council);
– the European Commission (referred to as “the Commission”);
– the Court of Justice of the European Union;
– the European Central Bank; and
– the Court of Auditors.

The European Parliament, the Council and the Commission are assisted, acting in an advisory capacity, by:

– the European Economic and Social Committee; and
– the Committee of the Regions.

Furthermore we mention separately:

– the European Investment Bank; and
– the European ombudsman.

*The European Parliament (EP)*

The functions of the EP can be divided into three areas: legislative, budgetary and supervisory.
The EP acts jointly with the Council in the legislative process (making regulations, issuing directives and taking decisions, see section 3.1).

Since the Treaties of Amsterdam and Lisbon the role of the EP in the legislative process has been considerably strengthened.

Under the Treaty of Amsterdam there were three different procedures: the co-decision, the cooperation and the consultation procedure. Under the Treaty of Lisbon the slightly modified co-decision procedure is renamed the “ordinary legislative procedure”, see Article 294 TFEU. The influence of the EP is the largest in this procedure where it acts as a co-legislator on an equal footing with the Council. This procedure applies, inter alia, for areas such as free movement, internal market, environment and cooperation in the field of customs.

In the few remaining areas, Parliament either has the right of consent to a Council measure, or vice-versa, (constituting “a special legislative procedure”) except in the few cases where the old consultation procedure applied, wherein the Council has to consult the European Parliament before voting on the Commission proposal and take its views into account. It is not bound by the Parliament’s position but only by the obligation to consult it, e.g. with regard to adoption of Directives in the field of VAT. Parliament needs to be consulted again if the Council deviates too far from the initial proposal.

The EP has supervisory powers over the Commission. The Commission must answer parliamentary questions, defend its proposals and present the EP with an annual general report of the activities of the Union for debate. The EP can, by a two-thirds majority, pass a motion of censure and thereby compel the Commission to resign as a body. Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament (Article 44 of the Charter of Fundamental Rights of the European Union).

Representatives in the EP “of the Union’s citizens” are elected once in the 5 years by direct universal suffrage. The Treaty of Lisbon has resulted in a review of the number of representatives and has set a maximum of representatives including the President at 751 members.

The Lisbon Treaty expands the role of Member States’ parliaments in the legislative processes of EU institutions, giving them a greater role in responding to new applications for membership. National parliaments will be able to veto measures furthering judicial cooperation in civil matters. National parliaments are to contribute to the good functioning of the Union through receiving draft EU legislation, seeing to it that the principle of subsidiarity is respected, etc. (See also section 2.2.1.) The Treaty of Lisbon allows national parliaments 8 weeks to study legislative proposals made by the Commission and decide whether to send a reasoned opinion stating why the national parliament considers it to be incompatible with the principle of subsidiarity. National parliaments may vote to
have the measure reviewed. If one third (or one quarter, where the proposed EU measure concerns freedom, justice and security) of national parliaments are in favour of a review, the Commission would have to review the measure and if it decides to maintain it, must give a reasoned opinion to the Union legislator as to why it considers the measure to be compatible with subsidiarity.

The European Council

Under the Lisbon Treaty the European Council has officially gained the status of an institution of the European Union. Under the name European Council the Heads of State or Government together with its President and the President of the Commission meet at least twice a year to provide the Union with the necessary impetus for its development and to define the general political directions and priorities thereof.

A President of the European Council is appointed for a 2½ year term in a qualified majority vote of the European Council. A President could be reappointed once, and besides be removed by the same voting procedure. The President’s work is largely administrative, as he or she will be responsible for coordinating the work of the European Council, hosting its meetings and reporting its activities to the European Parliament after each meeting and at the beginning and end of his or her term. Additionally, the President will provide external representation to the Union.

The Council

The Council’s main task is to exercise legislative and budgetary functions. The Council is made up of representatives of the governments of the Member States. The Council meets in different configurations, i.e. representatives may vary according to the subject under discussion. The Council is referred to with the names by which the respective subjects are known: Council of Agriculture Ministers, Council of Transport Ministers, etc.; for VAT and other taxes the ECOFIN Council (Council of Economic and Finance Ministers) meets once a month.

The standard system of voting in the Council is “Qualified majority voting” (QMV). It is based on the principle of the double majority. Decisions in the Council of Ministers will need the support of 55% of Member States (currently 15 out of 28 EU countries) representing a minimum of 65% of the EU’s population. To make it impossible for a very small number of the most populous Member States to prevent a decision from being adopted, a blocking minority must comprise at least four Member States; otherwise, the qualified majority will be deemed to have been reached even if the population criterion is not met.

The European Council agreed that the new system will take effect in 2014. In the first 3 years, until 2017, a Member State may request that an act be adopted in accordance with the qualified majority as defined in the Treaty of Nice.

In tax matters the Council must act unanimously.
The Presidency of the Council, with the exception of the Foreign Affairs configuration, is held by pre-established groups of three Member States for a period of 18 months. The groups are made up on a basis of equal rotation among the Member States. Each member of the group in turn chairs for a 6-month period all configurations of the Council, with the exception of the Foreign Affairs configuration. The other members of the group assist the Chair in all its responsibilities on the basis of a common programme. Members of the team may decide alternative arrangements among themselves.

A committee of ambassadors of the Member States (referred to with its French acronym Coreper) is responsible for preparing the work of the Council.

The Commission

The Commission can be seen as the “executive committee” of the EU. It has the exclusive right of initiative, meaning that if there is no Commission proposal, there will be no act by the Council. The Commission also has a supervisory function – it ensures the observance by the Member States of their obligations under the Treaty. It may institute proceedings against Member States which may ultimately lead to a judgment of the Court of Justice (see section 4.3.1). It can oblige an undertaking to make an end to an infringement of the rules and may impose fines and penalties. The Commission executes the policy of the Council. Article 17 TEU describes the tasks of the Commission as follows:

The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union’s external representation. It shall initiate the Union’s annual and multiannual programming with a view to achieving interinstitutional agreements.

