A GUIDE TO THE
European VAT Directives

Introduction to European VAT and integrated texts 2017

Volumes 1 & 2

Ben Terra – Julie Kajus
A Guide to the European VAT Directives 2017

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 European Union in force, and a discussion of the case law of the Court of Justice of the European Union 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, 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 (the Recast VAT Directive, referred to as the VAT Directive). VAT issues are illustrated by excerpts from decisions of the Court of Justice. The changes from the VAT package are included, and all chapters and references are updated with the changes from the Lisbon Treaty.

Volume 2: Integrated Texts of the VAT Directives and the former Sixth VAT Directive

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Volume 1

NUR 826

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2.1 Introduction

Article 19 TEU states the following:

The Court of Justice of the European Union ... shall ensure that in the interpretation and application of the Treaties the law is observed.

This recognition of “the law” as source of the legal order of the European Union has empowered the Court of Justice to apply general legal principles when interpreting EU provisions. With regard to general principles AG Tesauro observed the following: 33

19. Firstly, I would recall that in Community practice the elaboration and application of unwritten principles have assumed an importance which is not insignificant, despite the lack of any express provision to this effect. Besides being used as interpretation criteria, these principles essentially serve to identify the limits on the powers exercised by the administration over subjects and, more generally, to determine the legality of an act or of the conduct of a Community institution or of a Member State.

It should be pointed out that these principles are simply created by the Court, as occurs in the national sphere, and they accordingly constitute principles specific to Community law, in the sense that they are not borrowed in individual cases from other legal systems. Therefore, while the Court is certainly inspired by national legal practice in elaborating and defining general principles, it nevertheless always adapts the specific principle concerned to the needs, functioning and objectives of the Community.

Koopmans observes the following: 34

The importance of a reasoned argument increases as courts tend to rely on principles or on broad guidelines rather than on specific paragraphs of legal provision. Many new problems simply cannot be solved by just applying a provision to be found in the code or in the statute books: judges often resort to principles of law. But principles don’t fall from heaven, except perhaps in a very metaphorical sense, they have to be found and elaborated, and there is only one way to that by reasoned argument.

General unwritten principles form part of the EU’s legal order. In addition to that the Treaties mention fundamental legal principles which must be observed (see section 2.2). Fundamental rights must also be observed (see sections 2.3 and

33. Case C-367/96 (Kefalas). He also observed:
“23. ... the elaboration of a general principle at Community level does not necessarily require that the principle exist in all the national legal systems or that it be subject to the same conditions and application criteria. These are principles which must be incorporated in the Community order and which, therefore, acquire their own autonomy in function of the structure and the objectives of that order”.
See further on Kefalas, section 2.4.2.
2.3.1). In many judgments the Court of Justice applies principles which often are referred to as general principles of administrative law in national legal orders (see section 2.4). In the field of VAT especially the principle of fiscal neutrality plays an important role (see section 2.5).

At this place we quote the Court of Justice with regard to the status of general principles. In Case C-174/08 (NCC) it held (our emphasis):

41. That principle of fiscal neutrality was intended by the Community legislature to reflect, in matters relating to VAT, the general principle of equal treatment (see, to that effect, Case C-309/06 Marks & Spencer ..., paragraph 49, and the case law cited).

42. However, while that latter principle, like the other general principles of Community law, has constitutional status, the principle of fiscal neutrality requires legislation to be drafted and enacted, which requires a measure of secondary Community law (see, by analogy, with regard to the protection of minority shareholders, Case C-101/08 Audiolux ...).

See also section 2.5.

2.2 Fundamental legal principles

The Treaties refer to a range of principles such as respect for the principles of the United Nations Charter (Articles 3 and 21 TEU), the principle of sincere cooperation (Article 4 TEU), the principle of conferral (Article 5 TEU and Article 7 TFEU), the principle of subsidiarity and proportionality (Article 5 TEU and Articles 69 and 296 TFEU), the principles set out in the Charter of Fundamental Rights of the European Union Fundamental rights (Article 6 TEU), democratic principles (Article 9 TEU), the principle of the equality of its citizens (Article 9 TEU), the principles which have inspired the Union’s creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law (Article 21 TEU), the principle of non-discrimination based on nationality (Article 18 TFEU), the principle of mutual recognition of judicial and extrajudicial decisions in civil matters (Articles 67, 70, 81, 82 TFEU), the principle of non-refoulement (which protects refugees from being returned to places where their lives or freedoms could be threatened, Article 78 TFEU), the principle of solidarity and fair sharing of responsibility (Article 80 TFEU), the principle of an open market economy with free competition (Article 119 TFEU), the principle of equal pay for male and female workers for equal work or work of

35. Member States must not only interpret their national law in a manner consistent with EU law but also make sure they do not rely on an interpretation of wording of secondary legislation which would be in conflict with the fundamental rights protected by the Union legal order or with the other general principles of EU law. Case C-101/01 (Lindqvist), paragraph 87.

36. See also T. Tridimas, The General Principles of EU Law, 2005 Oxford University Press.
equal value (Article 157 TFEU), the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Article 157 TFEU), the principle of equal treatment (Article 157 TFEU), the principles of international law and the principles of impartiality, neutrality and non-discrimination (Article 214 TFEU) and the principle of sound financial management (Article 310 TFEU).37

We also draw the attention to Declaration 17, concerning primacy, annexed to the final Act of the intergovernmental conference which adopted the Lisbon Treaty:

The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.

