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The Independent Concepts of European Law in The VAT Field

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List of Abbreviations

CJEU, the Court: Court of Justice of the European Union

EU concepts, EU legal concepts: Independent Concepts of European law

EU: European Union

FE: Fixed Establishment

OECD: Organization for Economic Cooperation and Development

PE: Permanent Establishment

TEU: Treaty on the European Union

TFEU: Treaty on the Functioning of The European Union

VAT: Value Added Tax

VCLT: Vienna Convention on The Law of The Treaties

Abstract

In order to create an autonomous supranational legal system,[1] European law must be applied uniformly by the Member States. Hence, the concepts used in European legislation should have their own meaning, functional to the objectives pursued by the European Union, in particular to the creation of the Internal Market. This is the reason why many concepts of the VAT Directive were qualified by the CJEU as independent concepts of European law: notions whose meaning is determined at the European level, without leaving any discretion to the Member States. The main features of EU concepts are that their meaning is provided paying particular attention to the economic core of the underlying situation and that they aim at preserving the core features of the tax: neutrality and the general character of VAT. It is precisely because of the preservation of neutrality that many exemptions are qualified as EU concepts, while the exigence of taxing all consumption of goods and services is evident in the case of EU concepts related to the taxable transactions. The identification and definition of EU concepts raises many issues at both the European and national level. In particular, the introduction of new concepts within national systems creates problems at the moment of transposition, interpretation and application of the latter, with the resulting costs in terms of legal certainty.

[1] Case C-26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*.

The Independent Concepts of European Law in The VAT Field

1. Introduction

1.1. Introduction to The Topic

The aim of this thesis is to analyze the development of the independent concepts of European law, as one of the consequences which stem from the coexistence of different legal traditions within the European Union. In fact, the need for harmonization and uniform application of law in all the Member States has led the CJEU, between other means, to develop some concepts whose significance is provided by the CJEU itself. Accordingly, national jurisdictions have introduced new legal notions into their systems, or, they have given a new meaning to concepts which already existed.

The research of EU concepts is particularly fruitful in the field of VAT.[2] The reason lies in the fact that the discipline of VAT relies on Directives; the main feature of this legislative instrument is that it is *binding, as to the result to be achieved, upon each Member State to which it is addressed, but the choice of form and methods*[3] is left to the Member States. As a consequence, there is the risk that national transpositions are not in line with the European discipline. Even though some of the difficulties related to an incorrect transposition can be solved through interpretation,[4] the latter is not always effective.[5] The EU concepts result particularly useful to pursue harmonization precisely when interpretation is insufficient.

The main feature of the EU concepts is that the definitions provided are functional to the objectives of the European Union, namely the creation of the Internal Market and the protection of competition. Since these aims are not the leading ones in the case of national concepts, on the one hand, the implementation of EU concepts forces the interpreter to deal with new categories motivated by different rationales, on the other hand, it creates risk or erroneous transposition and interpretation.

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[2] See, for example, Case C-169/04, *Abbey National plc e Inscape Investment Fund v Commissioners of Customs & Excise,* in relation to the concept of "management" of investment funds mentioned by Article 13 (B) (d) Directive 77/388; Case C-174/06, *Ministero delle Finanze - Ufficio IVA di Milano v CO.GE.P. Srl.* and Case C-572/07, *RLRE Tellmer Property sro v Finanční ředitelství v Ústí nad Labem,* in relation to the notion of "leasing of immovable property" mentioned by Article 13 (B) (b) Directive 77/388; Case C-468/93, *Gemeente Emmen v Belastingdienst Grote Ondernemingen,* in relation to the meaning of "building land" used by Article 13 (B) (h) and Article 4 (3) (b) Directive 77/388/EEC;
Case C-168/84, *Gunter Berkholz v Finanzamt Hamburg-Mitte-Altstadt*, in relation to the concept of "fixed establishment" mentioned by Article 9 Sixth Diective; Joint Cases C-322/99 e C-323/99, *Finanzamt Burgdorf v Hans-Georg Fischer and Finanzamt Dusseldorf- Mettmann v Klaus Brandenstein,* in relation of the definiton of "good" provided by Article 14 (1) Sixth Directive; Case C-497/01, *Zita Modes Sàrl v Administration de l'enregistrement et des domaines*, in relation to the concept of "transfer of going concern" mentioned by Article 19 Sixth Directive.

[3] Article 288 (3) TFEU.

[4] In particular, for the obligation to operate a conciliatory interpretation, see Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentation SA*, paragraph 8. For a more detailed analysis of conciliatory interpretation, see Carla Acocella, *Interpretazione conforme al diritto comunitario ed efficienza economica: il principio di concorrenza,* in D'Amico e Randazzo, *Interpretazione conforme e tecniche argomentative*, Atti del convegno di Milano svoltosi il 6-7 Giugno 2008.

[5] Case C-80/86, *Kolpinghuis Nijmegen,* for the limits to conciliatory interpretation, i.e. this cannot be *contra legem*.

However, this is not the only critical aspect related to the issue, in fact the same identification and definition of the EU concepts is frequently problematic.

The following chapters will analyse the causes, identification, main features, and consequences of the development of EU concepts in the VAT field.

1.2. Motivation of The Research Question

More in detail, the author plans to deal with a study which answers to the following research questions:

"What are the reasons for the development of the independent concepts of European law? Who identifies these concepts? What are their main features? What are the EU concepts within the framework of VAT? What issues arise in relation to the identification and definition of the latter ones? What are the consequences of their introduction at national level?"

The fact that the topic is worth being analyzed results evident when we consider that the introduction of EU concepts is strictly intertwined with the supranational nature of the European Union, in fact, the creation of a new legal order[6] requires the creation of legal concepts which are suitable to serve the aims and interests of the supranational institution.[7] Indeed, the pursuance of common objectives could be hindered by divergencies in the application of law.

In this sense, a systematic study of the issue is particularly relevant and useful when we become aware of the fact that there are many difficulties related to the identification and definition of EU concepts.

The reason for paying particular attention to the field of indirect taxation and specifically of VAT is, in addition to a personal preference for this subject, that this field is exclusive competence of the European Union,[8] accordingly, since the incidence of European legislation is broader and more coherent[9] than in other fields of taxation, the issue can be more effectively systematized.[10]

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[6] Case C-26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*.

[7] For a further analysis of the core elements necessary for the existence of supranational institutions see Maurice Lagrange, *The Court of Justice of the European Communities from the Schuman Plan to the European Union*, Mélanges Fernand Dehousse, 1979, n ° book 2, *La Construction Européenne*, Paris/Bruxelles: Fernand Nathan/Editions Labor; Alec Stone Sweet, *The Judicial Construction of Europe,* Oxford Scholarship Online, 2005.

[8] Article 113 TFEU.

[9] Adriano Di Pietro, *L'incidenza del Diritto dell'Unione Europea sul Diritto Tributario. Cinquant'Anni di Dialettica tra Imposizione Nazionale e Mercato Europeo*, in Giacomo Di Federico - Lucia Serena Rossi (a cura di), *L'incidenza del Diritto dell'Unione Europea Sullo Studio Delle Discipline Giuridiche*, Napoli, 2008.

[10] Since the European discipline, in the field of VAT, covers almost every aspect of the tax, it is possible to find a continuos thread in the development of EU concepts. This is more difficult in the context of direct taxation, where the interventions of the European legislator are limited to certain aspects and every aspect is underpinned by a different rationale.

1.3. Methodology

The thesis will be split in five chapters. The research will be structured in such a way to depart from general considerations, becoming more deep and targeted as the analysis proceeds, in order to provide a general and theoretical framework of the issue, as well as an insight on the aspects and problems related to some specific concepts. The actual difficulties that national tax administration, judges, taxpayers and interprets have to face as a consequence of the introduction of the EU concepts will be object of the last part of the writing.

More specifically, the Second Chapter will set the issue in the broader framework of the coexistence of different legal traditions, which is one of the distinguishing features of the European Union, underlying the specific features that the phenomenon takes in the field of taxation. The Third Chapter will analyze more in depth the EU Concepts in the field of VAT, trying to bring to light the role that the CJEU has played in the identification and definition of these concepts. The analysis will follow the structure of the Directive, starting from the concepts related to the taxable person, moving to the taxable transaction and place of supply, till the exemptions, the field of VAT where more EU concepts can be found.[11] In the course of the Third Chapter, the author will explore more scrupulously those aspects which are likely to give rise to noteworthy issues.

The Fourth Chapter will concentrate on the consequences that the implementation of new concepts has had on national jurisdictions, moving from general considerations concerning the change of national legal categories, till the more actual consequences that the States and taxpayers have to face.

Given the leading role and the importance of the CJEU in the understanding of the topic, the statements and considerations will be supported by the analysis of the relevant case-law of the CJEU. However, the analysis will not be a mere compilation of the jurisprudence of the CJEU related to the EU concepts, on the contrary, it will take a systemic approach so as to better stress the reasons and the evolution of the issue.

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[11] The reason will be explained in detail later on, by now it is sufficient to anticipate that this is related to the fact that the need for uniform application and consequent avoidance of distortions is stronger in relation to those aspects which are likely to prevent the pursuance of neutrality, cornerstone of VAT.
See Angela Piri, Stefania Gianoncelli, *La Disciplina Delle Esenzioni IVA*, in Lo Stato Della Fiscalità in Europa, page 12.

2. The issue and The Role of The EU Legal Concepts in The European Context

The aim of this Chapter is to provide a brief insight on the reasons why the CJEU developed EU concepts, focusing on the link between these, the coexistence of different legal traditions in the European framework, multilingualism and the need for harmonization. Also the different shape that this exigence has at the European level and at the international level, which is due to the different aims, purposes and features of the two systems, will be examined.

2.1. Different Legal Traditions Entail a Different Language

Law is for a significant part composed by rules which are expressed in language. The clarity and transparency of the language used are decisive for the understandability of the rules and effectiveness of law.[12]

One of the most important features of the *Western Legal Tradition* is the use of a sectoral and technical language which, from the Ordinance of Villers-Cotterets[13] of 1539, formally marking the shift from Latin as universal language of law to national languages, diverges from one jurisdiction to the other.[14] In fact, these languages reflect different legal traditions and *formae mentis* which developed separately.

A common example is the comparison between the German legal tradition which relies on a language which is highly sectoral, conceptual and definitory and the French legal language which is characterized by the attribution of a special significance to common words;[15] different again is the language adopted by common law countries which is far from any conceptualization.[16]

However, the last decades have seen the circulation of legal models and languages, in the wake of the global dimension of economies and creation of supranational institutions. The transposition of concepts

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[12] Tom Morawetz, *Law and Language,* The International Library of Essays in Law and Legal Theory, 2000, page 3.

[13] The Ordinance of Villers-Cotterêts (French: *Ordonnance de Villers-Cotterêts*) is an extensive piece of reform legislation signed into law by Francis I of France on August 10, 1539 in the city of Villers-Cotterêts. Articles 110 and 111, the most famous, and the oldest still in use in the French legislation, called for the use of French in all legal acts, notarised contracts and official legislation to avoid any linguistic confusion.

[14] Harold J. Berman, *Law and Revolution: The Formation of The Western Legal Tradition*, Harvard, 1983.

[15] Barbara Pozzo, Marina Timoteo, *Europa e Linguaggi Giuridici*, Le lingue del diritto, 2008, page 83.

[16] Even if the origins of German legal language date back to the V-VI century, the most important period for the development of German Legal Tradition has been the one of the Codifications of the XIX century. During this century, thanks to the establishment of the German Historical School by Savigny and Pandectists, the language became more and more abstract. In fact, especially in the case of Pandectists, they tried to elaborate, systematically and dogmatically, the material belonging to German legal tradition. The core of their analysis was the deduction of concepts from other concepts and this entailed an in depth analysis of all the elements of every legal situation, so that each of these elements had its correct and specific qualification. Pandectists heavily influenced the structure and language of Bürgerliches GesetzBuch which is a code which is not directed to the population but to lawyers, as a consequence comprehensibility is not one of its aims. The language is extremely technical and abstract, as a consequence it is hardly comprehensible for common readers but extremely rich, clear and precise. Most of this theoretical concepts are included in the first part of the Bürgerliches GesetzBuch which is the more general part where all the concepts which are used later, in the specific parts, are defined.
On the contrary, French legal language used a very technical language, however it did not create its own vocabulary but rather attributed a specific legal meaning to words which already existed in common language. See Gambaro, Sacco, *Sistemi Giuridici Comparati*, Utet, 2008, pp. 9 ss.

born and designed for a jurisdiction has hardly ever been possible through a mere literal translation since many concepts often have not a corresponding in other jurisdictions or apparently corresponding words, concepts and categories have slightly different meaning in different traditions. This is evident in the case of *contract, contrat, contratto, vertrag* which has a completely different meaning in each jurisdiction.[17]

The phenomenon takes on a relevant significance in the context of supranational institutions where multilingualism is a determining feature[18].

2.2. Overview of The Issue

The twentieth century has experienced the creation of various supranational institutions such as the European Union or the World Trade Organization, just to name the most famous. Through them, Member States transcend national boundaries and interests, pursuing aims and taking decisions which relate to a wider group. These institutions operate in more countries and they usually have regulatory powers in their area of interest, while enforcement powers are usually left to the countries which compose the supranational institution. The powers of a supranational institution are those which are conferred to it by Member States through an international treaty.[19]

The European Union can be qualified as a supranational institution even though its peculiar features have brought many to identify it as a *sui generis* entity:[20] the most important distinguishing feature of the European Union is that it provides for popular elections and the members of the Union have a European citizenship in addition to the national one.[21] Robert Schuman, one of the founding fathers of the European Union, qualified it as a midway between a confederation and a federation:[22] in fact, although the powers of the European Union are those which are conferred to it by the Member States, in order to exercise its powers

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[17] In common law the meaning of contract is more limited than in civil law: the main difference lies in the fact that, while in civil law contracts can be distinguished in bilateral contacts and unilateral contracts, in common law the word “contract” only identities bilateral contracts, since an indispensable element of the contract is the *consideration,* meaning the exchange of benefits and performances between the parties. Additionally, in common law, those contacts which in civil law tradition are qualified as “contratti reali” are not identified as contracts.
In Germany *Vertrag* is defined by scholars (*Bürgerliches Gesetzbuch* does not define it) as the *agreement of two or more parties having as object the creation of rights between the parties* (Larenz), while according to Italian *Codice Civile* it is the agreement of two or more parties to create, regulate or extinguish a patrimonial legal relationship. A similar definition is given by French *Code Civil*; consequently the definition provided under German law is the broadest, not requiring any economic/patrimonial element.