Under the terms of the Lisbon Treaty, the post of High Representative is merged with that of the European Commissioner for External Relations under a new title of High Representative of the Union for Foreign Affairs and Security Policy. He or she is also a Vice-President in the Commission and chairs the Council of Ministers in its Foreign Affairs configuration. Although the High Representative has powers to make proposals he or she can only represent the Union in matters where there is an agreed policy between all Member States. The post is backed by an External Action

Service (EEAS), which assists the High Representative to generate consensus in the European Union and implement that consensus when achieved.

**The Court of Justice of the European Union**

The Court of Justice of the European Union, established in Luxembourg, “shall ensure that in the interpretation and application of the Treaty the law is observed” (Article 19 TFEU).

The Court of Justice of the European Union includes the Court of Justice (CJEU) and the Court of First Instance, renamed the General Court (GC), which has jurisdiction regarding direct appeals by individuals and companies and regarding technical areas such as competition, anti-dumping, compensation for damages and disputes between the European Union and its civil servants. Its decisions are subject to appeal to the Court of Justice on points of law only.

The Court of Justice rules on actions brought by a Member State, an institution or a natural or legal person. In order to promote the uniformity of interpretation of EU law in the legal practice of the Member States the Court has jurisdiction to give so-called preliminary rulings. When questions regarding the interpretation of EU law are raised before a national court it may (and when there is no judicial remedy against the decision of the national court that court must) bring the matter for the Court, unless of course it has already given a judgment on the subject matter or the answer to the question is evident.

The Court of Justice and the General Court consist of one judge per Member State.

The CJEU is assisted by ten Advocates General. The institute of Advocate General was introduced to counterbalance the “single-tier” nature of court proceedings, i.e. the absence of any appeal procedures. The task of the Advocates General is to submit “Opinions” to the Court in the form of (non-binding) proposals for the Court decision based on a fully independent and non-partisan survey of the questions of law raised in the case concerned. The Opinions are an integral part of the oral procedure of the Court of Justice and are published together with the judgment in the Court Reports.

On 2 November 2004, the Council adopted a decision establishing a new judicial body, to hear disputes between the EU’s institutions and its officials and other staff. The decision aims at relieving the General Court of part of its caseload. The EU Civil Service Tribunal (CST), forming an integral part of the Court of Justice, sits in Luxembourg. The EU Civil Service Tribunal exercises jurisdiction at first instance and its judgments may be appealed against, on points of law only, to the General Court. The Tribunal is composed of seven judges appointed by the Council for a 6-year term after consultation of an independent committee of figures from the legal world. The judges elect the President of the Tribunal from among their number for a 3-year term; he or she may be re-elected.
On 23 June 2015, the Council backed a proposal to reform the General Court, aimed at enabling it to face an increasing workload and ensuring that legal redress in the European Union is guaranteed within a reasonable time.\(^5\) The reform provides for a progressive increase in the number of judges at the General Court and for the merging of the Civil Service Tribunal with the General Court. In 2015, the number of judges would increase by 12. In 2016, the seven posts of judges from the Civil Service Tribunal would be transferred to the General Court to which nine further judges would be attributed in 2019. In total, this means 21 additional judges at the end of the process. This increase in the number of judges will also allow the General Court to have chambers of five judges rather than three judges to address the cases which justify it.

**The European Central Bank (ECB)**

Based on Article 13 TEU the European Central Bank has gained the status of an EU institution. The ECB together with the national central banks constitute the European System of Central Banks (ESCB). The primary objective of the ESCB is to maintain price stability.

The basic tasks to be carried out through the ESCB are to define and implement the monetary policy of Union, to conduct foreign exchange operations, to hold and manage the official foreign reserves of the Member States and to promote the smooth operation of payment systems.

The ECB must be consulted on any proposed Union act in its fields of competence. The ECB has the exclusive right to authorize the issue of banknotes within the European Union. The seat of the ECB is in Frankfurt am Main.

**The Court of Auditors**

The task of the Court of Auditors is to examine the accounts of revenue and expenditure of the Union. It may perform audits on the spot in the Member States including on the premises of business.\(^6\) It draws up an annual report published in the Official Journal.

**The European Economic and Social Committee (EESC) and the Committee of the Regions**

According to Article 13 TEU, the European Parliament, the Council and the Commission are assisted, acting in an advisory capacity by an Economic and

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\(^6\) See in this context Case C-539/09 (*Commission v. Germany*) in which the Court held that, by refusing to permit the European Court of Auditors to review cross-border administrative cooperation in the field of VAT in Germany, the Federal Republic of Germany had failed to fulfil its obligations under Union law.
Social Committee and by a Committee of the Regions acting in an advisory capacity. Both bodies may not have more than 350 members.

The Economic and Social Committee consists of representatives of organizations of employers, of the employed, and of other parties representative of civil society, notably in socio-economic, civic, professional and cultural areas.

The Committee of the Regions consists of representatives of regional and local bodies who either hold a regional or local authority electoral mandate or are politically accountable to an elected assembly.

As with the Committee of the Regions, the opinion of the Economic and Social Committee is a mandatory requirement for EU legislation, when provided by the Treaties.

*The European Investment Bank*

The task of the European Investment Bank having legal personality is to contribute, by having recourse to the capital market and utilizing its own resources, to the balanced and steady development of the common market in the interest of the Union. For this purpose the Bank, operating on a non-profit-making basis, grants loans and gives guarantees which facilitate the financing of projects for developing less-developed regions, projects for modernizing or converting undertakings, and projects of common interest to several Member States where these projects are of such a size or nature that they cannot be entirely financed by the various means available in the individual Member States.

*The European ombudsman*

Since the Treaty of Maastricht there is a European ombudsman appointed by the European Parliament and empowered to conduct inquiries for which he or she finds grounds, either on his own initiative or on the basis of complaints submitted to him directly or through a Member of the European Parliament. According to Article 43 of the Charter of Fundamental Rights of the European Union, any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union, with the exception of the Court of Justice of the European Union acting in its judicial role. Where the ombudsman establishes an instance of maladministration, he or she refers the matter to the institution concerned, which has a period of 3 months in which to inform him or her of its views. The ombudsman then forwards a report to the European Parliament and the institution concerned.