The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260):

“Opinion of the Council Legal Service of 22 June 2007

It results from the case law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/64) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case law of the Court of Justice.”

Below we elaborate on three legal principles, fundamental for the EU legal order in taxation: the principle of conferral governed by the principles of subsidiarity and proportionality (Article 5 TEU), the principle of sincere cooperation (Article 4 TFEU) and the prohibition of discrimination based on nationality (Article 18 TFEU).

### 2.2.1 The principles of conferral, subsidiarity and of proportionality

According to Article 4(1) TEU, in accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

Article 5 TEU provides that the limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. Under the principle of conferral, the Union may act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein, see for example Article 216 TFEU discussed in section 1.4. Competences not conferred upon the Union in the Treaties remain with the Member States.

37. On the protection of the European Union’s financial interests, see Case C-105/14 (Taricco and Others) in section 2.3.1.
With regard to the principles of subsidiarity and proportionality Article 5 TEU provides:

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

According to the Protocol on the application of the principles of subsidiarity and proportionality, before proposing legislative acts, the Commission must consult widely. The Commission must forward its draft legislative acts and its amended drafts to national Parliaments at the same time as to the Union legislator. Thus, national parliaments are for the first time fully recognized as part of the democratic fabric of the European Union. Draft legislative acts must be justified with regard to the principles of subsidiarity and proportionality. The reasons for concluding that a Union objective can be better achieved at Union level must be substantiated by qualitative and, wherever possible, quantitative indicators. Any national Parliament may, within 8 weeks from the date of transmission of a draft legislative act, send to the Presidents of the EP, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. When at least one third of all the votes allocated to the national Parliaments considers that the draft in question does not comply with the principle of subsidiarity the draft must be reviewed.38

The Court of Justice of the European Union has jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in

38. If it chooses to maintain the proposal, the Commission will have, in a reasoned opinion, to justify why it considers that the proposal complies with the principle of subsidiarity. This reasoned opinion, as well as the reasoned opinions of the national Parliaments, will have to be submitted to the Union legislator, for consideration in the procedure:
   (a) before concluding the first reading, the legislator (the European Parliament and the Council) must consider whether the legislative proposal is compatible with the principle of subsidiarity, taking particular account of the reasons expressed and shared by the majority of national Parliaments as well as the reasoned opinion of the Commission;
   (b) if, by a majority of 55% of the members of the Council or a majority of the votes cast in the European Parliament, the legislator is of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal shall not be given further consideration.
accordance with the rules laid down in Article 263 TFEU by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof. The Committee of the Regions may also bring such actions against legislative acts for the adoption of which the TFEU provides that it be consulted.

Of great importance is the proportionality principle embedded in the fourth paragraph of Article 5 TEU, as well as in Article 49 of the Charter, see section 2.3.1. Proportionality may be defined as “an expression of the general right of the citizen towards the State that his freedom should be limited by the public authorities only to the extent indispensable for the protection of public interest.”\(^{39}\) Inter alia, the \emph{Ampafrance and Sanofi cases}\(^{40}\) deal with this principle.

Both cases involve the validity of Council Decision 89/487/EEC. The Decision authorized France to introduce a special measure derogating from the second subparagraph of Article 17(6) of the Sixth Directive (now Article 176 of the VAT Directive). Article 17(6) includes a standstill clause allowing Member States to continue to block the input tax deduction on transactions where these were blocked before 1 January 1979.

The Court of Justice reviewed the Decision against the proportionality principle. It held:

62. Although it is not for the Court to comment on the appropriateness of other means of combating tax evasion and avoidance which might be contemplated, including limiting authorized deductions to a fixed amount or introducing a control modelled on that employed in connection with income tax or corporation tax, it must be pointed out that, as Community law now stands, national legislation which excludes from the right to deduct VAT expenditure in respect of accommodation, hospitality, food and entertainment without making any provision for the taxable person to demonstrate the absence of tax evasion or avoidance in order to take advantage of the right of deduction is not a means proportionate to the objective of combating tax evasion and avoidance and has a disproportionate effect on the objectives and principles of the Sixth Directive.

Consequently, the Court of Justice found Decision 89/487/EEC invalid. (See, however, Case C-17/01 (\textit{Sudholz}) in section 20.3.2 where the Court of Justice took a more finely tuned approach.)