[18] Johann W. Unger, Michał Krzyżanowski and Ruth Wodak (eds.), *Multilingual Encounters in Europe's Institutional Spaces, London: Bloomsbury*, 2014, page 279 ss.

[19] See Wayne Sandholtz and Alec Stone Sweet (eds.), *European Integration and Supranational Governance*, Oxford University Press, 1998, page 3 ss., for a theorizetion of integration and supranational governance.

[20] Uwe Leonardy, *The political dimension; German practice and the European perspective*, In Joachim Jens Hesse-Vincent Wright (eds.), *Federalising Europe? The Costs, Benefits, and Preconditions of Federal Political Systems*, Oxford University Press, Oxford-New York, 1996. pp. 86-87, or, Rainer Lepsius, *The European Union as a Sovereignty Association of a special Nature*, In Christian Joerges- Yves Mény-J. H. H. Weiler (eds.), *What kind of constitution for what kind of polity? - Responses to Joschka Fischer,* The Robert Schuman Center for Advanced Studies, European University Institute, 2000, page 219.

[21] Damien Chalmers, Gareth Davies, Giorgio Monti, *European Union Law Text and Materials,* 2014.

[22] Paul Reuter, *La Communaute du Charbon et de l'Acier,* preface by Robert Schuman, Paris, 1953, page 7.

in its fields of competence, it has its own legislative, executive and judicial bodies. Over time the European Community has undergone a process of institutionalization which signed its remarkable transformation *from an interstate bargain into a multidimensional, quasi-federal polity*.[23]
As any other supranational institution, the European Union is based on treaties, the founding treaty of the European Union is the Treaty of Rome which was signed in 1957. As the European Union is different from other supranational bodies, its founding treaty is different as well from the founding treaties of the other institutions since: it is much more similar to a constitutions, ruling on the level of democracy within the European Union and on the rule of law. In *Van Gend en Loos*, a decision whose *importance is difficult to exaggerate*,[24] the Court emphasized this difference stating that the treaty *is more than an agreement which merely creates mutual obligations between the contracting states.... [it] constitutes a new legal order.., the subjects of which comprise not only Member States but also their nationals*.[25]

In order to pursue their aims and purposes international organizations adopt pieces of legislation, since these legal texts are drafted and have to be applied in different countries, in defining the meaning of these authoritative texts, the interpreters have to take into account the divergencies in the different versions which belong to the different countries. In fact, in order to be actually effective and efficient, every supranational institution should not only have its own set of bodies but also its principles, interpretative rules and concepts which are typical of that institution and serve its aim and purposes.[26] However, this need often clashes with the awareness that the creation and application of supranational rules is left to sovereign States and to their interpreters: sovereign States are not likely to leave supranational institutions eroding their competences. Additionally, the ones who are in charge of applying supranational law are national interpreters who frequently do not have the instruments for a correct application of supranational rules.[27]
The most important tool to overcome distortions resulting from different transpositions is interpretation: at the international level Vienna Convention on the Law of Treaties provides useful tools to interpret international treaties and overcome the differences between different versions.

However, since the European Union is a creature of its own nature, the issue of interpretation of legal texts takes on a different shape in respect of both the international context and the national one.[28] Eu-

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[23] Alec Stonw Sweet and Wayne Sandholtz, *European Integration and Supranational Governance,* Oxford University Press, 1998.

[24] See also Nial Fennelly, *Legal Interpretation at the European Court of Justice*, Fordham International Law Journal, Volume 20, Issue 3, 1996, Article 4.

[25] Case C-26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*.
For a more detailed analysis of the importance of the principle of autonomy within the European Union see Jan Willem van Rossem, *The Autonomy of EU Law: More is Less?,* in R. A. Wessel and S. Blockmans (eds.), *Between Autonomy and Dependence*, ASSER PRESS, The Hague, The Netherlands, and the authors 2013.

[26] Katalin Gombos, *EU Law Viewed Through the Eyes of a National Judge,* Brussels, 2014, in Quality of Legislation Seminar "EU Legislative Drafting: Views from those applying EU law in the Member States", page

[27] *Ibidem*.

[28] The essence of the method of interpretation of the Treaties was clarified in *Van Gend en Loos* as well, were the Court stated that *it is necessary to consider the spirit, the general scheme and the wording* of the provision in question.
See also Mattias Derlen, *Multilingual Interpretation of European Union Law,* European Monographs, 2009, page 17.

ropean law at the same time influences and permeates national law, sometimes overlapping with it, but also heavily interacts with national and international system, often borrowing concepts, terms and institutions from national and international legal tradition.[29] Nonetheless, in the European contest, these terms, concepts and institutions have acquired their own meaning becoming part of the European system. In fact, the main principles of European law are equality before the law; legal certainty; predictable, clear and comprehensible legal provisions; and transparent legislation.[30] In order to comply with these principles, it is necessary that all the language versions have the same meaning within the different countries, so that European law is interpreted uniformly in all the countries of the European Union, nevertheless, the countries which compose the European Union are different and have different legal traditions.

In the opinion of the author, the solution, in an ideal scenario, would be attributing an own meaning to each and every concept which can be found within European legislation, this meaning should not necessarily be the same meaning which is attributed to the same concepts in the legislation of Member States and should be functional to the objectives of the Union.

This statement seems to have been welcomed by the CJEU in some of its decisions such as *Commission v Sweden* where the Court, in interpreting Article 11 VAT Directive asserted that *it follows from the need for uniform application of European Union law and from the principle of equality that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union*.[31] The author thinks it is reasonable to infer from this decision that each word of European law should have its own meaning unless otherwise provided by European law itself.

Nonetheless, such a requirement is probably far from reality, where the lack of common definitions at the European level, language barriers, costs, lack of time, difficulty for national authorities to know and apply properly national law prevent a truthful common application of European law. As a consequence, what happened in practice is that European legislation has been interpreted by national interpreters according to national categories[32] and the uniformity of European law has been granted *ex post* through the intervention of the CJEU[33] which has "rectified" the incorrect qualifications provided by national interpreters or has clarified the meaning of European texts through its role of interpreter of the treaties.[34] As a consequence, every time the CJEU, in solving an interpretative doubt of a national court or in sanctioning an incorrect implementation

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[29] For example, see what Sebastian Pfeiffer says in relation to VAT Groping whose idea finds its origin in the German *Organschaft* (*VAT Grouping from a European Perspective*, Volume 34 in the Doctoral Series, 2015), page 11.

[30] Katalin Gombos, *EU Law Viewed Through the Eyes of a National Judge,* Brussels, 2014, in Quality of Legislation Seminar "EU Legislative Drafting: Views from those applying EU law in the Member States", page 2, or, Adriano Di Pietro e Thomas Tassani (a cura di), *I principi europei del diritto tributario,* Il diritto tributario d'Europa, 2014.

[31] Exactly the same statement can be found in Case C-174/08, *NCC Construction Danmark A/S v Skatteministeriet,* paragraphs 23 - 24.

[32] Angela Piri, Stefania Gianoncelli, *La Disciplina Delle Esenzioni IVA*, in *Lo Stato Della Fiscalità in Europa*, page 11.

[33] Adriano Di Pietro (a cura di), *Per una Costituzione Fiscale d'Europa*, Il diritto tributario d'Europa, 2008.

[34] The role of interpreter of the treaties is attributed to the Court by Article 220 Treaty of Rome.

of European law, specifies that a certain word or concept has a specific meaning under European law, that word or concept can be considered as an independent concept of European law.

Despite this, an analysis of the decisions of the Court reveals that the role of the Court merely lies in the identification of a concept which already existed as such;[35] the relevant consequence is legal uncertainty for the Member States who cannot know in advance which concepts are to be labelled as independent concepts of European law. In fact, in the absence of an identification formula or rule, there is uncertainty for the Member States on the method to use to compel with this identification, additionally, also providing a definition which is in accordance with European objectives and purposes could often be challenging.

In the following Chapter the author will deal more closely with the coexistence of legal traditions within the European Union, as this is framework within which the issue has to be contextualized.

2.3. The Coexistence of Different Legal Traditions in the European Context

The European Union is nowadays composed by twenty-eight countries and has twenty-four official languages[36] which are all authentic languages and working languages of the European institutions. This multilingualism is just an example of one of the determining features of the European Union: the coexistence of different traditions which is, at the same time, an element of richness and a source of problems.[37]

The problems are well evident when we consider that the creation of rules at the European level takes place in a multilevel context where the competences are shared between the States and the Union: this entails that different countries could transpose the same concepts in different ways, depending on their legal categories, endangering the harmonization of European law and reducing its effectiveness.

In order to reduce this risk, the European bodies have, in addition to other means, both created concepts with an own meaning and attributed a different meaning to already existing concepts, in order to grant a unique significance in all the European Union. However, even this solution is far from being optimal, since it is not always clear which concepts have to be attributed a specific meaning and the meaning cannot always be found in the European legislation, endangering legal certainty.

For example, European legislation made use of a European concept, without providing a definition, in *Rockfon*[38] where the CJEU had to deal with a regulatory gap in Directive 75/129 dealing with the approximation of the laws of the Member States relating to collective redundancies. The Court explicitly recognized that *as regards the second part of the question, it must be noted first of all that the term 'establishment' is not defined*

[35] See, for example Case C−264/14, *Skatteverket v David Hedqvist,* where the CJEU states that "as a preliminary point, it should be borne in mind that, in accordance with the Court's case-law, the exemptions laid down in Article 135(1) of the VAT Directive constitute independent concepts of EU law whose purpose is to avoid divergences in the application of the VAT system as between one Member State and another". The use of the words "the exemptions... constitute" seems to suggest the exemptions at stake are EU concepts as such and that the role of the Court is merely to bring into light such circumstance. A similar wording can be found in almost all the decisions concerning independent concepts of European law.

[36] As of 1 July 2013, the official languages of the European Union, as stipulated in the latest amendment of *Regulation No 1 determining the languages to be used by the European Economic Community* of 1958.

[37] Barbara Pozzo, Valentina Jacometti, *Multilingualism and The Harmonisation of European Law*, Kluwer Law International, 2006.

[38] Case C-449/93, *Rockfon A/S v Specialarbejderforbundet i Danmark*.

in the Directive[39] and *that the term 'establishment', as used in the Directive, is a term of Community law and cannot be defined by reference to the laws of the Member States*.[40]

Moreover, even when the definitions are provided by the CJEU, these definitions have some peculiar aspects which are consequences of the peculiar nature of the Union: the definition is often instrumental to the pursuance of the aims of the Union, being these aims of economic nature, the concepts created and defined by the Court have an economic content.[41] This distances these concepts from national traditions.

The pursuance of the objectives of the European Union has also to be borne in mind by the national interpreters when transposing European concepts into national legislation: the purpose of translation is not faithfulness to the original but a functional translation which grants an effective pursuance of the European purposes.[42] To make this possible, some Member States, such as the Netherlands or the United Kingdom, have made use of European terminology and provisions, with the advantage of reducing the risks of non compliance; other countries, such as Italy or Spain, have made use of the traditional civil and commercial categorizations, with the advantage for the interpreter of applying known categories to which he can easily associate the related rights and obligations.[43] Even if the first approach is less likely to give rise to divergencies, according to the author, there is still margin for a misalignment when the concept is interpreted in a manner which is not compatible with the European purposes.

To sum up, the European Legislator is both creating new concepts and attributing new significance to already existing national ones in order to overcome the problems related to diverging applications in different Member States and to grant harmonization. This entails a new challenge for the interpreter who does not only have to deal with new categories attributing them their exact meaning but, in addition, has to give an interpretation of national concepts which is functional to the European objectives. This type of interpretation is much different from the traditional interpretation of international law disciplined by Vienna Convention[44] and is due to the peculiar nature of the European Union.

2.3.1. The Reconciliation of Divergencies by The Court of Justice of The European Union

[39] *Idem,* paragraph 23.

[40] *Idem*, paragraph 25.

[41] For example Article 9 VAT Directive, in providing a definition of the taxable person for VAT purposes provides that '*Taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.* The concept of "economic activity" is a clear signal of the fact that the aim of the Directive is to discipline every activity which has economic relevance.

[42] Carla Acocella, *Interpretazione Conforme al Diritto Comunitario ed Efficienza Economica: il Principio di Concorrenza*, in Marilisa D'Amico e Barbara Randazzo, *Interpretazione Conforme e Tecniche Argomentative*, Atti del convegno di Milano svoltosi il 6-7 Giugno 2008, page 96.

[43] Marc Bourgeois, *I Soggetti Passivi: la Nozione di Attività Economica e i Diversi Tipi di Attività Economica e commerciale*, in *Lo Stato della Fiscalità in Europa*, page 3.

[44] Mattias Derlen, *Multilingual Interpretation of European Union Law,* European Monographs, 2009, page 17.

The direct consequence of the coexistence of different legal traditions is that there are frequent linguistic divergencies between the versions of the same act in different countries.

These divergencies can be qualified both as linguistic divergencies due to mistakes in translation and divergencies of significance.[45]

An important role to overcome these divergencies is left, as already mentioned, to the CJEU whose attitude towards such cases has not always been consistent, and, has also changed through time because of the increased number of States which were members of the European Union, however, all the decisions aim at representing uniformly different provisions and values in order to create a truly European system.

During the first years, when the official languages were only four, the Court affirmed the importance of a comparison between the different versions in the case of doubts on the significance of one or more concepts, at the same time taking into account the conformity between the interpretation given and the Treaties.[46]

In *Stauder*[47] the Court also mentioned, as a criterion to reconcile these divergencies, *the real intention of its author and the aim he seeks to achieve, in the light in particular of the versions in all four languages,* since the need for a *uniform interpretation makes it impossible to consider one version of the text in isolation*.

The same happened in *Commission v Italy*[48] where the Court, in interpreting Article 13 (A) (1) (c) VAT Directive which exempts the provision of *medical care in the exercise of medical and paramedical professions* as defined by the Member State concerned, sanctioned Italy for having included in the exemption the activities carried out by veterinaries while the comparison *with the German, Danish, French and Dutch language* and *the meaning attributed to that term in everyday language* suggested to exclude these activities.

Over time, increasing the number of the Member States and different languages, growing attention is paid to the criterion of the aim and context of the disputed provision, at the expense of a mere comparison of the different versions.[49]

In 1977 two relevant decisions were adopted which stressed the importance of another criterion: in *North Kerry Milk*[50] the Court was requested to interpret Article 6 Regulation 1134/1969 laying down rules for the implementation of Regulation (EEC) No 653/68 on conditions for alterations to the value of the unit of account used for the common agricultural policy. The issue concerned the English version of Article 6 which used the expression "*the event… in which… the amount becomes due and payable*" while the other versions

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[45] For example there was a scandal in Poland related to an erroneous translation of European Law in 2005. One of the Polish dailies, Gazeta Wyborcza (of 10th January 2005, p. 2), published an article with an allusive title: *Do Not Read in Polish (Nie czytać po polsku)*. Some of the mistakes were coarse: *psychologically* instead of *physically*, *import* instead of *export*, *15 per cent* instead of *1.5 per cent*, etc.