*The European Stability Mechanism (ESM)*

At this place we mention the ESM which was established on 27 September 2012, and will function as a permanent firewall for the Eurozone with a maximum lending capacity of EUR 500 billion. It replaces the two temporary EU funding programmes:
European Financial Stability Facility (EFSF) and the European Financial Stabilisation Mechanism (EFSM). All new bailout applications and deals for any Eurozone Member State with a financial stability issue, will in principle from now on be covered by ESM, while the EFSF and EFSM will only continue to handle transfer and monitoring of the previously approved bailout loans for Ireland, Portugal and Greece.

A separate treaty, amending Article 136 TFEU incorporating the ESM into EU law, has been ratified and entered into force on 1 January 2013.

ESM Member States can apply for an ESM bailout if they are in financial difficulty or their financial sector is a stability threat in need of recapitalization. ESM bailouts are conditional on Member States first signing a Memorandum of Understanding, outlining a programme for the needed reforms or fiscal consolidation to be implemented in order to restore the financial stability. Another precondition for receiving an ESM bailout, starting from 1 March 2013, will be that the Member State must have fully ratified the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union; also referred to as Fiscal Stability Treaty. When applying for ESM support, the country in concern will be analysed and evaluated on all relevant financial stability matters by the so-called Troika (European Commission, ECB and IMF) in order to decide if one/several of its five different kinds of support programmes should be offered.

1.4 International agreements

Union competence is based on the principle of conferral: the Union has only the competences conferred on it by the Treaties (Article 5 TEU), see also section 2.2.1. The competences conferred upon the Union may be divided into three categories: (i) exclusive competences (Member States are not competent any more), listed in Article 3 TFEU; (ii) shared competences with “pre-emption” (both the Union and the Member States are competent, but whenever the Union exercises its competence, the Member States lose their competence in the field on which the Union has exercised its competence), listed in Article 4 TFEU, and (iii) shared competences without pre-emption, meaning that the Union is only competent to support, coordinate or supplement, without superseding the competence of the Member States (listed in Article 6 TFEU). In areas of external competence, the TFEU also provides for treaty-making power, making the Union competent to negotiate and conclude treaties with third States and international organizations, also if internally the Union may not have as yet exercised any regulatory competence. Except where the Union’s external competence is exclusive (such as in the field of common commercial policy), also the Member States are competent to conclude treaties with third States, but because of the priority of Union law over national law, external action of the Union limits the area left for the Member States. The Union has not only competence to conclude treaties with third States where the TFEU explicitly so provides, but also, inter alia, “where the conclusion of an agreement is
necessary in order to achieve, within the framework of the Union’s policies, one of the objects referred to in the Treaties or ... .” (Article 216 TFEU).

In the period before the Lisbon Treaty entered into force, it already appeared from the _AETR_ case and from several opinions delivered by the Court of Justice, that whenever EU law confers internal powers on the European Union in order to attain an objective, the European Union is also competent to conclude international agreements necessary to attain that objective, even in the absence of a specific Treaty provision conferring such competence (“implied powers”). Moreover, the Court of Justice held in the _AETR_ case that if the exercise by the Community (now the European Union) of internal powers to attain the aims of the EC Treaty has led to the adoption of common rules, Member States no longer have powers to conclude their own agreements with third countries on the subject matter covered by the common rules without consulting with the European Union if such agreements with third countries could jeopardize the full effectiveness of the common rules. The European Union does not need to have implemented its available powers, on the internal level, for the Union to have authority to enter into international commitments.

A special case has been the relationship between the (E)EC and GATT. In the third _International Fruit Company_ case, dealing with the validity, in the light of Article XI GATT, of several regulations restricting the importation of apples, the preliminary question was whether the Court of Justice was competent to give a preliminary ruling on the validity of EC law under international law. According to the Court of Justice, the EEC, whilst not an original contracting party, was bound by the GATT rules, since the Community had assumed the powers previously exercised by the Member States, which had been recognized by the contracting parties (clearly an example of substitution). According to the Court of Justice, the validity, under Article 177 EEC Treaty (now Article 267 TFEU) of measures taken by institutions may be judged with reference to a provision of international law when that provision binds the Community (now the European Union) and is capable of conferring on individuals rights which they can invoke before the courts. For similar a reasoning on the same point, see Case 38/75 (_Nederlandse Spoorwegen_) dealing with the

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7. Case 22/70 (Commission v. Council). In this case it was decided that the bringing into force of a Regulation on the harmonization of certain social legislation relating to road transport necessarily vested in the Community power to negotiate and conclude the European Agreement on Road Transport.
9. The Court of Justice referred to Article 5 of the EC Treaty (now Article 4(3) TEU). Joined Cases 2, 4 and 6/76 (_Kramer_) dealing with the power to take any measures for the conservation of the biological resources of the sea, measures which include the fixing of catch quotas and their allocation between the different Member States.
10. Joined Cases 21 to 24/72 (_International Fruit Company_).
11. According to the Court of Justice, Article XI of the GATT does not have such a (direct) effect.
1.4 International agreements

Brussels Convention on Nomenclature and non-binding classification opinions. In that judgment the Court of Justice held:

24. It is true that these classification opinions do not bind the contracting parties but they have a bearing on interpretation which is all the more decisive because they emanate from an authority entrusted by the contracting parties with ensuring uniformity in the interpretation and application of the nomenclature.

25. When, furthermore, such an interpretation reflects the general practice followed by the contracting states, it can be set aside only if it appears incompatible with the wording of the heading concerned or goes manifestly beyond the discretion conferred on the customs cooperation Council.

(With regard to non-binding explanatory notes see also section 3.6.)