See also the Opinion of Advocate General Trstenjak in Case C-539/09 (\textit{Commission v. Germany}) in which she argued that the principle of proportionality requires in particular that individual measures are \textit{appropriate, necessary} and \textit{reasonable} in order to attain the envisaged objectives. A measure is \textit{appropriate} to ensuring attainment of the objective pursued if it genuinely reflects a concern to attain it in a consistent and systematic manner. A measure is \textit{necessary} if, from among several


\(^{40}\) Joined Cases C-177/99 and C-181/99 (\textit{Ampafrance and Sanofi}).
measures which are appropriate for meeting the objective pursued, it is the least onerous for the interest or legal asset in question. An unreasonable restriction of the interests or legal assets in question exists where, despite its contribution to attaining the legitimate objectives pursued, the measure results in excessively strong interference in those interests or legal assets. See further ex multis the following VAT cases: C-286/94 (Garage Molenheide) in section 17.5.8, C-271/06 (Netto Supermarkt) in section 15.6, C-25/07 (Sosnowska) in section 17.5.8, C-84/09 (X) in section 10.3.1, C-188/09 (Profaktor) in section 18.8, C-285/09 (Criminal proceedings against R) in section 15.4, C-284/11 (EMS Bulgaria) in section 17.5.1, C-259/12 (Rodopi) in section 18.8, C-424/12 (Fatorie) in section 17.5.3, C-563/12 (BDV) in section 15.6, C-272/13 (Equoland) in section 15.10.1, C-337/13 (Almos), in section 13.5.1, C-576/15 (Marinova) in section 13.2, C-424/14 (Balogh) in section 18.3, C-518/14 (Senatex) in section 18.4.10 and C-259/12 (Rodopi) in section 18.8.

2.2.2 The principle of sincere cooperation

The principle of sincere cooperation (formerly referred to as the principle of Community loyalty) is set out in Article 4 TEU (formerly Article 10 EC) as follows:

3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardize the attainment of the Union’s objectives.

Thus, Article 4 TEU contains two obligations for Member States: to cooperate loyally to facilitate the achievement of the Union’s task (positive loyalty) and to refrain from any measures which could jeopardize the attainment of the Union’s objectives (negative loyalty). Article 4 TEU (formerly Article 10 EC) is one of the fundamental provisions on which the Court of Justice relies as a basis for the autonomy of the EU legal order and for the development of EU law principles. It may to a certain extent be compared with the German constitutional concept of Bundestreu (federation loyalty) and has been used by the Court of Justice to fill various gaps of EU law. The principle of sincere cooperation (or loyalty) has, inter alia, served as a basis for:

– the prohibition by the Court of Justice on Member States’ actions which may frustrate the useful effect (effet utile) of EU measures41 or even proposed measures;

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41. See, for instance, Case 199/82 (San Giorgio), on the payment of charges levied contrary to Community law, see also section 5.8.3. See also Case 9/70 (Grad) in section 5.1.
2.2.3 The principle of non-discrimination on grounds of nationality

- the case law requiring national courts to interpret national law in such a way that it accords with relevant EU law (reconciliatory interpretation). This is especially the case where directives have not, or not correctly, been transposed into national law;42
- the case law stipulating that national procedural law may not be more burdensome in respect of the exercise of EU rights than it is in respect of similar actions of a domestic nature (the principle of equivalence, see section 2.4.1), nor may it render the exercise of rights conferred by EU law virtually impossible or excessively difficult (the principle of effectiveness, see section 2.4.1);43
- the case law holding, under certain conditions, individual Member States liable for damages suffered by individuals or undertakings as a result of the non-implementation or incorrect implementation of EC (now EU) directives (Francovich liability, see section 5.7);
- the case law on the effects of judgments of the Court. They apply only to those legal situations which, under domestic law, are still open to challenge or review and which, accordingly, may be the subject of a decision of a judicial authority, unless national law confers on an administrative body competence to reopen an administrative decision, which has become final (see section 5.8.2);
- the so-called implied powers of the European Union in the field of external relations (with third States) (see section 1.4).

Article 4 TEU must be observed by every part and level of the Member States’ legal and constitutional structure, therefore not only by the central government and its tax administration, but also by local and regional governments and by the judiciary, including tax courts.

2.2.3 The principle of non-discrimination on grounds of nationality

According to the Court of Justice, the principle of equality44 finds specific expression in the prohibition of discrimination.45 Article 18 TFEU (formerly Article 12 EC) prohibits any discrimination on grounds of nationality. It provides:

> Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

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42. See, for instance, Case 14/83 (Von Colson and Kamann), Case 80/86 (Kolpinghuis) and Case C-106/89 (Marleasiing), see section 5.5.
43. See, for instance, Case 199/82 (San Giorgio), Case C-208/90 (Emmott) and Joined Cases C-6/90 and C-9/90 (Francovich and Bonifaci). See also section 5.6.
44. The general principle of equal treatment requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified.
45. See Case C-63/93 (Duff).
The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.

See also Article 21 of the Charter on Fundamental Rights of the European Union which provides:

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

(See further on the Charter section 2.3.1.)

Obviously, covert and indirect distinctions on the basis of nationality or origin are just as prohibited as direct discrimination. Distinctions based on criteria other than nationality of persons or origin of goods and therefore appearing neutral, such as place of residence or being subject to limited or unlimited tax liability, but mainly disadvantaging non-nationals, imported goods or foreign investment, are just as detrimental to free movement as direct discrimination. The market access rights imply that even measures without distinction (obstacles) may be prohibited if they make free movement less attractive and no justification is available. For instance, the *Bosman* case\(^\text{46}\) shows that the Court of Justice sometimes prohibits measures which have exactly the same domestic effect as cross-border effect, if that effect makes it virtually impossible to go abroad. The case concerned a Belgian professional football player with a contract to play in France, but unable to leave his Belgian club because a transfer fee had to be paid first to his old club. This (UEFA) requirement of a transfer fee would have stopped Mr Bosman in exactly the same manner from playing for another Belgian football club as well. Nonetheless, the Court held the transfer fee system to be incompatible with the free movement of workers.