[46] See Case C-16/65, *Firma G. Schwarze v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*.

[47] Case C-29/69, *Erich Stauder v City of Ulm - Sozialamt*.

[48] Case C-122/87, *Commission of the European Communities v Italian Republic*.

[49] For the importance of teleological interpretation within the European Union, see Nial Fennelly, *Legal Interpretation at the European Court of Justice,* Fordham International Law Journal, Volume 20, Issue 3 Article 4, 1996, page 664 ss.

[50] Case C-80/76, *North Kerry Milk Products Ltd. v Minister for Agriculture and Fisheries*.

proposed a different phrasing. In this case the Court asserted that interpreting the statement in the light of the other linguistic versions could have led to a meaning which was far from the *natural and usual meaning of the words*, endangering certainty of law. Consequently, it preferred to examine the *context and aim* of the rule.

In another landmark case, *Regina v. Pierre Boucherau,*[51] the issue concerned the interpretation of the word "measures" used by Article 3 Council Directive 64/221/EEC, concerning the limitations to the free movement of persons justified by reason of public policy. In particular, it was not clear whether or not the word "measures" covered also jurisdictional acts. Considering the differences between the other versions, the criterion of the comparison between the different versions was not helpful, so, the Court asserted that the statement had to be interpreted *in accordance with the system and the purpose* of the set of rules it belongs to.

During the same years, the Court specified for the first time that, in case of divergencies between different versions, the European notions should be attributed an autonomous significance which should be chosen taking into consideration, first of all, the *aims and structure of the european system* and, secondly, *the general principles of the different legal systems*.[52]

Another landmark decision was adopted in 1981. In *CILFIT* Case[53] the CJEU provided three guidelines for the interpretation of European law.

First of all, it stated that, in interpreting European law, the multilingualism of rules should be taken into account and, as the different linguistic versions have the same value, the interpretation of a European provision entails a comparison between these different versions.

Secondly, even when the different linguistic versions appear to be in line the ones with the others, European law makes use of a terminology which is peculiar, as a consequence, often the different legal notions do not have the same meaning within European law and national law.

Finally, it stated that every provision of European law has to be considered in its context and it has to be interpreted in the light of all the provisions of Community law, taking into account its aims, purposes, and state of evolution at the date when the provision has to be applied.[54]

If we want to find the *fil rouge* in the decisions taken by the Court from that moment onwards, we can say that it continued to follow the criterion of comparison between different linguistic versions in the easiest cases, such as the ones where there was just one diverging version, while, in the most complex cases it some-

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[51] Case C-30/77, *Regina v. Pierre Boucherau*.

[52] Case C-157/80 *Criminal proceedings against Siegfried Ewald Rinkau,* paragraph 11: a*lthough the concept of an "offence which was not intentionally committed" is not defined in the Convention, in order to ensure as far as possible that the rights and obligations of the contracting States and of the persons concerned arising from the Convention are equal and uniform, it must nevertheless be regarded as an independent concept which must be explained by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which the national legal systems have in common. That is all the more necessary where, as in this case, terminological differences exist between the various language versions of the Convention.*

[53] Case C-283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health,* see in particular paragraphs 18 - 20.

[54] For an analysis of the importance of CILFIT Case in the context of interpretation see Giangiacomo D'Angelo, *Integrazione Europea e interpretazione del diritto tributario*, Padova, 2014.

times referred to the notion of *system,*[55] *systematic*[56] interpretation or even to the *system of Community law in relation to the rules and their purpose*.[57]

Common situations where the Court stressed the importance of an interpretation *by reference to the purpose and general scheme of the rules of which it forms a part*[58] or *to the context in which it occurs and to the structure*[59] were those where it had to provide a definition of too general and vague terms: in these cases only a teleological interpretation could grant uniform application of European law.

This fast survey of the most important decisions taken by the Court concerning the reconciliation of diverging legal concepts is useful to highlight that, even in the lack of a unique and clear theory or strategy for the interpretation of multilingual texts,[60] the Court fostered the importance of teleological interpretation or developed European law notions, so to facilitate a uniform interpretation in the national jurisdictions, when the notions to be interpreted were technical-legal notions and, so, they were likely to be different from one country to the other. In both the situations the aim of the Court was not simply to reconcile different linguistic versions but also different significances.[61]

2.4 The Specificities of The Tax Field and The Consequences on The Issue

The aim of this paragraph is to show which features the issue at stake assumes in respect of tax law, due to the specificities of this field of law and to show how the interpretation of the CJEU is particularly relevant here in order to grant the effectiveness of European law.[62]

The tax field is one of the more intertwined with State sovereignty and autonomy, even though to a different extent depending on whether we consider direct or indirect taxation. As far as the latter in concerned, Article 113 TFEU gives authorization to the Council to *adopt provisions for the harmonization of legislation concerning turnover taxes, excise duties and other forms of indirect taxation*. The existence of an explicit provision in TFEU which calls for the harmonization of indirect taxes, while a similar rule is lacking for direct taxation, can be explained by several reasons. First of all, the pivotal point of the idea of Internal Market is the abolition of custom duties, i.e. the implementation of a customs union. Although, the prohibition of imposing import duties and export subsidies and other restrictions which hinder the trade can be easi-

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[55] Case C-135/83 - *Abels v Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie,* para. 13, *Its meaning must therefore be clarified in the light of the scheme of the directive, its place in the system of Community law in relation to the rules on insolvency, and its purpose*.

[56] Case C-136/80 - *Hudig en Pieters BV v Ministero per l'Agricoltura e la Pesca*.

[57] Case C-135/83, *Abels v Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie*.

[58] Case C-100/84, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*.

[59] Case C-173/88, *Skatteministeriet v Morten Henriksen*

[60] Barbara Pozzo, Marina Timoteo, *Europa e Linguaggi Giuridici*, Le lingue del diritto, 2008, page 431.

[61] *Ibidem*.

[62] For further information on the importance of the principle of effectiveness for the interpretation of tax law, Giangiacomo D'Angelo, *Integrazione Europea e Interpretazione del Diritto Tributario*, Padova, 2014, page 45.

ly circumvented by levying internal discriminative taxes on products and services which would lead to the same consequences. Therefore, it was crucial to carry out the harmonization of these taxes, too.[63] Secondly, a certain ratio of VAT base of countries as well as custom duty revenues form part of own resources of the EU, as a consequence, the equity between the Member States requires the contribution to be calculated on the same basis. This can be achieved only by means of harmonization of the custom and VAT rules of the Member States.[64]

However, the CJEU, through its interpretative role, has ensured a growing importance of the European juridical dimension into national jurisdictions also in the field of direct taxation. In complying with this task, the role of the Court has overcame the role which is traditionally reserved to judicial bodies in the traditional allocation of powers between the legislative power, the executive power and the judiciary: the Court has often risen up to the role of law creator.[65]

Focusing on the issue of EU concepts, the qualification of certain terms as independent concepts of European law is not a peculiarity of indirect taxation: such a qualification can be found also within the framework of the Merger Directive, Parent-Subsidiary Directive or Interest and Royalty Directive.[66] The latter, as already anticipated, will not be object of this analysis, but their existence is an interesting input to mention one of the most problematic aspects of the issue. Being indirect taxation harmonized while direct taxation is not, being the intervention of the European legislator limited to certain areas, each supported by a different rationale, it is complex for the European bodies to give coherence to its interventions. This occurrence has consequences on the issue at stake: some concepts which are used in both the fields of direct and indirect taxation could be given different definitions, parcelling the uniformity which is typical of legal categories.[67]

Another aspect which is worth to stress is the importance of the general principles of European law as a source of European tax law. In order to solve some of the problems due to incomplete harmonization, the Court used principles with the aim of creating a structured European system.[68] The role of principles is even more relevant when we consider that their catalogue is open. In the interpretative process, next to general principles, also different and specific principles exist, depending on the field which is taken into consideration. For example, in the field of VAT the interpretation in the light of neutrality principle is decisive. The

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[63] Ben Terra, Peter Wattel, *European Tax Law, Kluwer,* Deventer, 2012, page 8-9.

[64] *Idem*, pp. 9-10.

[65] See Giangiacomo D'Angelo, *Integrazione Europea e Interpretazione del Diritto Tributario*, Padova, 2014, page 14, for the role of the CJEU in the context of taxation, while, to understand the increasing importance of the CJEU in the European construction see Ditlev Tamm, *The History of the Court of Justice of the European Union Since its Origin,* 2012, and Arnull, *The European Union and its Court of Justice*. Oxford University Press, Oxford, 2006.

[66] For example, see Ben Terra, Peter Wattel, *European Tax Law, Kluwer,* Deventer, 2012, page 293 (concept of *beneficial owner* in the Interest and Royalty Directive); page 299 (concept of *interest* and *royalty* in the Interest and Royalty Directive*);* page 238 (concept of *distribution of profits* in the Parent-Subsidiary Directive).

[67] Adriano Di Pietro (a cura di), *Per una costituzione fiscale d'Europa*, Il diritto tributario d'Europa, 2008.

[68] Adriano Di Pietro e Thomas Tassani (a cura di), *I principi europei del diritto tributario,* Il diritto tributario d'Europa, 2014.

preservation of neutrality is the reason which explains why several European concepts are found in the context of exemptions.[69]

To draw conclusions, when dealing with European tax law, it is important to bear in mind that two factors have a leading role: the incidence of the CJEU with its original features and the role of principles. Both the elements have the purpose of extending the area of influence of European law and creating a coherent legal system.

[69] Since the consequence of exemptions is that the taxpayer is not entitled to the right of deduction, any exemption has to be interpreted restrictively; furthermore, in order to avoid the distortions which arise if one country considers a certain activity exempted and another one does not, they must be interpreted uniformly across national jurisdictions.
See Angela Piri, Stefania Gianoncelli, *La disciplina delle esenzioni IVA*, in *Lo stato della fiscalità in Europa*, page 11.

3. The Identification of The EU Legal Concepts

3.1. Introduction

"In EU law, the interpretation to be given to the concept of 'internal armed conflict' must be independent of the definition used in international humanitarian law."[70]

"Transactions which are covered by the exemptions laid down in Article 13 of the Sixth Directive constitute independent concepts of EU law, in order to avoid divergences in the application of the VAT system from one Member State to another."[71]

These are examples of decisions where the Court mentioned the existence of EU Concepts.

Once ascertained the existence of these concepts and discussed the reasons for their existence in the previous Chapter, the time has now come to understand how to identify them. As mentioned in the first paragraph of the Second Chapter, the starting point of this thesis is that, according to the author, in an ideal situation every concept used within European acts should be such, it should have its own meaning and should be defined within the Directive or Regulation which makes use of it; hence, no identification method would be necessary. However, what happens in practice is that not every term of European legislation is considered an EU concept; it is eminently a task of the CJEU, every time an EU concept is relevant for one of its decisions, to specify its qualification as such and the meaning to attach to it.[72] If the CJEU has a crucial role in the identification, this does not mean that the concepts are created by the Court, on the contrary an analysis of its decisions highlights that the Court believes that these concepts already existed within EU legislation.[73] Nonetheless, European legislation usually does not provide significative indication on the concepts to consider as independent concepts of European law and the Court can only intervene if a case is brought in front of it by the parties; it follows that, for a comprehensive identification, the parties should ask for a preliminary reference decision for all the concepts used by European legislation and not identified there as such. This is clearly impossible, consequently, Member States have to face the issue of identification and the ensuing problems in terms of legal certainty.

This Chapter will focus on the role of EU legal concepts in the field of VAT, providing some examples and highlighting the importance of the neutrality principle in the identification. For some of these concepts a more in depth analysis will be provided, the choice has been made depending on the issues which arise in relation to them: for example, the definition of what can be considered an electronic service entails an analysis of the role of explanatory notes within the VAT system, while the definition of VAT Grouping

[70] Case C-285/12, *Diakité v Commissaire général aux réfugiés et aux apatrides*.

[71] Case C-584/13, *Directeur général des finances publiques v Mapfre asistencia compania internacional de seguros y reaseguros SA*.

[72] Sometimes, as we will see in the case of *taxable person* and *economic activity*, the CJEU does not explicitly qualify a certain concept as an EU concept, nonetheless it provides a definition which is detailed and binding for national jurisdictions, in order to limit their discretion. In this case, according to the author, it is still possible to talk about an EU concept.

[73] *Supra* note 34.

calls for a reflection on the different attitude by the CJEU towards EU legal concepts depending on whether they are included in a mandatory or optional provision.

3.2. The Role of The Court of Justice of The European Union in The Identification of The EU Legal Concepts

As anticipated several times the leading role, in the identification of and definition of EU concepts, is left to the CJEU. The CJEU was born as the Court of Justice of the European Coal and Steel Community in 1952 covering the role of Supreme Court in relation to the *limited fields within which Member States had limited they sovereignty,*[74] however, widening the competencies of the Union, also the powers of the Court have increased leading someone to define it as a quasi-legislator.[75]

The main instrument used by the Court to perpetrate the extension of the influence of European competences and creation of a true European legal system has been the one related to the preliminary rulings.[76] In order to accomplish with its role, the Court has elaborated an original interpretative method.

3.2.1. General Reflection on The Role of The Court of Justice of The European Union in The Institutional Framework of The European Union

Defining the role of the Court of Justice within the framework of the European Union has been object of deep investigations and *querelles* between scholars[77] even if one point is unquestionable: the Court of Justice is one of the most powerful courts of the world and it has had - and still has - a leading role in the harmonization and creation of a European legal system. This leading role of the Court is strictly intertwined with the *sui generis* nature of the European Union whose aim is the pursuance of a political aim, the avoidance of wars, through an economic tool, the creation of the internal market, but whose powers are often not enough for the pursuance of such an objective.[78]

In order to understand the role of the CJEU, it is necessary to depart from an analysis of the Articles of the Treaties which define the tasks of the Court. Article 259 TFEU grants to the Court the power to decide over the disputes between Member States, while Article 258 TFEU is the legal basis for the competence of the Court over infringement procedures initiated by the Commission and Article 263 TFEU grants the power

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[74] As the Court itself stated in Case C-26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*.

[75] Among the others, Katrin Nyman Metcalf, Ioannis Papageorgiou, *Regional Integration and Courts of Justice,* 2005, page 79 and Michael Blauberger, Susanne K. Schmidt, *The European Court of Justice and its political impact,* Journal Western European Politics, Volume 40, 2017 - Issue 4, page 907 - 918.