The GATT has now been replaced by the Treaty establishing the World Trade Organization (WTO). Both the Community and the Member States have signed and ratified this Treaty,12 which also means that the European Union is a contracting party. Clearly, this mixed type of agreement is potentially fertile soil for disputes on the division of competences between the European Union and the Member States. (As to whether the WTO rules can be relied upon when contesting the validity of Union legislation, see Joined Cases C-120/06 P and C-121/06 P (FIAMM and Fedon). With regard to the GATS see also section 10.4 and Case C-335/05 (Provozu) in section 17.2.6).

The association agreements between the European Union and non-member countries are particularly worth mentioning. Association goes far beyond the mere regulation of trade and involves close economic cooperation and wide-ranging financial assistance from the European Union for the country concerned (see Article 217 TFEU).13 A distinction may be drawn between three different types of association agreement.

(1) Agreements that maintain special links between certain Member States and non-member countries

One particular reason for the creation of the association agreement was the existence of overseas countries and territories with which some of the founding Member States maintained particularly close ties as a legacy of their colonial past. The introduction of a common external tariff in the Community would have seriously

12. And the multilateral trade agreements deriving from it, including in particular the General Agreement on Tariffs and Trade (GATT 1994) the Antidumping and Subsidies Code, the General Agreement on Trade in Services (GATS) the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Understanding on Rules and Procedures Governing the Settlement of Disputes.

13. Cooperation agreements (based on Article 218 TFEU) are not as far reaching as association agreements being aimed solely at intensive economic cooperation. Such agreements exist with the Maghreb States (Morocco, Algeria and Tunisia), the Mashreq States (Egypt, Jordan, Lebanon and Syria) and Israel for instance.
disrupted trade with these countries, which meant that special arrangements were needed so that the system of unrestricted Community trade could be extended to them. At the same time, tariffs on goods originating in these countries were progressively dismantled. Financial and technical assistance from the Community was channelled through the European Development Fund.

(2) Agreements as preparation for accession to the European Union or for the establishment of a customs union

Association arrangements are also used in the preparation of countries for possible membership of the European Union. The arrangement serves as a preliminary stage towards accession during which the applicant country can work on converging its economy with that of the European Union. This proved successful in the case of Greece, which was associated with the Community from 1962. Another association agreement with a view to (a so far less successful) future accession was concluded with Turkey in 1964. The “Europe Agreements” with Poland, Hungary the Czech Republic, Slovakia, Bulgaria, Romania, Slovenia and the three Baltic States (Lithuania, Estonia and Latvia) made it clear that Community membership was the ultimate goal for these countries making the transition to a market economy. The purpose of the association with them was to help them meet the conditions required for membership within the foreseeable future. The European Union has established customs unions with Andorra, San Marino and Turkey. With Poland, Hungary, the Czech Republic, Slovakia, Slovenia, the three Baltic States, Malta and Cyprus agreements were reached for their accession on 1 May 2004 at the summit of Copenhagen of 13 December 2002. On 25 April 2005, the Treaty of Accession with Bulgaria and Romania was signed at a special ceremony held in the Grand Duchy of Luxembourg. The signature of the Treaty of Accession by Bulgaria and Romania paved the way for the ratification procedures that formalized their membership of the Union on 1 January 2007. Croatia acceded on 1 July 2013.

(3) Agreement on the European Economic Area (EEA)

The EEA Agreement brings the remaining EFTA States (Norway, Iceland and Liechtenstein, but not Switzerland) into the internal market and, by requiring them to incorporate nearly two thirds of the European Union’s legislation, lays a firm basis for subsequent accession. In the EEA, on the basis of the acquis (see section 1.7) there is to be free movement of goods, persons, services and capital, there are uniform rules on competition and State aid, and there is closer cooperation on
horizontal and flanking policies (environment, research and development, education). 14

1.5 International customary law

The sources of EU law, described so far, share a common feature in that they all produce written law. Like all systems of law, however, the EU legal order cannot consist entirely of written rules: there will always be gaps which have to be filled by unwritten law. Unwritten EU law encompasses legal custom and the general principles of law.

In Case C-162/96 (Racke) the Court of Justice recognized that international customary law forms part of the EU legal order. In this case the question was whether the so-called “clausula rebus sic stantibus” was applicable, based on which a change of circumstances may entail the lapse or suspension of a treaty, in this case the Cooperation Agreement between the Community and the former Yugoslavia. The Court of Justice observed:

24. By way of a preliminary observation, it should be noted that even though the Vienna Convention does not bind either the Community or all its Member States, a series of its provisions, including Article 62, reflect the rules of international law which lay down, subject to certain conditions, the principle that a change of circumstances may entail the lapse or suspension of a treaty. Thus the International Court of Justice held that “[t]his principle, and the conditions and exceptions to which it is subject, have been embodied in Article 62 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances” (judgment of 2 February 1973, Fisheries Jurisdiction (United Kingdom v. Iceland), ICJ Reports 1973, p. 3, paragraph 36). ...

48. Racke is invoking fundamental rules of customary international law against the disputed regulation, which was taken pursuant to those rules and deprives Racke of the rights to preferential treatment granted to it by the Cooperation Agreement (for a comparable situation in relation to basic rules of a contractual nature, see Case C-69/89 (Nakajima v. Council) [1991] I-2069, paragraph 31).

49. The rules invoked by Racke form an exception to the pacta sunt servanda principle, which constitutes a fundamental principle of any legal order and, in particular, the international legal order. Applied to international law, that principle requires that every treaty be binding upon the parties to it and be performed by them in good faith (see Article 26 of the Vienna Convention).

14. The successful operation of the EEA depends upon uniform implementation and application of the common rules in all EEA States. To this end, a two-pillar system of supervision has been devised: the EU Member States are supervised by the Commission and the EFTA States party to the EEA by the EFTA Surveillance Authority. The latter has been given powers corresponding to those of the Commission in the exercise of its surveillance role. A two-pillar structure has also been established in respect of judicial control; the EFTA Court operates in parallel to the Court of Justice of the European Union. (See also section 4.1.)
50. The importance of that principle has been further underlined by the International Court of Justice, which has held that “the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases” (judgment of 25 September 1997, Gabckovo-Nagymaros Project (Hungary v. Slovakia), at paragraph 104, ...).