Article 18 TFEU contains a general prohibition on discrimination based on nationality, but “without prejudice to any special provisions” contained in the Treaties. Because of this clause, Article 12 EC with a similar clause has not been applied often on its own merits: there are many special provisions, especially the four freedoms (free movement of persons, goods, services and capital), which leave hardly any scope for Article 18 TFEU, since these provisions cover almost the entire “scope of application of the Treaties”, i.e. almost all cross-border economic activity (employment, self-employment, establishment of undertakings, subsidiaries, branches and agencies, active and passive (portfolio) investment, provision and purchase of services, payments, etc.). Article 18 TFEU applies independently only to situations governed by EU law with regard to which the

\(^{46}\) Case C-415/93 (*Bosman*), paragraphs 98 and 99.
2.2.3 The principle of non-discrimination on grounds of nationality

Treaties lay down no specific prohibition of discrimination; see the Articles 45, 49 and 56 TFEU. When these provisions apply one cannot invoke Article 18 TFEU. In the field of direct taxation the principle of non-discrimination plays a particularly important role. The following examples are derived from the case law of the Court of Justice on VAT. Case C-361/96 (Société générale des grandes sources d’eaux minérales françaises) dealt, inter alia, with the obligation of taxpayers not established in the country concerned to annex the original invoices or import documents to applications for a refund of the tax.

The Court of Justice stated:

34. Furthermore, in accordance with the principle of non-discrimination set out in Article 6 of the EC Treaty, the fifth recital in the preamble to the Eighth Directive expressly records that the Directive “must not lead to the treatment of taxable persons differing according to the Member State in the territory of which they are established”. However, it is settled law that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations (see, inter alia, Case C-279/93 Schumacker, paragraph 30).

35. The German Government claims that the absence of an exception to the obligation to attach the original document to cover cases where the original has been lost through no fault of the taxpayer is justified by the risk of misuse of documents other than the original where applications for a refund of VAT are made by taxpayers not established in the Member State concerned, whose accounts and operating methods, unlike those of taxpayers established in the country concerned, cannot be checked by the competent authorities and in respect of whom the procedure for requesting administrative assistance between the Member States is generally lengthy and unproductive.

36. Those reasons cannot in any event justify different treatment of taxpayers depending on whether they are established in the Member State concerned or elsewhere, if the transaction which led to the application for a refund occurred, if the loss of the invoice or import document is not attributable to the taxpayer concerned and if there is no risk of further applications for a refund.

37. In so far as in such a situation the principle of non-discrimination requires taxpayers not established in the Member State concerned to be permitted to prove their entitlement to a refund of VAT by submitting a duplicate or photocopy of the invoice under the same conditions as taxpayers established in the Member State concerned, it is not necessary to examine the second question in the light of the principle of neutrality of VAT.

38. The reply to the second question is therefore that where a taxable person established in a Member State may prove his entitlement to a refund of VAT by submitting a duplicate or photocopy of the invoice if the original which he received has been lost for reasons beyond his control, the principle of non-discrimination set out in

---

47. See by analogy Case 305/87 (Commission v. Greece), Case C-1/93 (Halliburton Services) and Case C-311/97 (Royal Bank of Scotland).

48. With regard to discrimination and restriction concepts see Terra/Wattel, European Tax Law, sixth edition, Kluwer Deventer 2012, chs. 3.2.1. and 3.7.
Article 6 of the Treaty and referred to in the fifth recital in the preamble to the Eighth Directive requires that the same possibility be extended to taxable persons not established in that Member State if the transaction which led to the application for a refund occurred and there is no risk of further applications for a refund.

Case C-390/96 (Lease Plan Luxembourg) dealt with the place of supply of car leasing services and rules governing reimbursement of VAT to taxable persons not established in the territory of the State. Regarding the latter subject, the Court of Justice observed the following with regard to the principle of non-discrimination:

32. Rules such as those in issue in the main proceedings give taxable persons not established in the territory of the Member State concerned, on the expiry of the statutory time-limit for reimbursement, interest at a rate lower than that of the interest paid to taxable persons established in the territory of that State. In addition, whilst the latter receive interest automatically in the event of a delay in repayment, taxable persons who are not established in the territory of the Member State concerned are obliged, in order to obtain interest after the expiry of the statutory time-limit for reimbursement, to serve formal notice to pay on that State and to bear the cost of that additional formality.

33. Such rules, which treat taxable persons differently depending on whether they are established in the territory of the Member State concerned or not, are such as to constitute discrimination prohibited by Article 59 of the Treaty.

34. However, it is settled law that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations (see, inter alia, Case C-279/93 Finanzamt Köln-Altstadt v. Schumacker, paragraph 30).

40. Since rules of the kind in issue in the main proceedings are caught by Article 59 of the Treaty, it is unnecessary to consider whether they are compatible with Article 6 of the Treaty.