[76] Article 267 TFEU.

[77] Helen Wallace, Mark Pollack, Alasdair Young, *Policy-making in the European Union*, 2015; Alec Stone Sweet, *The Judicial Construction of Europe,* Oxford Scholarship Online, 2005; Katrin Nyman Metcalf, Ioannis Papageorgiou, *Regional Integration and Courts of Justice,* 2005, page 79; Michael Blauberger; Susanne K. Schmidt, *The European Court of Justice and its political impact,* Journal Western European Politics, Volume 40, 2017 - Issue 4, page 907-918.

[78] Adriano Di Pietro (a cura di), *Per una Costituzione Fiscale d'Europa*, Il diritto tributario d'Europa, 2008, page 200.

to review the legality of legislative acts and to settle the disputes between supranational organs. However, the most important task of the Court is the one which is defined by Article 267. Article 267 TFEU ensures to the Court the competence to provide preliminary rulings concerning the interpretation of European law. This competence is particularly important because preliminary rulings have been used as a decentralized means of monitoring and enforcing European law. In fact, the decisions of the Court constitute both a command and an example for national judges: a command because they bind the judge who referred the issue to the Court, and an example because, after a certain interpretation has been provided by the Court, the national judges have to follow that interpretation.[79] The broad use of its interpretative powers, together with the fact that European law generally makes use of broad general formula in order to combine different cultures, and sometimes legislation is vague, incomplete or silent, has often led the Court to rise up to the role of *creator of law*, assimilating it with a legislator.[80]

3.2.2. The Interpretative Methods of The Court of Justice of The European Union

The European system is an autonomous *sui generis* supranational legal system which is distinct from both national and international system: they have different sources, different application methods, different institutions and procedures, different purposes and rules receive different interpretation.[81] Since interpretation is so important in the European context the author thinks it is worth to focus on the original interpretative methods [82] which were developed by the CJEU.

3.2.2.1 Comparison Between the Issue of Coexistence of Different Legal Traditions in The European Context and in the International One

The issue of reconciliation of different concepts is not a unique feature of the European Union: every time there are relationships between different legal cultures, there are potential clashes to be solved.[83] This is why, in this paragraph, the author will provide a brief insight on the approach taken in international law in order to solve the clashes due to the coexistence of different traditions when they have to regulate a common topic, especially concentrating on the similarities and differences in the interpretative approach adopted by the two systems and on the reasons which justify them.

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[79] Giangiacomo D'Angelo, *Integrazione Europea e Interpretazione del Diritto Tributario*, Padova, 2014, pp. 3 ss.

[80] See footnote 73.

[81] Mattias Derlen, *Multilingual Interpretation of European Union Law,* European Monographs, Kluwer Law International, 2009; Barbara Pozzo, *L'interpretazione della Corte del Lussemburgo del testo multilingue: una rassegna giurisprudenziale*, page 3.

[82] The use of the word *methods* instead of *method* is a deliberate choice: as argued by Derlen (M. Derlén, *A Castle in the Air – The Complexity of Multilingual Interpretation of European Community Law*, Umeå Studies in Law, 2007, page 82), especially when it is necessary to reconcile the different versions, adopted at the national level, of the same European legislation, it is difficult to find a unique method which was used in each and every situation.

[83] Mattias Derlen, *Multilingual Interpretation of European Union Law,* European Monographs, Kluwer Law International, 2009, page 17.

In the field of international law, the main issue concerning the interpretation of diverging linguistic versions regards the interpretation of tax treaties. This is disciplined by Vienna Convention, "The Treaty to Govern all the Treaties".[84] Vienna Convention was adopted in 1969 and its scope is limited, since it only covers those treaties which were concluded after it entered into force, in addition only half of the members of the United Nations are part of the Vienna Convention; however its use exceeds its formal scope since it's considered to reflect international customary law.[85]

First of all, the interpretative rules are listed by Articles 31-33 VCLT and they only concern the interpretation of *authentic* versions of a treaty; a text is authentic when it is final and definitive, meaning that it cannot undergo further changes.

Articles 31-32 VCLT concern interpretation in general and they emphasize the role of a textual approach, proposing that the meaning of the treaty is to be researched firstly in the treaty itself, in particular taking into account its ordinary meaning and its objects and purposes, and only secondarily in other sources such as *any subsequent agreement between the parties*, *any subsequent practice in the application of the treaty* or *any relevant rules of international law applicable in the relations between the parties*.[86]

Here, the first difference between the interpretation of European law and international law: while conventions are an autonomous system of law which is created as a result of the will of the parties and whose rules depend on the will of the parties, European law is much more similar to public law, where the law is based on the authority of a sovereign entity.[87]

This entails that the interpretative techniques used in the one and in the other are extremely different and not interchangeable: the rule contained in Article 31 VCLT which, in the interpretation on international conventions, leaves space for the subsequent agreements and practices between the parties, would not be suitable in the field of European law.

Article 33 VCLT[88] explicitly concerns the interpretation of treaties authenticated in two or more languages. When dealing with Article 33 VCLT, the most relevant points to be addressed are the meaning to attribute to the phrasing "*the terms of the treaty are presumed to have the same meaning in each authentic text*" and how to comply with the reconciliation of diverging versions.

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[84] *Ibidem*.

[85] For the role of VCLT in the interpretation of bilateral treaties which follow the OECD Model Convention, see Michael Lang, *Introduction to The Law of Double Taxation Conventions,* 2013, pp. 41 ss.

[86] Articles 31-32 VCLT.

[87] Mattias Derlén, *Multilingual Interpretation of European Union Law,* European Monographs, Kluwer Law International, 2009.

[88] *Article 33. Interpretation of Treaties Authenticated in Two or More Languages*
1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so pro vides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

Starting from the first point, the author argues that the use of this expression entails a need to interpret the treaty in order to give to the different language versions the same meaning, in other words, to ensure the *unity of the treaty*. This is a similarity between the interpretation of international law and the interpretation of European law since they both aim at granting uniformity of law as a precondition for its effectiveness, although this is not always possible because of the sectoral coverage of their competences.[89] However, what still remains unclear, in the case of Vienna Convention, is whether this presumption entails that, when the wording of one single version is clear, there is no need to analyze and ascertain the meaning of the other versions or if the unity of the treaty has always to prevail and, as a consequence, it is necessary to compare every single version with the others.[90] This doubts and ambiguities seem not to exist in the case of European law, where the CJEU explicitly stated in many cases that, in order to grant the uniform application of European law, the interpreter has to compare and analyze all the language versions.[91]

The reconciliation of diverging versions is considered by Article 33 (4) which provides that, in the case of divergencies, the meaning to be chosen should be the one which best reconciles the texts *having regard to its object and purpose*. This criterion, which is similar to the one which was developed by the CJEU in addition to the one of literal interpretation taking into account all the linguistic versions, was included in Vienna Convention because of the insistences of the US during the Conference on the Law of Treaties.[92] Before, the reconciliation process was conducted on the basis of other criteria, such as the most restrictive interpretation, which was used in *Mavrommatis* Case[93] by the Permanent Court of International Justice. This approach was rebutted by the International Law Commission since it was not respectful of the principle of equality of different language versions.

However, while the scope of international tax conventions is usually just the avoidance of double taxation/non taxation and the prevention of tax avoidance and tax evasion,[94] the aim of European law is generally much broader, leaving a more pervasive role to teleological interpretation.

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[89] Mattias Derlén, *Multilingual Interpretation of European Union Law (European Monographs)*, Kluwer Law International, 2009.

[90] As examples of scholars supporting the first view see Kuner, Hardy and Germer; for the risks entire day the second view see Hilf and Tabory, mentioned by Mattias Derlén, *Multilingual Interpretation of European Union Law (European Monographs)*, Kluwer Law International, 2009, pp. 23 ss.

[91] See for example Case C-283/81, CILFIT v. Ministry of Health, para. 18, stating that i*t must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions.*

[92] Mattias Derlén, *Multilingual Interpretation of European Union Law (European Monographs)*, Kluwer Law International, 2009, page 25.

[93] Case *Mavrommatis Palestine Concessions*, Publications of the Permanent Court of International Justice, Series A - No. 2, 30 August 1924: *the court is opinion that, where two versions possessing equal authority exist one for which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonize with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the Parties.*

[94] Even if there is debate at the international level whether also prevention of tax evasion and avoidance are included.
For further information about this debate, see Michael Lang, *Introduction to The Law of Double Taxation Conventions,* 2013, page 41; E.C.C.M. Kemmeren, Principle of Origin in Tax Conventions, Dongen: Pijnenburg, 2001, page 11.

3.2.2.2. The Leading Role of Teleological Interpretation and Principles

The traditional theory on interpretation identifies several interpretative methods: literal or grammatical interpretation, systematic interpretation, historical interpretation, teleological interpretation.[95]
In addition, the CJEU has made large use[96] of analogy, of interpretation according to the subjective intent or objective goal,[97] of the principle of *effet utile,* of comparisons between legal traditions, it has ensured a leading role to teleological interpretation; additionally the Court has also made reference to an interpretation guided by the treaties,[98] fundamental rights[99] and sometimes even moral values[100] or customs.[101]

One of the specific and more problematic features of the interpretative activity of the Court, which differentiates it from traditional interpretation under national and international law, is that there are not meta-principles for interpretation and in order to understand the method used by the Court it is necessary to look at the case-law of the court itself.[102] Additionally, there is no precise hierarchy between the different types of interpretation,[103] as a consequence, it is not clear, for example, whether preference should be given to literal interpretation and, only if this is not clear, to teleological one or whether a teleological analysis should be always carried out.[104]
However, some driving guidelines are that interpretation has to achieve the intent of the legislation and that European terms have to be applied as within European context.[105]

The first guideline entails a leading role for teleological interpretation, with which the author has already dealt in Chapter Two and has particularly relevant consequences in the tax field. In fact, national tax systems and the European system have broadly different aims: while the first perceives taxes as tools to finance public expenditures and which also have redistributive purposes, the second aims principally to the creation of the internal market and perceives tax especially as an obstacle to the creation of the internal mar-

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95 Carl Friedrich von Savigny elaborated the system of four interpretation canons for the modern jurisprudence.

96 Katalin Gombos, *EU Law Viewed Through the Eyes of a National Judge,* Brussels, 2014, in Quality of Legislation Seminar "EU Legislative Drafting: Views from those applying EU law in the Member States", pp. 4 - 5.

97 Case C-267/03, *Lars Erik Staffan Lindberg*, paragraph 30.

98 Cases C-201 and C-202/85, *Marthe Klensch and others v. Secrétaire d'État à l'Agriculture et à la Viticulture*, paragraph 21.

99 Case C-311/04. *Algemene Scheeps Agentuur Dordrecht BV v. Inspecteur der Belastingdienst - Douanedistrict Rotterdam, para 25;* Case 61/94. *Commission of the European Communities v. Federal Republic of Germany,* para.52, Case C-286/02. *Bellio F.lli v. Prefettura di Treviso*, paragraph 33.

100 Case C-275/92, *Her Majesty's Customs and Excise v. Gerhart Schindler és Jörg Schindler*, paragraph 58.

101 T-222/99, T-327/99 és T-329/99, *Jean-Claude Martinez, Charles de Gaulle, Front national and Emma Bonino and Others v. European Parliament joined cases*.

102 Giangiacomo D'Angelo, *Integrazione Europea e interpretazione del diritto tributario*, Padova, 2014.

103 Most of national systems provides for a hierarchy and usually give precedence to literal interpretation. See, for example, Article 12 of the Italian Civil Code, Disposizioni sulla legge in generale.

104 Giangiacomo D'Angelo, *Integrazione Europea e interpretazione del diritto tributario*, Padova, 2014.

105 *Ibidem*.

ket, to a truly free competition and to the full development of economic forces (and this is the reason why indirect taxes were the first to be harmonized since their effect on prices and trade is immediately visible);[106] this divergence of purposes could bring to some clashes. The central role of teleological interpretation entails that it is necessary to pay attention to the Preambles of European legislation, since these can provide useful information on the purposes of the acts.

The second guideline (European terms have to be applied as within European context) is particularly hard to implement in a system such as the European one, which is characterized by its incompleteness.

Both the guidelines entail some risks especially in the tax field due, on the one hand, to the difficulty to balance the aims of the European Union and the aims of Member States, on the other hand, to the difficulty to provide a truly systemic interpretation in a field which is characterized by incompleteness. To solve and overcome these difficulties the Court has relied deeply on principles.[107] These are partly shared and partly common to both the European system and national ones, such as the principle of legality, the principle of certainty of law, the principle of good faith or due process; and partly they are typical of the European system, such as the non-discrimination principle, the neutrality principle, the principle of competition, the principle of co-operation between national administrations and finally to the principle of effectiveness.[108]
Effectiveness means that Member State are committed to realize the effects of a provision of European law, and, in case of conflict, effectiveness requires Member States to realize the requisite legal consequences.[109] The linkage between the principle and teleological interpretation is self-evident.

The effects of the attention paid to principles has led on the one side to the extension of the influence of European law to fields which were not originally covered (this is particularly evident in all those situations where the principle of effectiveness has been used to rule over the compatibility of the procedural rules adopted in certain Member States[110]) but also to give to harmonization a stable effectiveness.[111]

The Importance of The Neutrality Principle in The Field of VAT

[106] Ben Terra, Peter Wattel, *European Tax Law, Kluwer,* Deventer, 2012, page 8-9.

[107] Adriano Di Pietro e Thomas Tassani (a cura di), *I principi europei del diritto tributario,* Il diritto tributario d'Europa, 2014.

[108] Katalin Gombos, *EU Law Viewed Through the Eyes of a National Judge,* Brussels, 2014, in Quality of Legislation Seminar "EU Legislative Drafting: Views from those applying EU law in the Member States", pp. 4 - 5.

[109] For more details see Matej Accetto and Stefan Zlepting, *The principle of effectiveness*, 11 European Public Law 375, 2005.

[110] For example, Case C-261/1995, *Rosalba Palmisani and Istituto Nazionale della Previdenza Sociale (INPS).*

[111] Adriano Di Pietro e Thomas Tassani (a cura di), *I principi europei del diritto tributario,* Il diritto tributario d'Europa, 2014.