In Case C-366/10 (Air Transport Association of America) the Court of Justice repeated that under Article 3(5) TEU, the European Union is to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union (inter alia, referring to Case C-162/96 (Racke) cited above).

1.6 General principles

Unwritten law also encompasses general principles of law. Unwritten general principles of EU law as well as those laid down in the Treaties and the Charter form part of the legal order of the European Union; see chapter 2.

1.7 Indirect taxation and primary EU law; the acquis

In primary EU law, Articles 28-37 TFEU and 110-113 TFEU are especially important for European indirect tax law. Articles 28-37 TFEU (the former Articles 23-31 EC) deal with the free movement of goods, the customs union and the prohibition of quantitative restrictions. Articles 110-113 TFEU (the former Articles 90-93 EC) prohibit fiscal discrimination and fiscal dumping with indirect taxes between the Member States and instruct the Council to adopt provisions for further harmonization in the field of indirect taxation.

Before turning to the Acts of Accession, reference should be made of the so-called acquis. The acquis is all that has been acquired at EU level, i.e. the applicable primary and secondary EU law. The acquis has to be accepted by candidate States for accession to the Union.

Although in principle it is “take it, or leave it”, the Acts of Accession are used to agree on temporary exceptions to the acquis, especially, so it seems, in the field of indirect taxation. One rather remarkable exception can be found in the Act of Accession of Spain and Portugal (Annex I(V)(2)), which allows Portugal to apply reduced VAT rates in comparison to those on the mainland to transactions carried out in the autonomous regions of the Azores and Madeira and to direct imports into

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Please note that this sample chapter is limited to 16 pages. To read more about this book, please visit the book’s page on our website.

15. The idea is that principles are usually understood to be different from rules in the sense that the former are rather directional, whereas the latter are decisional. Cf. Principles of Law: Function, Status and Impact in EU Tax Law, Editor Cécile Brokelind, IBFD 2014, p. 3.

16. See the small phenomenology of international car taxation in ch. 2.3 of Terra/Wattel, European Tax Law, sixth edition (Kluwer Deventer 2012).

17. Cf. Article 20(4) TEU.
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Title I
Subject Matter and Scope

Article 1
[Subject]

1. This Directive establishes the common system of value added tax (VAT).

2. The principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged.

On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components.

The common system of VAT shall be applied up to and including the retail trade stage.

Article 2
[Scope]¹

1. The following transactions shall be subject to VAT:

(a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;

(b) the intra-Community acquisition of goods for consideration within the territory of a Member State by:

(i) a taxable person acting as such, or a non-taxable legal person, where the vendor is a taxable person acting as such who is not eligible for the exemption for small enterprises provided for in Articles 282 to 292 and who is not covered by Articles 33 or 36;

(ii) in the case of new means of transport, a taxable person, or a non-taxable legal person, whose other acquisitions are not subject to VAT pursuant to Article 3(1), or any other non-taxable person;
Subject Matter and Scope

(iii) in the case of products subject to excise duty, where the excise duty on the intra-Community acquisition is chargeable, pursuant to Directive 92/12/EEC [now Directive 2008/118/EC, BT/JK], within the territory of the Member State, a taxable person, or a non-taxable legal person, whose other acquisitions are not subject to VAT pursuant to Article 3(1):

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such;

(d) the importation of goods.

2.(a) For the purposes of point (ii) of paragraph 1(b), the following shall be regarded as ‘means of transport’, where they are intended for the transport of persons or goods:

(i) motorised land vehicles the capacity of which exceeds 48 cubic centimetres or the power of which exceeds 7,2 kilowatts;

(ii) vessels exceeding 7.5 metres in length, with the exception of vessels used for navigation on the high seas and carrying passengers for reward, and of vessels used for the purposes of commercial, industrial or fishing activities, or for rescue or assistance at sea, or for inshore fishing;

(iii) aircraft the take-off weight of which exceeds 1 550 kilograms, with the exception of aircraft used by airlines operating for reward chiefly on international routes.

(b) These means of transport shall be regarded as ‘new’ in the cases:

(i) of motorised land vehicles, where the supply takes place within six months of the date of first entry into service or where the vehicle has travelled for no more than 6 000 kilometres;

(ii) of vessels, where the supply takes place within three months of the date of first entry into service or where the vessel has sailed for no more than 100 hours;

(iii) of aircraft, where the supply takes place within three months of the date of first entry into service or where the aircraft has flown for no more than 40 hours.

(c) Member States shall lay down the conditions under which the facts referred to in point (b) may be regarded as established.
3. ‘Products subject to excise duty’ shall mean energy products, alcohol and alcoholic beverages and manufactured tobacco, as defined by current Community legislation, but not gas supplied through a natural gas system situated within the territory of the Community or any network connected to such a system.


The following shall not result in intra-Community acquisitions within the meaning of point (b) of Article 2(1) of Directive 2006/112/EC:

(a) the transfer of a new means of transport by a non-taxable person upon change of residence provided that the exemption provided for in point (a) of Article 138(2) of Directive 2006/112/EC could not apply at the time of supply;

(b) the return of a new means of transport by a non-taxable person to the Member State from which it was initially supplied to him under the exemption provided for in point (a) of Article 138(2) of Directive 2006/112/EC.

Article 3 Regulation (EU) No. 282/2011 [Supplies of services outside the Community]

Without prejudice to point (b) of the first paragraph of Article 59a of Directive 2006/112/EC, the supply of the following services is not subject to VAT if the supplier demonstrates that the place of supply determined in accordance with Subsections 3 and 4 of Section 4 of Chapter V of this Regulation is outside the Community:

(a) from 1 January 2013, the service referred to in the first subparagraph of Article 56(2) of Directive 2006/112/EC;

(b) from 1 January 2015, the services listed in Article 58 of Directive 2006/112/EC;

(c) the services listed in Article 59 of Directive 2006/112/EC.