Thus, since a specific provision applied in this case (Article 59 EC Treaty, now Article 56 TFEU) the compatibility with the general prohibition of discrimination did not need to be considered.
2.3 Fundamental rights

Article 6(2) TEU stipulates that the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.\textsuperscript{49} Such accession will not affect the Union’s competences as defined in the Treaties\textsuperscript{50}.

Article 6(2) TEU adds to this provision that fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.\textsuperscript{51}

See also Articles 52 and 53 of the Charter in the next section.

\textsuperscript{49} Under the old Article 6(2) EU, the Union “respected” the fundamental rights contained in the European Convention for the Protection of Human Rights. Article 46(d) EU instructed the European Court of Justice to review the acts of the institutions based on these fundamental rights. See Case 4/73 (\textit{Nold}) regarding the freedom to engage in trade in coal, Case 36/75 (\textit{Rutili}) regarding the freedom of movement and residence of an Italian in certain French Départements and Case 46/87 (\textit{Hoechst}) in which the Court of Justice held that the existence of a fundamental right on the inviolability of the home must be recognized in the Community legal order as a principle common to the laws of the Member States with regard to the private dwellings of natural persons. The same is not true with regard to undertakings. The right to enter any premises, land and means of transport of undertakings is of particular importance inasmuch as it is intended to permit the Commission to obtain evidence of infringements of the competition rules in the places in which such evidence is normally to be found, that is to say, on the business premises of undertakings.

\textsuperscript{50} On 18 December 2014, the Court of Justice (full Court) delivered its Opinion (No. 2/13) with regard to the possible accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Court is of the opinion that agreement on the accession of the European Union to the European Convention is not compatible with Article 6(2) TEU or with Protocol (No. 8) relating to Article 6(2) of the TEU.

\textsuperscript{51} With regard to fundamental rights included in national constitutions, the Court of Justice has used the common constitutional tradition of the Member States as “a source of inspiration” to formulate Community fundamental rights without giving priority to them. See for example Case 11/70 (\textit{Interationale Handelsgesellschaft}) where the question was asked whether the undertaking to export, the lodging of a deposit which accompanied that undertaking, and forfeiture of the deposit should the export not take place during the period of validity of the export licence complied with the law, i.e. certain structural principles of national constitutional law. According to the Court of Justice there was no reason to assume the invalidity of this provision. See also Case C-60/02 (\textit{Criminal proceedings against X}), discussed in section 5.5, in which the Court of Justice held (emphasis added):

63. If the national court reaches the conclusion that national law does not prohibit the transit of counterfeit goods across Austrian territory, the principle of non-retroactivity of penalties, as enshrined in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is a general principle of Community law common to the constitutional traditions of the Member States, would prohibit the imposition of criminal penalties for such conduct, even if the national rule were contrary to Community law.
2.3.1 Charter of Fundamental Rights of the European Union

On 12 December 2007, the Charter of Fundamental Rights of the European Union was signed and solemnly proclaimed in Strasbourg, opening the way for the signing of the Treaty of Lisbon the next day.\textsuperscript{52}

The Charter comprises seven chapters and 54 Articles. Particular rights can be found in six substantive chapters of the Charter: Dignity, Freedoms, Equality, Solidarity, Citizens’ rights and Justice. The last chapter “General provisions” deals with the interpretation and application of the Charter. The Charter comprises rights derived from the TEU and the TFEU or recognized as general principles of the European Union by the Court of Justice of the European Union.

Among the most innovative are the rights to protection of personal data (Article 8), the rights of the child (Article 24), the rights of the elderly to lead a life of dignity and independence (Article 25), the full integration of persons with disabilities (Article 26), environmental protection (Article 37) and consumer protection (Article 38). A further element of novelty is the introduction of several principles of bioethics: the right to the integrity of the person, the prohibition of eugenic practices (i.e. practices which aim at improving the genetic quality of the human population), and the prohibition of the reproductive cloning of human beings (Article 3). The Charter condemns the death penalty (Article 2), forbids torture and inhuman or degrading treatment or punishment (Article 4) and prohibits slavery and forced labour (Article 5). Equality between men and women must be ensured in all areas, including employment, work and pay, also allowing for practices of positive discrimination (Article 23). The freedom to conduct a business is guaranteed (Article 16) and, important also in the field of VAT, the right to property is secured (Article 17). Moreover, the chapter on solidarity contains several articles concerning collective rights (particularly workers’ rights) and social security, including the right to strike among the rights of collective bargaining and action (Article 28).

\textsuperscript{52} OJ 2007, C 303, p. 1. and the explanations relating to the Charter, at p. 17 and following. See also the Report on the Application of the EU Charter of Fundamental Rights COM(2014) 224. Several other texts of the 2007 Intergovernmental Conference relate to the Charter (see also Declarations 1 and 2 annexed to the Final Act of the Intergovernmental Conference): Protocol No. 30 on the application of the Charter to Poland and the United Kingdom, Declaration No. 61 by Poland on the Charter and Declaration No. 62 by Poland on the Protocol concerning the application of the Charter to Poland and the United Kingdom. The special arrangements agreed with the United Kingdom and Poland have enabled the binding nature of the Charter to be maintained and for it to be applied in full by the other Member States. As mentioned in section 1.3 the Czech Republic also has an opt-out from the application of the Charter as a condition for signing the Lisbon Treaty.
The Charter also features the right to good administration (Article 41) and the right of access to documents (Article 42). It also guarantees that everyone has the right to an effective remedy before a tribunal and to a fair trial within a reasonable time (Article 47, this right includes the right of every person to be heard, before any individual measure which would affect him or her adversely is taken), as well as the right to presumption of innocence and right of defence (Article 48). The principles of legality and proportionality of criminal offences and penalties (Article 49, see also the Taricco case further below) and the principle of ne bis in idem (Article 50) are likewise affirmed, see also the Åkerberg Fransson case, C-617/10, below.