The most characteristic of the European principles in relation to Value Added Tax is the principle of neutrality. The principle of neutrality is the guiding principle of the legal structure of VAT, as well as of its interpretation and application.[112]

However the VAT Directive does not provide a definition of the principle, which is given by the CJEU. According to the Court, the principle of neutrality stems from Article 1 (2) VAT Directive and it has two dimensions. The first dimension of neutrality is rather economic[113] and relates to the fact that the length of the production and distribution chain should not influence the amount of VAT which ultimately burdens a good or a service and thus should not affect businesses decisions concerning their organization; hence, VAT should not cascade.[114] The right of deduction is the tool used to pursue this dimension of neutrality. The economic neutrality, when combined with the fact that VAT is a general tax, strengthens the dimension of "indifference": VAT does not have any selective or redistributive role, taxing more heavily certain types of consumption.[115]

The second dimension of neutrality is more legal and relates to the legal effects of the tax: the tax should be applied in such a way that it *result in neutrality in competition, such that within the territory of each Member State similar goods and services bear the same tax burden, whatever the length of the production and distribution chain*.[116] The purpose, here, is to ensure that similar goods and services are treated equally for VAT purposes, as a consequence the same VAT rates should be applied to similar goods, taxable persons in comparable situations should be taxed in the same way - with the consequence of neutrality of legal form - and the system should be structured in such a way to be as plain as possible in order to facilitate compliance.

Both the aspects concern the internal dimension of neutrality; however, neutrality also has an external dimension[117] whose function is that goods and services which are supplied cross-border and internally should carry the same burden of VAT. This aim is achieved, for example, through Article 148 VAT Directive which grants an exemption for those goods which are exported outside the European Union, and through Article 130 VAT Directive which ensures that goods which are imported within the European Union are taxed within the European Union, or through Article 169 (1) (c) VAT Directive which grants a right of deduction to those

[112] Quoting the Preamble, Point 5, VAT Directive "*A VAT system achieves the highest degree of simplicity and of neutrality when the tax is levied in as general a manner as possible and when its scope covers all stages of production and distribution, as well as the supply of services. It is therefore in the interests of the internal market and of Member States to adopt a common system which also applies to the retail trade*".

[113] Also defined as "system neutrality". See Ad Van Doesum, Herman Van Kesteren, Gert-Jan Van Norden, *Fundamentals Of EU VAT Law*, 2013, page 36.

[114] By cascading of a tax we mean that a tax is levied on a good at each stage of the production process up to the point of being sold to the final consumer.

[115] Adriano Di Pietro e Thomas Tassani (a cura di), *I Principi Europei del Diritto Tributario,* Il diritto tributario d'Europa, 2014, pp. 269 ss.

[116] Preamble, Point 7, VAT Directive.

[117] Ad Van Doesum, Herman Van Kesteren, Gert-Jan Van Norden, *Fundamentals Of EU VAT Law*, 2013, page 38.

who perform a financial or insurance activity which falls within Article 135 (1) (a)-(f) VAT Directive and is exempted according to this Article.[118]

Especially in its second dimension, the principle of neutrality has to be intended as neutrality concerning competition, meaning that fiscal neutrality is to be pursued as long as it is instrumental to the creation of the internal market and useful for the free flow of entrepreneurial activity. It is in this light that Article 113 TFEU[119] should be read: the harmonization of tax law should be pursued only as long as it is necessary to the functioning of the internal market, this aim constituting both the purpose and the limit to harmonization itself.[120] Accordingly, its scope is limited to the hypothesis of competing traders: this is evident in the case of illegal supplies which are considered taxable as long as the "illegal supplier" can compete with the legal ones.[121]

Examining the decisions of the Court, it is possible to notice that in the cases concerning Article 13 VAT Directive it provided a very broad definition of "distortion of competition", which is necessary in order to invoke neutrality. Article 13 VAT Directive states that public bodies *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 interpretation the term "significant distortion of competition" the Court did not interpret the rule literally but rather stated that public bodies should not be charged with VAT only if the distortions of competition are negligible.[122]

However, the aim of VAT is not only the pursuance of economic and competition neutrality but also the pursuance of effectiveness of taxation. As a consequence the structure of the tax is the result of the combination of the two exigences: the economic one and the fiscal one; in case of difficulties the balance between the two is operated by the CJEU.

The principle of neutrality in its legal dimension is also strictly intertwined with the principle of equal treatment.[123] In *Fiscale eenheid*[124] the CJEU expressly stated that "*the principle of fiscal neutrality, which is the reflection in the field of VAT of the principle of equal treatment (…)*" even if principle of neutrality and principle of equal treatment do not perfectly coincide. In fact, the Court also specified that the *infringement of the principle of fiscal neutrality may be envisaged only as between competing traders, as has been*

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[118] Ad Van Doesum, Herman Van Kesteren, Gert-Jan Van Norden, *Fundamentals Of EU VAT Law*, 2013.

[119] Article 113
(ex Article 93 TEC)
The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.

[120] Adriano Di Pietro e Thomas Tassani (a cura di), *I principi europei del diritto tributario,* Il diritto tributario d'Europa, 2014, pp. 275 ss.

[121] *Ibidem*.

[122] *Ibidem*.

[123] *Ibidem*.

[124] Case C-484/06, *Fiscale eenheid Koninklijke Ahold NV v Staatssecretaris van Financiën*.

pointed out in paragraph 47 of this judgment, while the *infringement of the general principle of equal treatment may be established, in matters relating to tax, by other kinds of discrimination which affect traders who are not necessarily in competition with each other but who are nevertheless in a similar situation in other respects*.[125]

It is worth to mention the link between neutrality in its multiple meanings and the conception of VAT as a consumption tax: the taxation basis of VAT should be as broad as possible, thus, the subjective and objective scope of the Directive should be interpreted extensively while all the elements which, such as the exemptions, could limit the scope should be interpreted restrictively.[126]

As things stand, the pursuance of perfect neutrality is impossible in for two reasons: VAT is not completely harmonized and the exigences behind neutrality have to be balanced with other exigences.The differences in the rates and the different mechanisms for business to business (B2B) and business to consumer (B2C) supplies are examples of imperfections in the harmonization of VAT[127] while the system of exemptions is a clear example of a situation where the exigencies of neutrality were balanced with other needs such as public interest, technical reasons or interaction with other taxes.[128]

3.3. The EU Legal Concepts in The Field of VAT

3.3.1. Introduction: Features and Historical Notes

VAT is *a general tax on consumption exactly proportional to the price of the goods and services*[129] whose final burden is borne by the final consumer.
The main features of VAT are that it is a general tax, meaning that it applies to all goods and services, it has the form of a transaction tax which covers every transaction which takes place within the European Union, it is proportional to the price of goods and services, furthermore, it is charged at each stage of the production process, in such a way that the risk of non-compliance does not remain at one single stage but is spread over all the production and distribution chain, and it is neutral.[130]

Since 1957, the moment of ratification of the Treaty of Rome, its discipline is harmonized throughout the European Union. In fact, Article 99 TEC (now, Article 113 TFEU) provided that turnover taxes, excise duties and other forms of indirect taxation *should be harmonized in the interest of the Common Market*. As it was explicitly stated by the two reports of 1962 and 1963 (General Report of Sub-Groups A, B and

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125 Case C-309/06, *Marks & Spencer plc v Commissioners of Customs and Excise*.

126 Ad Van Doesum, Herman Van Kesteren, Gert-Jan Van Norden, *Fundamentals Of EU VAT Law*, 2013, pp. 262 -264.

127 *Idem*, page 250, recalling the EEC reports on Tax Harmonization, The Report of the Fiscal and financial Committee and the Reports of The Sub-Group A, B and C(Amsterdam International Bureau of Fiscal Documentation, 1963).

128 *Idem*, page 265.

129 Article 1 (2) VAT Directive.

130 Ad Van Doesum, Herman Van Kesteren, Gert-Jan Van Norden, *Fundamentals Of EU VAT Law*, 2013, page 32 ss.

C and the famous "Neumark Report"), the cumulative taxes existing at that time could endanger the free flow of goods and services within the internal market, the existence of tax frontiers hindered the free movement of goods, while the existence of different tax systems hindered international trade.[131] In order to harmonize the field of indirect taxation, the European legislator adopted Regulations and Directives which were transposed into national law. In the field of VAT, the preferred tools are Directives.[132] Although Member States are free to implement Directives in the way they consider more suitable, in an ideal situation, the final result should be the across Europe. However, the achievement of a total harmonization through Directives in the field of VAT was impossible, firstly, because of the existence of options and derogations in the Directive but also because of the different implementation given by different countries. This lack of harmonization, which entailed distortions of trade and competition, became even less acceptable after the Sixth Directive established that a percentage of the income derived from VAT was to be reserved to the Union.[133]

The most important of VAT Directives is the Sixth Directive, dating back to 17th May 1977, which provided for a further degree of harmonization, nonetheless leaving some space for derogations and options.

Currently the sources of European law are Directive 2006/112/CE (Recast Directive) which made order in the confused preexisting framework of directives, the two Refund Directives (Directive 2008/9/EC and Directive 86/560/EEC) which discipline the refund due to persons which are stablished outside the Union, VAT Regulation (Regulation 1777/2005/EC) which provides useful details concerning rules of the Directives in order to *ensure that application of the VAT system complies more fully with the objective of the internal market, in cases where divergences in application have arisen or may arise which are incompatible with the proper functioning of such internal market*.[134] The other relevant sources are the more than seven hundred cases already decided by the CJEU and some non binding instruments such as explanatory notes, which are acts published by the Commission which provide practical and informal guidelines on the interpretation and application of European law at a certain moment time. Then there are the VAT Committee Guidelines and European Commission Communications: the first are mentioned in Article 398 VAT Directive and are soft law instruments whose aim is, again, to join an equal application of European law.

The structure of the VAT Directive, which is the indispensable source, is extremely systematic and rational and can be used as a blueprint providing all the relevant questions to be answered in order to solve any case which relates to VAT (frequently defined as "VAT Determination Scheme").[135] The first part is composed by a Preamble and some Articles dealing with the subject matter and territorial scope of the Directive. Afterwords, there are 13 Titles dealing respectively with the taxable person, taxable transactions, place of

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131 *Idem*, page 11.

132 Generally Member States prefer to pursue harmonization through Directives instead of through Regulations because Directives leave more leeway to the implementing country and, so, Directives are particularly useful when the aim is to harmonize entire fields of law or to introduce complex legislative modifications. In this respect see Paul Craig and Gràinne De Burga, *EU Law, Text, Cases and Materials*, 2011, pag. 106.

133 Ad Van Doesum, Herman Van Kesteren, Gert-Jan Van Norden, *Fundamentals Of EU VAT Law*, 2013, page 13.

134 Preamble, Point 2, VAT Regulation.

135 Ad Van Doesum, Herman Van Kesteren, Gert-Jan Van Norden, *Fundamentals Of EU VAT Law*, 2013, pp. 43 - 45.

supply, chargeable event and chargeability, taxable amounts and rates, exemptions, deductions, obligations of taxable persons and non taxable persons, special schemes, derogations and some miscellaneous and final provisions.

3.3.2. The Identification of EU Legal Concepts

Some examples relating to the existence of EU Concepts in the field of VAT have been mentioned in the previous paragraphs. In the next ones, the author, without claiming to be exhaustive, will provide further examples that are particularly relevant because they stimulate some reflections.

The analysis of the EU concepts will be provided following the structure of the Directive, starting from the taxable person, moving to the taxable transaction and place of supply and closing with the exemptions. The author believes development of EU concepts follow systemic exigencies and is strictly interwined with the distinguishing features of VAT: the qualification of many exemptions serves to preserve neutrality, the qualification of certain aspects related to the taxable person serves to grant the general character of the tax, finally, those related to the taxable base and rate serve to protect proportionality.

3.3.2.1. The EU Legal Concepts Related to The Taxable Person

Who can be identified as a taxable person for VAT purposes? Answering this question is crucial, since the taxable person qualification entails the entitlement to the right of deduction, the fundamental tool to pursue neutrality.[136] Even though the concept of *taxable person* has never been defined as a EU concept, the CJEU has intervened several times in order to substantiate and specify the meaning of Article 9 VAT Directive, paying particular attention to the notion of *economic activity*. Hence, according to the author, both the concepts should be labeled as EU concepts.

In the case of VAT Grouping, the qualification as EU concept is complex, especially because of the optional character of Article 11 VAT Directive.

<u>Economic Activity: Not an Explicit Qualification; The Use of This Concept Out of VAT Directive</u>

The *taxable person* is defined by Article 9 VAT Directive which provides a broad definition that is focused on the notion of *economic activity*. Neither the concept of *taxable person*, nor the concept of *economic activity* have been *expressis verbis* labeled as EU concepts. Nonetheless, their meaning has been object

[136] Adriano Di Pietro, *Detrazione e Neutralità,* in *L'imposta sul Valore Aggiunto,* Aspetti economici e giuridici, Atti del convegno Assonime-LUISS del 21 e 22 Settembre 2009, Giur. Impr. Volume LXXXII - 2009, page 115.

of many decisions of the CJEU,[137] so to leave the smallest discretion to national legislators in the transposition and application. Since, through decisions which are binding upon all Member States, the CJEU aimed at obtaining a detailed and uniform definition, in the opinion of the author, from a substantial point of view, the notion of *taxable person* and *economic activity* are EU concepts. Accordingly they should be explicitly identified as such.

In fact, according to the author, the essence of EU concepts is that the definition of the notion is provided at the European level and that the discretion of the Member States in the transposition, interpretation and application of the concept is limited, so as to grant a uniform application. Thus, when this happens, as in the case of the *taxable person* and *economic activity*, whose content is detailed by the jurisprudence of the CJEU so as to leave no discretion at the national level, the two notions can be considered EU concepts, independently from an explicit labelling. Even if, according to the author, for the sake of clarity, they should explicitly classified as EU concepts, such a classification would not entail differences from the current situation from the point of view of consequences.

Probably, the reason why many independent concepts of European law - explicitly qualified as such - can be found in the field of exemptions,[138] while such qualification is more rare in relation to the other aspects of the tax, such as the taxable person, is that exemptions amount to a direct derogation from the scheme of the tax, accordingly, the exigence of restricting their scope and applying them uniformly is more urgent.

Article 9 VAT Directive provides that *'taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.*

So, the relevant criteria to determine whether there is a taxable person are the existence of *any person at any place* and the existence of an *economic activity* which is carried out *independently*.