Article 3 [Acquisitions not subject to VAT]

1. By way of derogation from Article 2(1)(b)(i), the following transactions shall not be subject to VAT:

(a) the intra-Community acquisition of goods by a taxable person or a non-taxable legal person, where the supply of such goods within the territory of the Member State of acquisition would be exempt pursuant to Articles 148 and 151;

(b) the intra-Community acquisition of goods, other than those referred to in point (a) and Article 4, and other than new means of transport or products subject to excise duty, by a taxable person for the purposes of his agricultural, forestry or fisheries business subject to the common flat-rate scheme for farmers, or by a
taxable person who carries out only supplies of goods or services in respect of which VAT is not deductible, or by a non-taxable legal person.

2. Point (b) of paragraph 1 shall apply only if the following conditions are met:

(a) during the current calendar year, the total value of intra-Community acquisitions of goods does not exceed a threshold which the Member States shall determine but which may not be less than EUR 10 000 or the equivalent in national currency;

(b) during the previous calendar year, the total value of intra-Community acquisitions of goods did not exceed the threshold provided for in point (a).

The threshold which serves as the reference shall consist of the total value, exclusive of VAT due or paid in the Member State in which dispatch or transport of the goods began, of the intra-Community acquisitions of goods as referred to under point (b) of paragraph 1.

3. Member States shall grant taxable persons and non-taxable legal persons eligible under point (b) of paragraph 1 the right to opt for the general scheme provided for in Article 2(1)(b)(i).

Member States shall lay down the detailed rules for the exercise of the option referred to in the first subparagraph, which shall in any event cover a period of two calendar years.

Article 4 Regulation (EU) No. 282/2011 [Non-taxation acquisitions notwithstanding VAT number]

A taxable person who is entitled to non-taxation of his intra-Community acquisitions of goods, in accordance with Article 3 of Directive 2006/112/EC, shall remain so where, pursuant to Article 214(1)(d) or (e) of that Directive, a VAT identification number has been attributed to that taxable person for the services received for which he is liable to pay VAT or for the services supplied by him within the territory of another Member State for which VAT is payable solely by the recipient.

However, if that taxable person communicates this VAT identification number to a supplier in respect of an intra-Community acquisition of goods, he shall be deemed to have exercised the option provided for in Article 3(3) of that Directive.

Article 55 Regulation (EU) No. 282/2011 [Obligation to communicate VAT identification numbers]

For the transactions referred to in Article 262 of Directive 2006/112/EC, taxable persons to whom a VAT identification number has been attributed in accordance with Article 214 of that Directive and non-taxable legal persons identified for VAT purposes shall be
required, when acting as such, to communicate their VAT identification number forthwith to those supplying goods and services to them.

The taxable persons referred to in point (b) of Article 3(1) of Directive 2006/112/EC, who are entitled to non-taxation of their intra-Community acquisitions of goods in accordance with the first paragraph of Article 4 of this Regulation, shall not be required to communicate their VAT identification number to those supplying goods to them when a VAT identification number has been attributed to them in accordance with Article 214(1)(d) or (e) of that Directive.

Article 4
[Acquisitions of second-hand goods not subject to VAT]

In addition to the transactions referred to in Article 3, the following transactions shall not be subject to VAT:

(a) the intra-Community acquisition of second-hand goods, works of art, collectors’ items or antiques, as defined in points (1) to (4) of Article 311(1), where the vendor is a taxable dealer acting as such and VAT has been applied to the goods in the Member State in which their dispatch or transport began, in accordance with the margin scheme provided for in Articles 312 to 325;

(b) the intra-Community acquisition of second-hand means of transport, as defined in Article 327(3), where the vendor is a taxable dealer acting as such and VAT has been applied to the means of transport in the Member State in which their dispatch or transport began, in accordance with the transitional arrangements for second-hand means of transport;

(c) the intra-Community acquisition of second-hand goods, works of art, collectors’ items or antiques, as defined in points (1) to (4) of Article 311(1), where the vendor is an organiser of sales by public auction, acting as such, and VAT has been applied to the goods in the Member State in which their dispatch or transport began, in accordance with the special arrangements for sales by public auction.
Title II
Territorial Scope

Article 5
[Definitions]³

For the purposes of applying this Directive, the following definitions shall apply:

(1) ‘Community’ and ‘territory of the Community’ mean the territories of the Member States as defined in point (2);

(2) ‘Member State’ and ‘territory of a Member State’ mean the territory of each Member State of the Community to which the Treaty establishing the European Community is applicable, in accordance with Article 299 of that Treaty [now Articles 52 TEU and 349 TFEU BT/JK], with the exception of any territory referred to in Article 6 of this Directive;

(3) ‘third territories’ means those territories referred to in Article 6;

(4) ‘third country’ means any State or territory to which the Treaty is not applicable.

Article 6
[Excluded territories]

1. This Directive shall not apply to the following territories forming part of the customs territory of the Community:

(a) Mount Athos;

(b) the Canary Islands;

(c) the French territories referred to in Article 349 and Article 355(1) of the Treaty on the Functioning of the European Union;

(d) the Åland Islands;

(e) the Channel Islands.

2. This Directive shall not apply to the following territories not forming part of the customs territory of the Community:

(a) the Island of Heligoland;

(b) the territory of Büsingen;
(c) Ceuta;
(d) Melilla;
(e) Livigno;
(f) Campione d'Italia;
(g) the Italian waters of Lake Lugano.

Article 7
[Monaco, Isle of Man, Akrotiri and Dhekelia]\(^4\)

1. In view of the conventions and treaties concluded with France, the United Kingdom and Cyprus respectively, the Principality of Monaco, the Isle of Man and the United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia shall not be regarded, for the purposes of the application of this Directive, as third countries.