Article 51 of the Charter provides (emphasis added):

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

The Åkerberg Fransson case concerned a Swedish fisherman. The Swedish tax authorities accused him of incorrectly reporting his income, reducing also the amount of VAT due. He was given a fine for tax offences, part of which was a VAT offence. Later, the Public Prosecutor also started criminal proceedings against Mr Åkerberg for tax evasion relating to the same conduct. The Swedish court referred to the Court of Justice the question whether the duplication in administrative and criminal proceedings was precluded by Article 50 CFR (ne bis in idem principle). In its ruling, the Court first had to decide whether this was a case where the Charter was applicable. It, therefore, used the Explanations relating to the Charter of Fundamental Rights of the European Union to interpret Article 51 of the Charter itself, which limits the scope for Member States “implementing Union law” to “…Member States when they act in the scope of Union law”.

53. Note that under the ECHR no “fair trial” in administrative appeals is warranted. In Ferrazini v. Italy (Application No. 44759/98), the taxpayer and the Italian tax authorities were in dispute. The trial in Italy had lasted over 12 years and the appeal showed little sign of being heard promptly. The European Court of Human Rights held on 12 July 2001 that Convention rights apply to litigants in the civil and criminal systems of justice, but not to those seeking administrative justice against the State. The ECtHR also observed that Article 1 of Protocol No. 1, which concerns the protection of property, reserves the right of States to enact such laws as they deem necessary for the purpose of securing the payment of taxes (see, mutatis mutandis, Gasus Dosier- und Fördertechnik GmbH v. the Netherlands, judgment of 23 February 1995, Series A no. 306-B, pp. 48-49, paragraph 60). See also section 5.8.2.1 where the ECtHR took a different stance. See also Case C-565/11 (Irimie) in section 5.8.4.

54. See Case C-349/07 (Sopropé) and Joined Cases C-129/13 and C-130/13 (Kamino). See also Joined Cases C-29/13 and C-30/13 (Global Trans Lodzhistik) in section 13.4.
Volume 2
ISBN 978-90-8722-399-1 (print)
NUR 826

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Where goods are not dispatched or transported, the place of supply shall be deemed to be the place where the goods are located at the time when the supply takes place.

Section 2
Supply of goods with transport

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Where goods are dispatched or transported by the supplier, or by the customer, or by a third person, the place of supply shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer begins.

However, if dispatch or transport of the goods begins in a third territory or third country, both the place of supply by the importer designated or recognised under Article 201 as liable for payment of VAT and the place of any subsequent supply shall be deemed to be within the Member State of importation of the goods.

Article 33
[Distance sales]27

1. By way of derogation from Article 32, the place of supply of goods dispatched or transported by or on behalf of the supplier from a Member State other than that in which dispatch or transport of the goods ends shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer ends, where the following conditions are met:

(a) the supply of goods is carried out for a taxable person, or a non-taxable legal person, whose intra-Community acquisitions of goods are not subject to VAT pursuant to Article 3(1) or for any other non-taxable person;
(b) the goods supplied are neither new means of transport nor goods supplied after assembly or installation, with or without a trial run, by or on behalf of the supplier.

2. Where the goods supplied are dispatched or transported from a third territory or a third country and imported by the supplier into a Member State other than that in which dispatch or transport of the goods to the customer ends, they shall be regarded as having been dispatched or transported from the Member State of importation.

Article 14 Regulation (EU) No. 282/2011 [Exceeding the threshold]

Where in the course of a calendar year the threshold applied by a Member State in accordance with Article 34 of Directive 2006/112/EC is exceeded, Article 33 of that Directive shall not modify the place of supplies of goods other than products subject to excise duty carried out in the course of the same calendar year which are made before the threshold applied by the Member State for the calendar year then current is exceeded provided that all of the following conditions are met:

(a) the supplier has not exercised the option provided for under Article 34(4) of that Directive;

(b) the value of his supplies of goods did not exceed the threshold in the course of the preceding calendar year.

However, Article 33 of Directive 2006/112/EC shall modify the place of the following supplies to the Member State in which the dispatch or transport ends:

(a) the supply of goods by which the threshold applied by the Member State for the calendar year then current was exceeded in the course of the same calendar year;

(b) any subsequent supplies of goods within that Member State in that calendar year;

(c) supplies of goods within that Member State in the calendar year following the calendar year in which the event referred to in point (a) occurred.