The existence of an economic activity has been object of attention by the CJEU which has detailed its meaning through substantial jurisprudence. First of all, being VAT a general tax, the subjective scope must be as broad as possible and, so, the term *economic activity* has to be interpreted extensively.[139]

The first source to look at, in order to understand the concept of *economic activity,* is the Directive itself: Article 9 (1) VAT Directive provides that *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.*

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[137] For example, for the meaning of *any person*, see Case C-23/98, *Staatssecretaris van Financiën v J. Heerma,* for the meaning of *with the purpose of generating income therefrom* see Case C-89/81, *Staatssecretaris van Financiën v Hong Kong Trade Development Council,* for the requirement of continuity see Case C-62/12, *Galin Kostov v Direktor na Direktsia* and cases Cases C-180/10 *Jarosław Słaby v Minister Finansów* and C-181/10 *Emilian Kuć and Halina Jeziorska-Kuć v Dyrektor Izby Skarbowej w Warszawie,* for preparatory acts see Case C-268/83, *D. A. Rompelman and E. A. Rompelman-Van Deelen, Amsterdam, and Minister van Financiën [Minister for Finance].*

[138] Case C-264/14, *Skatteverket v David Hedqvist*, Case C-526/13, *UAB "Fast Bunkering Klaipėda"" v Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos,* Case C-348/87, *Stichting Uitvoering Financiële Acties v Staatssecretaris van Financiën,* Case C-584/13, *Directeur général des finances publiques v Mapfre asistencia compañia internacional de seguros y reaseguros SA and Mapfre warranty SpA v Directeur général des finances publiques,*

[139] Augusto Fantozzi, *I profili soggettivi del presupposto*, in *L'imposta sul valore aggiunto,* Aspetti economici e giuridici, Atti del convegno Assonime-LUISS del 21 e 22 Settembre 2009, Giur. Impr. Volume LXXXII - 2009, page 17.

Article 12 VAT Directive provides that also some occasional activities entail the status of *taxable person*. From a combined reading of these Articles we conclude that the constituent elements to talk about an *economic activity* are:

- the purpose of generating income;
- the regularity of the activity which can be deducted *a contrario* from Article 12 VAT Directive which taxes some occasional supplies, since, if regularity was not a constituent element of the economic activity, the existence of Article 12 would not have been justified;[140]
- also the exploitation of tangible and intangible property can be considered as an economic activity.[141]

The purpose of generating income has been confirmed by the CJEU in *Hong Kong*[142] where the Court stated that economic activities shall be *carried on with the object of obtaining payment of consideration or which are likely to be rewarded by the payment of consideration, because if they are free of charge in all cases they do not fall within the system of value added tax*.

However, as it is evident from *Tolsma,*[143] the intention to undertake and carry out an economic activity in general is not enough: it is also necessary that every individual supply is rewarded with consideration. In the case at stake, where a musician played music in the street, the CJEU found not to exist any economic activity since, even if the musician *solicited* money from passers-by, there was not any *stipulated* consideration.

However, the aim of obtaining *income* should not be confused with the purpose of obtaining a *profit* which is not necessary since Article 9 VAT Directive provides that the person has to be taxed *whatever the purpose of result*.[144]

The CJEU has had an important role in defining whether preparatory acts carried on before the real beginning of an economic activity can be qualified as an economic activity as well.

In *Rompelman*[145] the Court specified that *preparatory acts, such as the acquisition of assets and therefore the purchase of immovable property, which form part of those transactions must themselves be treated as constituting economic activity.*

In *INZO*[146] the Court argued that even a feasibility study, aiming at verifying whether an activity will ever be technically possible and profitable, can be qualified as an economic activity.

Another issue that the Court had to face was the one concerning the *companies in formation*, hence the one person businesses which transform into a private or public limited company or the private limited

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[140] This is the opinion of Ben Terra, Julie Kajus, *A guide to the European VAT Directives*, 2017.

[141] Ad Van Doesum, Herman Van Kesteren, Gert-Jan Van Norden, *Fundamentals of EU VAT Law*, 2016, page 61.

[142] Case C-89/81, *Staatssecretaris van Financiën v Hong Kong Trade Development Council*.

[143] Case C-16/93, *R. J. Tolsma v Inspecteur der Omzetbelasting Leeuwarden*.

[144] Ad Van Doesum, Herman Van Kesteren, Gert-Jan Van Norden, *Fundamentals of EU VAT Law*, 2016, page 60.

[145] Case C-268/83, D. A. Rompelman and E. A. Rompelman-Van Deelen, Amsterdam, and Minister van Financiën [Minister for Finance].

[146] Case C-110/94, *Intercommunale voor Zeewaterontzilting (Inzo), in liquidation, and Belgian State*.

companies which transform into public limited companies. While in the second case we cannot talk about a change in the taxable person, since the only element that changes is the law applicable to the company, in the first situation, there is a change in the taxable person. As a consequence, the activities performed before the registration should not be deductible by the newly created company because, legally speaking, these are different companies.[147] However, in *Faxworld*[148] - the case concerns a partnership created for the sole purpose of establishing a capital company whose only output transaction was to transfer all of its assets to the company once it had been established to another company (Faxworld AG) - the Court, after having specified that Article 4 of the Sixth Directive (now Article 9) shall be given a broad interpretation, ruled that the findings of *Rompleman* (when a person acquires goods for the purposes of an economic activity that is not immediately carried out there is still an economic activity) *can't be limited by the identity of the person whose economic activity is in question*.[149]

All these decisions of the CJEU have a common rationale which is the avoidance of cascading of VAT: in fact, not qualifying a person who has the intention to start an economic activity as a taxable person means that VAT paid in respect of the preparatory acts carried out would not be recoverable, so, once the business will be commenced the economic operator will include the VAT paid in the taxable transactions that it carries out. Being these transactions taxed as supply of goods or services there would be double taxation of the same operations.[150]

The same reasoning is valid for those companies which are undergoing a procedure of liquidation: in *Fini H*[151] the Court held that the payments that Fini H continued to make during the winding up period of the restaurant have to be regarded as an economic activity. The *raison d'être* for such a qualification is to grant a right of deduction which is indispensable to *ensure complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT*.[152]

Summing up, in order to grant neutrality, both the ends of the starting of an economic activity, should be considered to fall within Article 9 VAT Directive.

The principle of fiscal neutrality was invoked by the CJEU also to justify the qualification as *economic activity* of illegal transactions. In fact the CJEU emphasized that *the principle of fiscal neutrality does in fact preclude, as far as the levying of value-added tax is concerned, a generalized differentiation between*

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[147] Ad Van Doesum, Herman Van Kesteren, Gert-Jan Van Norden, *Fundamentals of EU VAT Law*, 2016, page 66.

[148] Case C-137/02, *Finanzamt Offenbach am Main-Land and Faxworld Vorgründungsgesellschaft Peter Hünninghausen und Wolfgang Klein GbR*.

[149] *Ibidem*.

[150] Augusto Fantozzi, *I Profili Soggettivi del Presupposto*, in *L'imposta sul Valore Aggiunto,* Aspetti economici e giuridici, Atti del convegno Assonime-LUISS del 21 e 22 Settembre 2009, Giur. Impr. Volume LXXXII - 2009, page 15.

[151] Case C-32/03, *I/S Fini H v Skatteministeriet*.

[152] *Ibidem*.

lawful and unlawful transactions.[153] If this is true in principle, the CJEU, in other decisions,[154] specified that an illegal transaction is outside the scope of VAT when some conditions are met: the supply of those goods undergoes a total prohibition in all Member States, the harmfulness of the products is generally recognized within the EU and there is no competition between legal and illegal sector which could obstacle the full achievement of the neutrality principle. It is not difficult to notice that the first and third condition are strictly intertwined: in fact when there is an absolute ban on the importation of certain products it is difficult to assert the existence of a market where there could be competition. As a consequence, the selling of both narcotic drugs (soft drugs) and hard drugs[155] fall outside the scope of VAT while the renting out a space for the sale of narcotic drugs falls within the scope of VAT Directive because it *is, in principle, an economic activity and the fact that the activities pursued there constitute a criminal offense, which may make the renting unlawful, does not alter the economic character of the renting and does not prevent competition in the sector, including that between lawful and unlawful activities*.[156] The same is true in the case of the sale of counterfeit perfumes[157] and for the organization of unlawful games of chance which is subject to tax but exempted.[158]
In the opinion of the author, it is evident that the inclusion/non inclusion lastly depends on the aim of creating the Internal Market: taxation or non taxation of illegal activities depends on whether it can endanger competition.

This concise analysis aims to show that, through the case-law of the CJEU, the concepts of *taxable person* and *economic activity* have been deeply specified; since the CJEU decisions are binding upon Member States, the detailed definitions are uniformly applied across national jurisdictions. Accordingly, the author believes that both the concepts should be explicitly qualified as EU concepts. This conclusions is bolstered by the statements of the CJEU in *Commission v Sweden,*[159] where the Court explicitly recognized the importance of giving an autonomous qualification to the term *taxable person* in order to pursue a uniform application of the VAT Directive.

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[153] Case 289 / 86, *Vereniging Happy Family Rustenburgerstraat, Amsterdam, and Inspecteur der Omzetbelasting, Amsterdam,* paragraph 20.

[154] Case C-3/97, *Goodwin/Unstead*, Case C-269/86, *Mol v Inspecteur der Invoerrechten en Accijnze,* Case C-289/86, *Vereniging Happy Family Rustenburgerstraat v Inspecteur der Omzetbelasting*.

[155] Case C-269/86, *Mol v Inspecteur der Invoerrechten en Accijnze*.

[156] Case C-158/98, *Staatssecretaris van Financiën v Coffeeshop "Siberië" vof*.

[157] Case C-3/97, *Goodwin/Unstead*.

[158] Case C-283/95, *Karlheinz Fischer v Finanzamt Donaueschingen*.

[159] See Case C-480/10, *European Commission v Kingdom of Sweden*, paragraph 34: *It is especially important for the uniform application of the VAT Directive that the notion of 'taxable person', defined in Title III thereof, is given an autonomous and uniform interpretation*.

An interesting issue is the one concerning the use of the concept of *economic activity* out of VAT Directive.[160] For example, this concept was found to be relevant in the context of CFC Rules after *Cadbury Schweppes*.[161] In this decision, the CJEU specified that, since CFC rules constitute a violation of the freedom of establishment, they can be applied only in the hypothesis of *wholly artificial arrangements*.[162] This raises the question of which degree of economic substance Member States can require in order to apply CFC Rules without violating the freedom of establishment. The answer is not clear nor certain but Advocate General Dermot in *Daily Mail*[163] argued that, since the concept of establishment is an economic concept whose aim is to grant that there is a *genuine economic link* between the establishment itself and the country, it entails the existence of two elements: a genuine economic link with the country and a physical location. Advocate General Jacobs in *Cassa di Risparmio di Firenze*[164] provided that *the same concepts in different areas of Community law should, as a general rule, be given identical meaning, unless otherwise justified by the nature or specific features of the area in which that concept is being inserted and which may warrant an ad hoc reading*[165]. It has been argued that the definition provided with regard to the VAT Directive, especially those concerning acquisition, holding and sale of shares and granting of loans from holding companies, could be used also in the field of CFC rules.[166]

Even if the statement of Advocate General Jacobs seems to be true in principle and appealing in the perspective of the creation of uniformity of European Law, the author thinks that the sectoral nature of European law in the field of taxation cannot support such a theory as a general rule but, rather, a case-by-case assessment should be carried out in order to decide whether to apply concepts related to one field of taxation to other areas. This is especially true when one of the fields is harmonized and the other is not. For example, in the mentioned hypothesis of CFC rules, the rationale underlying the definition of *economic activity* in the context of VAT is to grant the generality of the tax and the concept is the key to define the scope of VAT. On the contrary, in the case of the CFC rules, the concept of *economic activity* is used to decide when an anti-avoidance rule is a non proportionate derogation to Article 49 TFEU. Accordingly, even though some aspects of the *economic activity*, developed in relation to VAT, such as the absence of an economic activity in the case of mere holding of shares, could be useful also for the purpose of CFC rules, this should not always be the case.

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160 See Daniël S. Smit, *Substance Requirements for Entities Located in a Harmful Tax Jurisdiction under CFC Rules and the EU Freedom of Establishment,* in Derivatives and Financial Instruments Review, November-December 2014, page 259 ss.

161 Case C-196/04, *Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue*.

162 Michael Lang,Peter Melz,Eleonor Kristoffersson, Thomas Ecker, *Value Added Tax and Direct Taxation: Similarities and Differences,* 2009, page 476.

163 Case C-81/87, *The Queen and H.M. Treasury and Commissioners of Inland Revenue ex parte Daily Mail and General Trust PLC*.

164 IT: Opinion of Advocate General Jacobs, 27 Oct. 2005, Case C-222/04 *Cassa di Risparmio di Firenze and others*, (2006) ECR I-289, at n. 26.

165 *Ibidem*.

166 Daniel S. Smit, *Substance Requirements for Entities Located in a Harmful Tax Jurisdiction under CFC Rules and the EU Freedom of Establishmen*t, Derivatives and Financial Instruments Review, November-December 2014, page 260.

VAT Grouping and The Problematic Issues Related to The Optional Provisions

With the Second Directive, the notion of VAT Grouping was included in Article 11 VAT Directive. The latter provides that, when two or more persons are established within the territory of one Member State and they have financial, economical and organizational links, they may be treated as one single person for VAT purposes.

The VAT Grouping categorization as EU concept is a complex issue: on the one hand, the VAT Grouping has never been explicitly qualified as such, on the other hand, there are some recent decisions of the CJEU which seem to suggest such a conclusion.[167] The main source complexities is the optional nature of Article 11 VAT Directive, as a consequence, it is not clear whether countries can be asked to apply it uniformly. [168] Additionally, VAT Grouping represent an interesting opportunity to discuss and notice how some of the notions used by the VAT Directive take inspiration from national jurisdictions (in this case the German regime of the *Organschaft*) and if this has any relevant consequence on the interpretation and meaning of the "borrowed concept".

The qualification as VAT Grouping has both administrative and substantial consequences: the administrative consequence is that the Group will have only one VAT registration number, this number will be the one that the group has to use on the invoices related to its transactions, however, the most relevant consequence is that the transactions between the members of the group have to be ignored for VAT purposes: no VAT will be charged and no right of deduction will arise in relation to intra-group transactions. The fact that intra-group transactions are ignored entails that the companies have cash-flow advantages since they are not charged with any VAT and, when they carry out exempt transactions with other members of the group, they do not loose any amount of money.[169]

The rationale behind Article 11 VAT Directive, according the Explanatory Memorandum to the proposal, is to pursue administrative simplification and combat abuse, in fact, according to the Memorandum, the introduction of the VAT Grouping would allow one undertaking to be split in more than one taxable persons “whose independence is purely a legal technicality” and benefit from special schemes in relation to the transactions between these undertakings. However, as explicitly recognized by the Commission in the

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[167] Case C-480/10, *European Commission, v Kingdom of Sweden,* which will be analyzed further. See in particular the opinion of Advocate General Jääskinen, paragraph 48 (*It should also be borne in mind that it follows from the need for uniform application of European Union law, and from the general principle of equality, that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union*) and 55 (*…a more useful analogy to Article 11 of the VAT Directive might be found in the case-law relating to the application of optional measures in the internal market context. There the Court has concluded that the optional nature of a measure does not mean that the Member States could limit its scope in a way that is not provided in the European Union provision in question*).