2. Member States shall take the measures necessary to ensure that transactions originating in or intended for the Principality of Monaco are treated as transactions originating in or intended for France, that transactions originating in or intended for the Isle of Man are treated as transactions originating in or intended for the United Kingdom, and that transactions originating in or intended for the United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia are treated as transactions originating in or intended for Cyprus.

Article 8
[Proposals by Commission]

If the Commission considers that the provisions laid down in Articles 6 and 7 are no longer justified, particularly in terms of fair competition or own resources, it shall present appropriate proposals to the Council.
Title III
Taxable Persons

Article 9
[Taxable person]\(^5\)

1. ‘Taxable person’ shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as ‘economic activity’.

The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.

2. In addition to the persons referred to in paragraph 1, any person who, on an occasional basis, supplies a new means of transport, which is dispatched or transported to the customer by the vendor or the customer, or on behalf of the vendor or the customer, to a destination outside the territory of a Member State but within the territory of the Community, shall be regarded as a taxable person.

Article 5 Regulation (EU) No. 282/2011 [EEIG]

A European Economic Interest Grouping (EEIG) constituted in accordance with Regulation (EEC) No 2137/85 which supplies goods or services for consideration to its members or to third parties shall be a taxable person within the meaning of Article 9(1) of Directive 2006/112/EC.

Article 10
[Independent]

The condition in Article 9(1) that the economic activity be conducted ‘independently’ shall exclude employed and other persons from VAT in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer’s liability.

Article 11
[VAT grouping]\(^6\)

After consulting the advisory committee on value added tax (hereafter, the ‘VAT Committee’), each Member State may regard as a single taxable person any
persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links.

A Member State exercising the option provided for in the first paragraph, may adopt any measures needed to prevent tax evasion or avoidance through the use of this provision.

**Article 12**

**[Occasional activities]**

1. Member States may regard as a taxable person anyone who carries out, on an occasional basis, a transaction relating to the activities referred to in the second subparagraph of Article 9(1) and in particular one of the following transactions:

(a) the supply, before first occupation, of a building or parts of a building and of the land on which the building stands;

(b) the supply of building land.

2. For the purposes of paragraph 1(a), ‘building’ shall mean any structure fixed to or in the ground.

Member States may lay down the detailed rules for applying the criterion referred to in paragraph 1 (a) to conversions of buildings and may determine what is meant by ‘the land on which a building stands’.

Member States may apply criteria other than that of first occupation, such as the period elapsing between the date of completion of the building and the date of first supply, or the period elapsing between the date of first occupation and the date of subsequent supply, provided that those periods do not exceed five years and two years respectively.

3. For the purposes of paragraph 1(b), ‘building land’ shall mean any unimproved or improved land defined as such by the Member States.

**Article 13**

**[Bodies governed by public law]**

1. States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.
However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition.

In any event, bodies governed by public law shall be regarded as taxable persons in respect of the activities listed in Annex 1, provided that those activities are not carried out on such a small scale as to be negligible.

2. Member States may regard activities, exempt under Articles 132, 135, 136 and 371, Articles 374 to 377, Article 378(2), Article 379(2) or Articles 380 to 390c, engaged in by bodies governed by public law as activities in which those bodies engage as public authorities.
Title IV
Taxable Transactions

Chapter 1
Supply of goods

Article 14
[Supplies of goods]8

1. ‘Supply of goods’ shall mean the transfer of the right to dispose of tangible property as owner.

2. In addition to the transaction referred to in paragraph 1, each of the following shall be regarded as a supply of goods:

(a) the transfer, by order made by or in the name of a public authority or in pursuance of the law, of the ownership of property against payment of compensation;

(b) the actual handing over of goods pursuant to a contract for the hire of goods for a certain period, or for the sale of goods on deferred terms, which provides that in the normal course of events ownership is to pass at the latest upon payment of the final instalment;9

(c) the transfer of goods pursuant to a contract under which commission is payable on purchase or sale.10

3. Member States may regard the handing over of certain works of construction as a supply of goods.11

Article 15
[Tangible property]

1. Electricity, gas, heat or cooling energy and the like shall be treated as tangible property.

2. Member States may regard the following as tangible property:

(a) certain interests in immovable property;

(b) rights in rem giving the holder thereof a right of use over immovable property;
(c) shares or interests equivalent to shares giving the holder thereof de jure or de facto rights of ownership or possession over immovable property or part thereof.

**Article 16**  
**[Self-supply of goods]**

The application by a taxable person of goods forming part of his business assets for his private use or for that of his staff, or their disposal free of charge or, more generally, their application for purposes other than those of his business, shall be treated as a supply of goods for consideration, where the VAT on those goods or the component parts thereof was wholly or partly deductible.

However, the application of goods for business use as samples or as gifts of small value shall not be treated as a supply of goods for consideration.

**Article 17**  
**[Transfer to another Member State]**

1. The transfer by a taxable person of goods forming part of his business assets to another Member State shall be treated as a supply of goods for consideration.

‘Transfer to another Member State’ shall mean the dispatch or transport of movable tangible property by or on behalf of the taxable person, for the purposes of his business, to a destination outside the territory of the Member State in which the property is located, but within the Community.