Article 34
[Thresholds]28

1. Provided the following conditions are met, Article 33 shall not apply to supplies of goods all of which are dispatched or transported to the same Member State, where that Member State is the Member State in which dispatch or transport of the goods ends:

(a) the goods supplied are not products subject to excise duty;
Place of Taxable Transactions

(b) the total value, exclusive of VAT, of such supplies effected under the conditions laid down in Article 33 within that Member State does not in any one calendar year exceed EUR 100 000 or the equivalent in national currency;

(c) the total value, exclusive of VAT, of the supplies of goods, other than products subject to excise duty, effected under the conditions laid down in Article 33 within that Member State did not in the previous calendar year exceed EUR 100 000 or the equivalent in national currency.

2. The Member State within the territory of which the goods are located at the time when their dispatch or transport to the customer ends may limit the threshold referred to in paragraph 1 to EUR 35 000 or the equivalent in national currency, where that Member State fears that the threshold of EUR 100 000 might cause serious distortion of competition.

Member States which exercise the option under the first subparagraph shall take the measures necessary to inform accordingly the competent public authorities in the Member State in which dispatch or transport of the goods begins.

3. The Commission shall present to the Council at the earliest opportunity a report on the operation of the special EUR 35 000 threshold referred to in paragraph 2, accompanied, if necessary, by appropriate proposals.

4. The Member State within the territory of which the goods are located at the time when their dispatch or transport begins shall grant those taxable persons who carry out supplies of goods eligible under paragraph 1 the right to opt for the place of supply to be determined in accordance with Article 33.

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

Article 35
[Distance selling rules not applicable to second-hand goods]

Articles 33 and 34 shall not apply to supplies of second-hand goods, works of art, collectors’ items or antiques, as defined in points (1) to (4) of Article 311(1), nor to supplies of second-hand means of transport, as defined in Article 327(3), subject to VAT in accordance with the relevant special arrangements.
Article 36  
[Installation or assembly]^{29}

Where goods dispatched or transported by the supplier, by the customer or by a third person are installed or assembled, with or without a trial run, by or on behalf of the supplier, the place of supply shall be deemed to be the place where the goods are installed or assembled.

Where the installation or assembly is carried out in a Member State other than that of the supplier, the Member State within the territory of which the installation or assembly is carried out shall take the measures necessary to ensure that there is no double taxation in that Member State.

Section 3  
Supply of goods on board ships, aircraft or trains

Article 37  
[Supply of goods on board ships, aircraft or trains]^{30}

1. Where goods are supplied on board ships, aircraft or trains during the section of a passenger transport operation effected within the Community, the place of supply shall be deemed to be at the point of departure of the passenger transport operation.

2. For the purposes of paragraph 1, ‘section of a passenger transport operation effected within the Community’ shall mean the section of the operation effected, without a stopover outside the Community, between the point of departure and the point of arrival of the passenger transport operation.

‘Point of departure of a passenger transport operation’ shall mean the first scheduled point of passenger embarkation within the Community, where applicable after a stopover outside the Community.

‘Point of arrival of a passenger transport operation’ shall mean the last scheduled point of disembarkation within the Community of passengers who embarked in the Community, where applicable before a stopover outside the Community.

In the case of a return trip, the return leg shall be regarded as a separate transport operation.

3. The Commission shall, at the earliest opportunity, present to the Council a report, accompanied if necessary by appropriate proposals, on the place of taxation of the supply of goods for consumption on board and the supply of services, including restaurant services, for passengers on board ships, aircraft or trains.
Pending adoption of the proposals referred to in the first subparagraph, Member States may exempt or continue to exempt, with deductibility of the VAT paid at the preceding stage, the supply of goods for consumption on board in respect of which the place of taxation is determined in accordance with paragraph 1.

Article 15 Regulation (EU) No. 282/2011 [Section of a passenger transport operation]

The section of a passenger transport operation effected within the Community referred to in Article 37 of Directive 2006/112/EC, shall be determined by the journey of the means of transport and not by the journey completed by each of the passengers.

Section 4
Supply of gas through a natural gas system, of electricity and of heat or cooling energy through heating and cooling networks

Article 38 [Supplies of gas, electricity, heat and cooling]

1. In the case of 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 to a taxable dealer, the place of supply shall be deemed to be the place where that taxable dealer has established his business or has a fixed establishment for which the goods are supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.

2. For the purposes of paragraph 1, ‘taxable dealer’ shall mean a taxable person whose principal activity in respect of purchases of gas, electricity, heat or cooling energy is reselling those products and whose own consumption of those products is negligible.

Article 39 [Supplies of gas, electricity, heat and cooling; place of consumption]

In the case of 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, where such a supply is not covered by Article 38, the place of supply shall be deemed to be the place where the customer effectively uses and consumes the goods. Where all or part of the gas, electricity or heat or cooling energy is not effectively consumed by the customer, those non-consumed goods shall be deemed to have been used and consumed at the place where the customer has established his business or has a fixed establishment for which the goods are
supplied. In the absence of such a place of business or fixed establishment, the customer shall be deemed to have used and consumed the goods at the place where he has his permanent address or usually resides.

Chapter 2  
Place of an intra-Community acquisition of goods

Article 40  
[Place of an intra-Community acquisition of goods] 33  
The place of an intra-Community acquisition of goods shall be deemed to be the place where dispatch or transport of the goods to the person acquiring them ends.