[168] In other words, since States are free to decide whether to implement VAT Grouping or not, once they implemented it, can they be asked to apply it uniformly?

[169] Sebastian Pfeiffer, *VAT Grouping from a European Perspective*, Volume 34 in the Doctoral Series, 2015, pp. 3 ss.

Comments to *Van Paasen,*[170] the origin of VAT grouping has to be found in the German *Organschaft*. The *Organschaft* idea is based on the assumption that persons who are strictly linked to each other should be considered as one unique entity for company law and tax law purposes.[171] This is in line with the aim of the European Union to create an Internal Market which requires that businesses which operate nationally should not be treated less favorably than those which operate cross-border, independently from their legal form (principle of neutrality of the legal form). VAT grouping regime also respects the principle of economic reality which requires entities to be legally treated according to the way they are perceived from an economic perspective.[172] According to the author, the fact that some of the notions used by the Directive are inspired by national traditions could be useful in the interpretation and understanding of the concepts, when the rationale underlying the concept at national level is in accordance with the European objectives. Accordingly, the author believes that the principle of neutrality of the legal form and economic reality should be taken into account in the teleological interpretation about VAT Grouping and that that the idea that the only aim is administrative simplification should be abandoned.

From a more general perspective, the VAT Grouping derivation from the *Organschaft* shows that the interaction between the European legal system and the national legal systems is bilateral: on the one hand, the European system is enriched by elements taken from the Member States' legal traditions, on the other hand, the primacy of European law is the cause of many changes in Member States' jurisdictions.

The implementation and application of Article 11 VAT Directive has entailed many problems: first of all, Article 11 VAT Directive is an optional provision and this jeopardizes its application in the European countries, secondly, the wording is not completely clear, moreover, the CJEU has provided some contrasting and questionable decisions concerning the implementation and interpretation of the Article.[173]

Starting from the first remark, the fact that the provision is optional entails that States are free to implement it or not. Additionally, for the purposes of the more specific topic at stake, it could be wondered if States, once they decided to implement the provision, are bound to implement it in the same way. In other words, from the moment that the provision is optional, and so it automatically entails a discrimination between companies which reside in countries which opted in and companies in countries which did not, why should country not be entitled to differentiate the regimes they provide?

In *Gemeente Emmen,*[174] which dealt with the option for Member States to tax some specific supplies related to building land which were in principle exempted, the CJEU stated that, when words have their specific

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[170] Commission's written documents concerning the joined Cases C-181/78 and C-229/78, K*etelhandel P. van Paassen BV v Staatssecretaris van Financiën / Inspecteur der Invoerrechten en Accijnzen; Minister van Financiën v Denkavit Dienstbetoon BV*.

[171] Sebastian Pfeiffer, *VAT Grouping from a European Perspective*, Volume 34 in the Doctoral Series, 2015, page 15.

[172] *Ibidem*.

[173] The third problematic issue is mentioned for completeness but it will not be object of analysis since it is not relevant for the research topic.

[174] Case C-468/93, *Gemeente Emmen v Belastingdienst Grote Ondernemingen*.

meaning under Community Law, *Member States may not alter their content, in particular in laying down conditions of application,* unless *the Council has specifically conferred the task of defining certain terms of an exemption on the Member States;* it follows, by analogy, that Member States should not lay down conditions for the application of Article 11 VAT Directive which are more burdensome than the ones provided by the Directive itself if the Council did not specify explicitly that countries have this power.
However, in *Stichting Goed Wonen*,[175] the Court stated that States are free to lay down conditions for the application of optional clauses of the Directive as far as they do not alter the nature of the clause itself.
In another case concerning German legislation implementing VAT grouping conditioning the access on the condition that the entity had legal personality, the CJEU argued that limiting the scope of the provisions in such a way can only be justified in the case of *prevention of tax avoidance or tax evasion*.[176]
Even if *Gemeente Emmen* and *Stitchting Goed Wonen* seem to indicate two different directions, in respect of the freedom left to Member States in the implementation of optional provisions, in *Commission v. Sweden* the Court confirmed that the notion of taxable person should be given a uniform and autonomous meaning in all the countries of the European Union and that *such an interpretation is necessary for Article 11 of the VAT Directive, despite the optional nature, as regards the Member States, of the scheme for which it provides, in order to avoid differences in application of that scheme between one Member State and another when it is implemented*.[177] According to the author, this plays to the advantage of the view that VAT Grouping is a concept of Union law, notwithstanding the optional nature of the clause, accordingly it should be interpreted uniformly in the Member States.[178]

The second issue relates to the interpretation of the words of Article 11 VAT Directive. This issue was faced by the CJEU firstly in relation to the interpretation of the word *person*: while the Commission tried to argue that this word coincides with *taxable person* the CJEU clarified that a literal interpretation, fostered by the *ratio* of the rule, requires that the status of taxable person should not be required.[179]
A clarification was required also in relation to the significance to attribute to the *financial, economic and organizational link*. Even if the Commission tried to provide some guidance on the interpretation of these concepts,[180] Member States often applied different criteria which are more restrictive than the ones suggested by

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[175] Case C-326/99, *Stichting "Goed Wonen" v Staatssecretaris van Financiën*.

[176] Cases C-108/14 and C-109/14, *Beteiligungsgesellschaft Larentia + Minerva mbH & Co. KG and Finanzamt Hamburg-Mitte v Finanzamt Nordenham and Marenave Schiffahrts AG*.

[177] Case C-480/10, *European Commission, v Kingdom of Sweden,* paragraph 34.

[178] In this regard, Gert-Jan Van Norden, *Commission v Ireland, Commission v The Netherlands, Commission v UK: persons eligible for inclusion in a VAT Group*, British Tax Review, B.T.R. 2013, 3, 268/275, 2013.

[179] Case C-85/11, *European Commission v Ireland*, and, Case C-65/11, *European Commission v The Kingdom of The Netherlands*.

[180] 2009 Communication on VAT Grouping by the European Commission defines the financial link as ownership of over 50% of the capital or voting rights or bases on a franchise contract, the economic link as existent when the principal activity of the group is of the same nature, the activities of the group complementary or interdependent or one member of the group carries out activities which are wholly or substantially to the benefit of the other member and the organizational link as the existence of a shared or partially shares management structure.

the Commission. For example, Denmark requires a 100% participation in the capital, Austria requires a 75%. Even if these requirements are in principle and formally in line with the Guidelines provided by the Commission, they seem not to comply with the rationale behind the rule, which is to treat as a unique entity situations where one entity has *control* over the other. Countries which rather prefer to apply a more comprehensive test whose aim is to verify whether one entity has *control* over the other are the UK and Germany, the latter finding seems relevant especially from the moment that the concept of VAT Grouping originates from the German concept of *Organschaft*.[181]

Often Member States also excluded some specific sectors from the scope of Article 11 VAT Directive or just allowed the application of the Article to some specific sectors; for example Finland and Sweden only allowed financial institutions which undergo the monitoring of the Finance Inspectorate to become members of VAT Groupings. The Court argued that Member States can exclude some sectors only if the aim is to avoid abuses according to Article 11 (2) VAT Directive.[182] In principle, it seems that allowing the restriction of VAT Grouping only to certain sectors is incompatible with the qualification as EU concept, as it precludes the reaching of a uniform meaning across national jurisdictions. Nonetheless, according to the author, when it is the same European Law (in this case Article 11 (2) VAT Directive) which allows for some derogations, justified by the prevention of tax evasion and avoidance, and the restrictions are limited to these hypothesis, this should not foreclose the qualification as EU concept. However, it is worth to stress the fact that such a derogation must, as any deviation from the general scheme, be interpreted restrictively; in this case, the author believes that it is difficult to show that such a wide restriction (only financial institutions) can be justified by the need to prevent tax evasion and avoidance.

To sum up, the Second Directive included, within Article 11 VAT Directive, the notion of VAT Grouping; even if, according to the author, such a concept should be qualified as a EU concept, notwithstanding the nature of the provisions of a may clause, so as to afford a uniform application, the CJEU has not yet been clear in this respect and has not yet provided a clear guidance on the meaning of some of the key elements of the provision such as the *financial, economic and organizational link*. However, *Commission v Sweden* seems to be promising in this respect. Additionally, it would be useful if the CJEU clarifies the rationale underlying Article 11 VAT Directive specifying that it is not limited to the administrative simplification.

Nonetheless, the statement of principle in *Commission v Sweden* would be deprived of any meaning if the Court remains faithful to its line of reasoning in *Larentia + Minerva*.[183] This decision concerned the word *person* used by Article 11 VAT Directive. The German implementation of Article 11 VAT Directive provided that only entities with legal personality could become part of the VAT group. The CJEU stated that such a limitation is not in line with European law.[184] Nevertheless, it also found that Article 11 VAT Directive

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[181] Ad Van Doesum, Herman Van Kesteren, Gert-Jan Van Norden, *Fundamentals of EU VAT Law*, 2016, page 89.

[182] Case C-74/11, *European Commission v the Republic of Finland*, paragraph 39.

[183] Joined Cases C-108/14 and C-109/14, *Beteiligungsgesellschaft Larentia + Minerva mbH & Co. KG v Finanzamt Nordenham*, and *Finanzamt Hamburg-Mitte v Marenave Schiffahrts AG*.

[184] *Idem*, paragraph 46.

is not sufficiently precise to claim that it has direct effect. According to the author, this is not true in respect of the word *person*. In fact, the fact that the application of Article 11 VAT Directive depends on the existence of a close economic, organizational and financial link, does not mean that individuals cannot claim a violation of EU law when the national regime is not in line with the meaning of the word *person*, whose significance, in itself, is not limited nor conditional.

3.4.2.2. The EU Legal Concepts Related to The Taxable Transaction

Moving to the object of taxation, Article 2 VAT Directive identifies four taxable events: supplies of goods for consideration, supplies of services for consideration, intra-community acquisitions of goods and importations of goods. The notions of *supply of goods* and *supply of services* are aimed at granting the broadest coverage of VAT: the definition of *good* is extremely wide and is an EU concept,[185] the same is true for the concept of *transfer of ownership*[186] which is one of the requirements to talk about a supply of goods; the definition of services has a residual nature, so that everything which is not qualifiable as *good* falls within the definition of *service*.[187] However, it is not always clear how to distinguish between a *supply of goods* and a *supply of services*; this difficulty will be analyzed in relation to the lease contracts: the CJEU provided economic criteria for the choice. Also the significance of *transfer of ownership* was clarified by the CJEU giving importance to the economic substance, so as to avoid divergencies between national jurisdictions which are particularly frequent in respect of the ownership right.[188]

<u>Goods and The Recent Discussions Relating to the Qualifications of Goods</u>

It follows from the qualification of VAT as a general tax on consumption that the taxable base must be as broad as possible. As a consequence, the interpretation of the taxable transactions covered must be extensive.[189] In order to determine the existence of a supply of goods, some elements are required: the object of the transaction must be a "good", the transaction must be qualified as a "supply", the supply must be made "for consideration", "within the territory of a member state" and by a "taxable person acting as such".

The concept of *supply of good* is defined by Article 14 VAT Directive and it is an independent concept of community law,[190] as a consequence, it is irrelevant whether another definition of *good* is provided by

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185 Ad Van Doesum, Herman Van Kesteren, Gert-Jan Van Norden, *Fundamentals of EU VAT Law*, 2016, page 105.

186 *Idem*, page 107.

187 Article 24 VAT Directive.

188 Francesco Galgano, *Il Trasferimento Della Proprietà Mobiliare per Atto tra Vivi*, in Galgano (a cura di), *Atlante di Diritto Privato Comparato*, 2011, page 130 ss.

189 Ad Van Doesum, Herman Van Kesteren, Gert-Jan Van Norden, *Fundamentals of EU VAT Law*, 2016, page 105.

190 *Ibidem*.

national law. The main feature of this concept is that only *tangible physical objects*[191] can be qualified as goods.

Even if, at first sight, it could seem easy to decide whether an object falls within the definition of *good*, this is not always the case. Some problematic situations also arose in the past, for example the ones concerning the, at least weird, qualification of animals as second hand goods,[192] while, more recent and challenging decisions concerned digital goods, such as softwares. The supply of digital goods has been defined by the OECD itself as one of those posing the most serious challenges and threatens to international taxation.[193] One of the difficulties related to the qualification of digital goods is related to those softwares which are supplied on a physical support such as a DVD or CD-ROM, in such a situation it is hard to determine whether the transaction has to be considered as a supply of goods or as a supply of services. In *Levob*[194] the CJEU argued that the transaction is to be regarded as a supply of services when the customization service, which is provided together with the software, predominates, while the normal supply of a service on a carrier should be considered as a supply of goods.[195]

Even though, at first sight, it could seem useless to pay so much attention to the distinction between supplies of goods and supplies of services since both are covered by VAT Directive, this distinction becomes relevant when we have to determine the place of supply, since different rules apply in the case of goods and in the case of services, and when we determine the taxable base. In fact, identifying the transaction as an importation or as a supply of service - this was the doubt in *Levob* - implies that, in the first case, the taxable amount is the custom value i.e. the value of the carrier (low), while, in the second, it is the value of the service (much higher).

Transfer of Ownership

The other distinctive feature of a supply of goods is that it entails a transfer of the right to dispose of the good as an owner. *Shipping and Forwarding Enterprise*[196] brought clarity to the meaning of *transfer of ownership*: the Government of The Netherlands, after having noted that the term *supply of goods* is not defined by the Directive, argued that it is therefore natural that Member States should refer to their own civil law to determine the scope of the term. Under the Civil Code of The Netherlands, legal ownership of immovable property is not transferred until the relevant deed has been entered in the official registers, however, the Government of The Netherlands also recognized that the principle of neutrality could require that a transfer of

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191 Joined Cases C-322/99 and C-323/99, *Finanzamt Burgdorf v Hans-Georg Fischer.*

192 Case C-320/02, *Forvaltnings AB Stenholmen v Riksskatteverket*.

193 OECD, Action Plan on Base Erosion and Profit Shifting (OECD 2013), International Organizations' Documentation IBFD.

194 Case C-41/04, *Levob Verzekeringen BV and OV Bank NV v Staatssecretaris van Financiën*.

195 Opinion of Advocate General Kokott, Case C-41/04, *Levob Verzekeringen BV and OV Bank NV v Staatssecretaris van Financiën*.