2. The dispatch or transport of goods for the purposes of any of the following transactions shall not be regarded as a transfer to another Member State:

(a) the supply of the goods by the taxable person within the territory of the Member State in which the dispatch or transport ends, in accordance with the conditions laid down in Article 33;

(b) the supply of the goods, for installation or assembly by or on behalf of the supplier, by the taxable person within the territory of the Member State in which dispatch or transport of the goods ends, in accordance with the conditions laid down in Article 36;

(c) the supply of the goods by the taxable person on board a ship, an aircraft or a train in the course of a passenger transport operation, in accordance with the conditions laid down in Article 37;
(d) the supply of gas through a natural gas system situated within the territory of the Community or any network connected to such a system, the supply of electricity or the supply of heat or cooling energy through heating or cooling networks, in accordance with the conditions laid down in Articles 38 and 39;

(e) the supply of the goods by the taxable person within the territory of the Member State, in accordance with the conditions laid down in Articles 138, 146, 147, 148, 151 or 152;

(f) the supply of a service performed for the taxable person and consisting in valuations of, or work on, the goods in question physically carried out within the territory of the Member State in which dispatch or transport of the goods ends, provided that the goods, after being valued or worked upon, are returned to that taxable person in the Member State from which they were initially dispatched or transported;¹⁴

(g) the temporary use of the goods within the territory of the Member State in which dispatch or transport of the goods ends, for the purposes of the supply of services by the taxable person established within the Member State in which dispatch or transport of the goods began;

(h) the temporary use of the goods, for a period not exceeding twenty-four months, within the territory of another Member State, in which the importation of the same goods from a third country with a view to their temporary use would be covered by the arrangements for temporary importation with full exemption from import duties.

3. If one of the conditions governing eligibility under paragraph 2 is no longer met, the goods shall be regarded as having been transferred to another Member State. In such cases, the transfer shall be deemed to take place at the time when that condition ceases to be met.

Article 18
[Internal supply]

Member States may treat each of the following transactions as a supply of goods for consideration:

(a) the application by a taxable person for the purposes of his business of goods produced, constructed, extracted, processed, purchased or imported in the course of such business, where the VAT on such goods, had they been acquired from another taxable person, would not be wholly deductible;
(b) the application of goods by a taxable person for the purposes of a non-taxable area of activity, where the VAT on such goods became wholly or partly deductible upon their acquisition or upon their application in accordance with point (a);

(c) with the exception of the cases referred to in Article 19, the retention of goods by a taxable person, or by his successors, when he ceases to carry out a taxable economic activity, where the VAT on such goods became wholly or partly deductible upon their acquisition or upon their application in accordance with point (a).

**Article 19**

[TOGC]

In the event of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof, Member States may consider that no supply of goods has taken place and that the person to whom the goods are transferred is to be treated as the successor to the transferor.

Member States may, in cases where the recipient is not wholly liable to tax, take the measures necessary to prevent distortion of competition.

They may also adopt any measures needed to prevent tax evasion or avoidance through the use of this Article.

**Chapter 2**

*Intra-Community acquisition of goods*

**Article 20**

[Intra-Community acquisition of goods]

‘Intra-Community acquisition of goods’ shall mean the acquisition of the right to dispose as owner of movable tangible property dispatched or transported to the person acquiring the goods, by or on behalf of the vendor or the person acquiring the goods, in a Member State other than that in which dispatch or transport of the goods began.

Where goods acquired by a non-taxable legal person are dispatched or transported from a third territory or a third country and imported by that non-taxable legal person into a Member State other than the Member State in which dispatch or transport of the goods ends, the goods shall be regarded as having been dispatched or transported from the Member State of importation.
That Member State shall grant the importer designated or recognised under Article 201 as liable for payment of VAT a refund of the VAT paid in respect of the importation of the goods, provided that the importer establishes that VAT has been applied to his acquisition in the Member State in which dispatch or transport of the goods ends.

**Article 21**  
[Fictitious intra-Community acquisition of goods]  

The application by a taxable person, for the purposes of his business, of goods dispatched or transported by or on behalf of that taxable person from another Member State, within which the goods were produced, extracted, processed, purchased or acquired within the meaning of Article 2(1)(b), or into which they were imported by that taxable person for the purposes of his business, shall be treated as an intra-Community acquisition of goods for consideration.

**Article 22**  
[Intra-Community acquisition of goods by NATO]  

The application by the armed forces of a State party to the North Atlantic Treaty, for their use or for the use of the civilian staff accompanying them, of goods which they have not purchased subject to the general rules governing taxation on the domestic market of a Member State shall be treated as an intra-Community acquisition of goods for consideration, where the importation of those goods would not be eligible for the exemption provided for in Article 143(1)(h).

**Article 23**  
[Classed as supply of goods]  

Member States shall take the measures necessary to ensure that a transaction which would have been classed as a supply of goods if it had been carried out within their territory by a taxable person acting as such is classed as an intra-Community acquisition of goods.

**Chapter 3**  
Supply of services

**Article 24**  
[Supply of services]  

1. ‘Supply of services’ shall mean any transaction which does not constitute a supply of goods.
2. ‘Telecommunications services’ shall mean services relating to the transmission, emission or reception of signals, words, images and sounds or information of any nature by wire, radio, optical or other electromagnetic systems, including the related transfer or assignment of the right to use capacity for such transmission, emission or reception, with the inclusion of the provision of access to global information networks.17

Article 6 Regulation (EU) No. 282/2011 [Restaurant services]

1. Restaurant and catering services mean services consisting of the supply of prepared or unprepared food or beverages or both, for human consumption, accompanied by sufficient support services allowing for the immediate consumption thereof. The provision of food or beverages or both is only one component of the whole in which services shall predominate. Restaurant services are the supply of such services on the premises of the supplier, and catering services are the supply of such services off the premises of the supplier.

2. The supply of prepared or unprepared food or beverages or both, whether or not including transport but without any other support services, shall not be considered restaurant or catering services within the meaning of paragraph 1.

Article 6a Regulation (EU) No. 282/2011 [Telecommunication services]

1. Telecommunications services within the meaning of Article 24(2) of Directive 2006/112/EC shall cover, in particular, the following:

(a) fixed and mobile telephone services for the transmission and switching of voice, data and video, including telephone services with an imaging component (videophone services);

(b) telephone services provided through the internet, including voice over internet Protocol (VoIP);

(c) voice mail, call waiting, call forwarding, caller identification, three-way calling and other call management services;

(d) paging services;

(e) audiotext services;

(f) facsimile, telegraph and telex;

(g) access to the internet, including the World Wide Web;

(h) private network connections providing telecommunications links for the exclusive use of the client.
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