Article 16 Regulation (EU) No. 282/2011 [Place of an intra-Community acquisition; power of taxation]

Where an intra-Community acquisition of goods within the meaning of Article 20 of Directive 2006/112/EC has taken place, the Member State in which the dispatch or transport ends shall exercise its power of taxation irrespective of the VAT treatment applied to the transaction in the Member State in which the dispatch or transport began. Any request by a supplier of goods for a correction in the VAT invoiced by him and reported by him to the Member State where the dispatch or transport of the goods began shall be treated by that Member State in accordance with its own domestic rules.

Article 41  
[Place of an intra-Community acquisition; legal presumption]

Without prejudice to Article 40, the place of an intra-Community acquisition of goods as referred to in Article 2(1)(b)(i) shall be deemed to be within the territory of the Member State which issued the VAT identification number under which the person acquiring the goods made the acquisition, unless the person acquiring the goods establishes that VAT has been applied to that acquisition in accordance with Article 40.

If VAT is applied to the acquisition in accordance with the first paragraph and subsequently applied, pursuant to Article 40, to the acquisition in the Member State in which dispatch or transport of the goods ends, the taxable amount shall be reduced accordingly in the Member State which issued the VAT identification number under which the person acquiring the goods made the acquisition.
Article 42
[Triangulation]

The first paragraph of Article 41 shall not apply and VAT shall be deemed to have been applied to the intra-Community acquisition of goods in accordance with Article 40 where the following conditions are met:

(a) the person acquiring the goods establishes that he has made the intra-Community acquisition for the purposes of a subsequent supply, within the territory of the Member State identified in accordance with Article 40, for which the person to whom the supply is made has been designated in accordance with Article 197 as liable for payment of VAT;

(b) the person acquiring the goods has satisfied the obligations laid down in Article 265 relating to submission of the recapitulative statement.

Chapter 3
Place of supply of services

Section 1
Definitions

Article 43
[Definitions]\(^{34}\)

For the purpose of applying the rules concerning the place of supply of services:

1. a taxable person who also carries out activities or transactions that are not considered to be taxable supplies of goods or services in accordance with Article 2(1) shall be regarded as a taxable person in respect of all services rendered to him;

2. a non-taxable legal person who is identified for VAT purposes shall be regarded as a taxable person.

Section 2
General rules\(^{35}\)

Article 44
[Place of supply of services to a taxable person]\(^{36}\)

The place of supply of services to a taxable person acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of the taxable person located in a place other than
the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the taxable person who receives such services has his permanent address or usually resides.

**Article 10 Regulation (EU) No. 282/2011 [Place of business establishment]**

1. For the application of Articles 44 and 45 of Directive 2006/112/EC, the place where the business of a taxable person is established shall be the place where the functions of the business’ central administration are carried out.

2. In order to determine the place referred to in paragraph 1, account shall be taken of the place where essential decisions concerning the general management of the business are taken, the place where the registered office of the business is located and the place where management meets.

Where these criteria do not allow the place of establishment of a business to be determined with certainty, the place where essential decisions concerning the general management of the business are taken shall take precedence.

3. The mere presence of a postal address may not be taken to be the place of establishment of a business of a taxable person.

**Article 11 Regulation (EU) No. 282/2011 [Fixed establishment]**

1. For the application of Article 44 of Directive 2006/112/EC, a ‘fixed establishment’ shall be any establishment, other than the place of establishment of a business referred to in Article 10 of this Regulation, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs.

2. For the application of the following Articles, a ‘fixed establishment’ shall be any establishment, other than the place of establishment of a business referred to in Article 10 of this Regulation, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to provide the services which it supplies:

(a) Article 45 of Directive 2006/112/EC;

(b) from 1 January 2013, the second subparagraph of Article 56(2) of Directive 2006/112/EC;

(c) until 31 December 2014, Article 58 of Directive 2006/112/EC;

(d) Article 192a of Directive 2006/112/EC.

3. The fact of having a VAT identification number shall not in itself be sufficient to consider that a taxable person has a fixed establishment.
Place of Taxable Transactions

Article 12 Regulation (EU) No. 282/2011 [Permanent address]

For the application of Directive 2006/112/EC, the ‘permanent address’ of a natural person, whether or not a taxable person, shall be the address entered in the population or similar register, or the address indicated by that person to the relevant tax authorities, unless there is evidence that this address does not reflect reality.


The place where a natural person ‘usually resides’, whether or not a taxable person, as referred to in Directive 2006/112/EC shall be the place where that natural person usually lives as a result of personal and occupational ties.

Where the occupational ties are in a country different from that of the personal ties, or where no occupational ties exist, the place of usual residence shall be determined by personal ties which show close links between the natural person and a place where he is living.

Article 13a Regulation (EU) No. 282/2011 [Place where a non-taxable legal person is established]

The place where a non-taxable legal person is established, as referred to in the first subparagraph of Article 56(2) and Articles 58 and 59 of Directive 2006/112/EC, shall be:

(a) the place where the functions of its central administration are carried out; or

(b) the place of any other establishment characterized by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs.

Article 45 [Place of supply of services to a non-taxable person]

The place of supply of services to a non-taxable person shall be the place where the supplier has established his business. However, if those services are provided from a fixed establishment of the supplier located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the supplier has his permanent address or usually resides.