196 Case C-320/88, *Staatssecretaris van Financiën (Finance Secretary) and Shipping and Forwarding Enterprise Safe BV.*

de facto power of disposal over property is transferred to a third party who thereby secures all the economic interests connected with the property could fall within the definition. The CJEU stated that the term *supply of goods covers any transfer of tangible property by one party which empowers the other party actually to dispose of it as if he were the owner of the property*.[197] As a consequence, the transferee must be empowered with the right to dispose of that good both *de iure* (it can decide in what way and to what end the goods must be used) and *de facto* (it can actually use the goods in the way it retains). The necessity of the *de iure* part of the test is particularly relevant when we have to distinguish a supply of good from a rental.

This case is particularly relevant for two reasons: first of all, because there are huge divergencies within the EU between the definition of the concept of transfer of ownership, these differences are particularly visible when we look at countries which derive their definition from Roman law tradition and common law countries;[198] secondly, it is worth to notice that the Court, in providing the definition, adopts an approach which is rather substantial than formal, therefore, it pays particular attention to the economic substance of the transaction. Such an approach is probably due to the fact that it better responds to the aim of averting everything which hinders the Internal Market, in fact, in the case of many different legal traditions with different requirements, an approach which looks at economic substance is the more likely to achieve common application in the different countries. Additionally, according to the author, since the Internal Market is an economic creation, it is normal to assume an economic perspective in dealing with the factors which obstacle it.

So, the analysis of the *transfer of ownership* is a very good illustration of both the reason underlying the development and features of EU concepts.

<u>Lease Contracts</u>

If the notion of *transfer of ownership* is a good example to show the economic nature of the definitions provided by the Court, the leasing contracts are the perfect one to show the difficulties in determining whether certain civil law contracts fall within the scope of Article 14 VAT Directive (supply of goods) or Article 24 VAT Directive (supply of services).[199] In order to choose between the two, the CJEU looked, again, at the contractual relation from an economic perspective.

The Court of Justice clarified that a lease contract has to be qualified as a supply of goods when:

- the *ownership of that property is to be transferred to the lessee on the expiry of the contract*, or,

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[197] *Ibidem*.

[198] For a comparative analysis concerning the differences in the transfer of ownership within European jurisdictions see Francesco Galgano, *Il Trasferimento Della Proprietà Mobiliare per Atto tra Vivi*, in Galgano (a cura di), *Atlante di Diritto Privato Comparato*, 2011, page130 ss.

[199] See the opinion of Advocate General Szpunar delivered on 31 May 2017 to Case C‑164/16, *Commissioners for Her Majesty's Revenue & Customs v Mercedes-Benz Financial Services UK Ltd,* according to which *the concept of 'leasing' has no unambiguous definition and may be used to describe agreements of a very diverse legal nature*.

- when all the essential powers attaching to ownership of that property are to be enjoyed by the lessee and, in particular, when *substantially all the rewards and risks incidental to legal ownership of that property are transferred to the lessee*, or,
- when the *present value of the amount of the lease payments is practically identical to the market value of the property*.[200]

This definition provided by the CJEU seems to fit the one which is usually provided in relation to the financial leases, namely those leases where the lessor pays periodical amounts to the lessee until the sum of these equals the price of the asset plus a sum due because of the finance provided. Usually, the lessor buys the item at the end of the period for a symbolic price. Since the final aim is to allow the lessee to become the owner of the good at the end of the period, the lessee usually bears all the risks and rewards related to ownership. On the contrary, the operational lease is a contract where the duration of the lease is less than the useful life of the asset which is leased and the aim of the party is not to acquire the good but just to use it.

The intervention of the CJEU in the field of leasing contracts tries to solve the problems related to the different qualifications and requirements for the existence of a leasing contract in the different jurisdictions.[201] These difficulties do not only relate to the distinction between financial and operational leases. In fact, financial leases seem to resemble hire purchase contracts or sales with payment by instalment, however, there is an important difference between the first and latter: generally speaking this difference lies in the fact that, while in the latter the transfer of ownership is automatic, in the first it is not.[202] Nonetheless, depending on the importance paid by national legislators to this element, different qualifications as a *supply of goods* or as a *supply of services* could be adopted.

It is because of the attempt to eliminate at least some of these divergencies that, during the workings on the Sixth Directive, the Commission proposed to include in the Directive a provision which explicitly qualified financial leases as supplies of goods.[203]

As this did not happen, it was the responsibility of the CJEU to clarify the distinction between operational and financial lease: in *Eon Aset Menidjmunt*[204] it stated that *the leasing of a motor vehicle must, as a*

[200] Case C-209/14, *NLB Leasing d.o.o. v Republika Slovenija*.

[201] For a comparative study concerning lease contracts see Giuditta Cordero Moss, *Lectures on Comparative Law of Contracts,* Publications Series of the Institute of Private Law, University of Oslo, No 166, 2004.

[202] For a good definition of hire-purchase contracts see the opinion of Advocate General Szpunar delivered on 31 May 2017 to Case C‑164/16, *Commissioners for Her Majesty's Revenue & Customs v Mercedes-Benz Financial Services UK Ltd,* according to which *under this type of agreement the transfer of ownership to the lessee/purchaser is deferred, it takes place 'in the normal course of events', as it is the outcome of the normal performance of the agreement. The only situation in which transfer of ownership would not take place is when this results from extraordinary events and in particular from withdrawal by one of the parties from the agreement. (…) As a side note (as it does not concern the present case) it should be added that Article 14(2)(b) of Directive 2006/112 also covers, besides hire purchase agreements, contracts for the sale of goods on deferred terms. While in such agreements the hire component is missing, they are, functionally, however, similar to hire purchase agreements.*

[203] Proposal for a Sixth VAT Directive. European Commission, Common System of Value Added Tax: Uniform Basis of Assessment. Proposal for a Sixth Council Directive on the harmonization of Member States concerning turnover taxes. Submitted to the Council by the Commission. COM (73) 950 final, 20 June 1973. Bulletin of the European Communities Supplement 11/73, page 10.

[204] Case C-118/11, *Eon Aset Menidjmunt OOD v Direktor na Direktsia Obzhalvane i upravlenie na izpalnenieto*.

general rule, be categorised as a supply of services, according to Article 24(1) of the VAT Directive.[205] However, when *all the risks and rewards of legal ownership are transferred to the lessee,* the fact that the *transfer of ownership is provided for on the expiry of the contract* and that *the present value of the lease payments is practically identical to the market value of the property*[206] the lease can be qualified as a finance lease and, as a consequence, as a *supply of goods*. This is what the Court repeated later in the *NLB Leasing*,[207] mentioned at the beginning. As the Court underlined in the decision, these distinctive criteria between operational and financial were also the ones endorsed by IAS 17.[208]

Once again, the broad definitions provided for the concepts of *supply of goods* and *supply of services*, on the one hand, protect the general character of the tax, on the other, hand they do not provide clear guidance to the interpreter in complex situations and especially in those situations, such as transfer of ownership or lease contracts, where the divergencies between Civil Law traditions would led to different results. In order to solve the discrepancies, the CJEU suggested to look at the economic substance. The consequence is that a lease contract will have its own definition for the purposes of civil law and a different one for the purposes of the application of the Sixth Directive.

3.3.2.3. The EU Legal Concepts Related to The Place of Supply

The place of supply rules in the context of VAT Directive are the tool for the allocation of taxing rights between jurisdictions according to the place where consumption occurs. In fact, a globalized economy which is characterized by the presence of international trade and transactions, but where States remain sovereign jurisdictions, needs rules to allocate taxing rights.[209] These rules can be found in the tax treaties, when we deal with direct taxation, while, when we deal with VAT, it is necessary to look at Articles 31-39 VAT Directive and Articles 43-59c VAT Directive. The first set of rules provides the relevant provisions for the supplies of goods, while the second set provides for the relevant provisions in the field of services. The two set of rules for the determination of the place of supply are different but they serve the same purpose: taxing consumption where this takes place.

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[205] Case C-118/11, *Eon Aset Menidjmunt OOD v Direktor na Direktsia Obzhalvane i upravlenie na izpalnenieto*, paragraph 33.

[206] *Idem,* paragraph 38.

[207] Case C-209/14, *NLB Leasing d.o.o. v Republika Slovenija*.

[208] IAS 17 produced in Commission Regulation (EC) No 1126/2008 of 3 November 2008 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council (OJ 2008 L 320 p. 1). See the opinion of Advocate General Szpunar delivered on 31 May 2017 to Case C−164/16, *Commissioners for Her Majesty's Revenue & Customs v Mercedes-Benz Financial Services UK Ltd,* according to which the Court reached the conclusions concerning the qualification of operational leasing and financial leasing *by referring to international accounting standards incorporated in EU law by virtue of Regulation No 1126/2008. (…) Pursuant to paragraph 8 of IAS 17, a lease is to be classified as a finance lease if it transfers to the lessee 'substantially all the risks and rewards incidental to ownership'. These are, in the present context,* ***economic concepts*** *which refer to potential gains and losses for business purposes resulting from the use of the subject matter of the leasing agreement. Furthermore, an accounting entry of a specific transaction is based on, inter alia, the knowledge that the business has of the* ***true economic nature*** *of the transaction and its intended effect.*

[209] Sebastian Pfeiffer, Marlies Ursprung-Steindl, *Global Trends in VAT/GST and Direct Taxation,* Series of international tax law (Lang ed.), 2015, point 196.

In the case of the place of supply of services, a new system was introduced on 1st January 2010[210] precisely with this aim. The system adopted before 2010 was based on the principle of origin. The new rules for the determination of the place of supply differentiate between business to business (B2B) supplies and business to consumer (B2C) supplies and contemplates limited exceptions to the main rule. In this way, the effects of the different rates in different Member States have been reduced. One of the concerns in the creation of these new place of supply rules was to avoid excessive administrative burdens and this aim was pursued through the mandatory application of the *reverse charge* mechanism in the business to business supplies (B2B). In the determination of the place of supply of services, the concept of *fixed establishment* is central, the significance of such concept was clarified by the CJEU and then introduced in the VAT Regulation. In the analysis of the concept of *fixed establishment,* the author will focus on the sources which detail its significance and on the relationship between the concept of *fixed establishment* in indirect taxation and the concept of *permanent establishment* in direct taxation.

In the case of the place of supply of goods, Articles 31 VAT Directive (supply of goods without transport) and 32 VAT Directive (supply of goods with transport) mention *the place where the goods are located at the time when the supply takes place* and the *place where transport begins*. In order to join uniform application of the rules and avoid disputes between jurisdictions concerning the belonging of taxing rights, also these concepts should be qualified as EU concepts, nonetheless, the identification of the *place where the goods are located* and the *place where transport begins* are very factual issues. According to the author, this is the reason why neither the European legislator nor the CJEU have specified their meaning nor qualified them as such.

Fixed Establishment: Sources Detailing its Significance and The Comparison With The Concept of *Permanent Establishment* in the Field of Direct Taxation

In determining the place of supply of services, some concepts are fundamental: these are especially the concepts of place of business and fixed establishment, since both Article 44 VAT Directive (place of supply of B2B services) and Article 45 VAT Directive (place of supply of B2C services) make reference to these concepts, defining the place of supply as the one where the recipient (B2B) or the supplier (B2C) has its *place of business*, *fixed establishment*, *permanent address* or the *place where they usually reside*. From 1 July 2011 these concepts are defined and detailed in the VAT Regulation, Articles 10-13.[211] In fact, in 2011 many implementing provisions were introduced in order to grant that VAT rules are applied and interpreted uniformly within the EU.

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[210] Council Directive 2008/8/EC of 20 February 2008 amending Directive 2006/112/EC as regards the place of supply of services, (2008) OJ L44/11.

[211] Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (recast), (2011) OJ L77/1.

The VAT Directive does not provide any definition of the place of business which is defined, instead, by Article 10 VAT Regulation as *the place where the functions of the business's central administration are carried out*.

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.

However, when a taxable person has more than one establishment through which it carries on its business, the establishments which are not the place of business are qualified as fixed establishment of the taxable person and the latter is considered to be secondarily established there.

The fixed establishment becomes relevant in a B2B transactions under Article 44 VAT Directive when the service is supplied by the supplier to the fixed establishment of the recipient but also when the supplier, in a B2C transaction under Article 45 VAT Directive, supplies the service from its fixed establishment instead of its place of business. The concept of fixed establishment becomes relevant also for the application of the *reverse charge*.[212] As for the case of the place of business, the fixed establishment is not defined by VAT Directive, in this case the definition was provided by the Court of Justice: a fixed establishment is an establishment *of a certain minimum size and both the human and technical resources necessary for the provision of the services are permanently present*.[213]

The concept of fixed establishment can also be found also in VAT Regulation: Article 11 (1) VAT Regulation provides a definition of fixed establishment which is relevant in the case in which in a B2B supply of service the fixed establishment is receiving the service, while Article 11 (2) VAT Regulation provides the definition of fixed establishment which has to be followed when, in a B2C transaction, the fixed establishment is the one providing the service. Both the Articles trace the definition provided by the CJEU.

Since the VAT Regulation only provides implementing rules, the principle of proportionality requires that it should be interpreted restrictively and should not go further *what is necessary to ensure uniform application of the current VAT system by laying down rules implementing Directive 2006/112/EC*.[214] Are Article 11 (1) VAT Directive and Article 11 (2) VAT Directive merely implementing provisions? Since the definition provided by Article 11 (2) VAT Directive is the same used by the Court in several decisions,[215] there is not any problem in respect of this provision. However, the case-law of the CJEU concerns the situation where

[212] See Articles 196 VAT Directive and 192a VAT Directive.

[213] For example, Case C-168/84, *Gunter Berkholz v Finanzamt [Tax Office] Hamburg-Mitte-Altstadt*, or, Case C-73/06, *Planzer Luxembourg Sàrl v Bundeszentralamt für Steuern,* Case C-260/95, *Commissioners of Customs and Excise v DFDS A/S, Case C-190/95, ARO Lease BV v Inspecteur van de Belastingdienst Grote Ondernemingen te Amsterdam*.

[214] Introduction to Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax, paragraph (4).

[215] See note 209.

the fixed establishment is the one supplying the service.[216] Hence, Article 11 (1) VAT Regulation seems to go beyond the "allowed" content of an implementing Regulation.

In 2002 the Italian Supreme Court, in *Philip Morris,*[217] made use of the concept of *permanent establishment,* as interpreted within the framework of the OECD Model Convention and its Commentary, in a decision concerning the existence of a *fixed establishment*. The "protagonist" of the case was Intertaba Spa, an Italian subsidiary of two non(Italian)-resident companies.[218] The Italian Supreme Court, in assessing the existence of a *fixed establishment,* did not make reference to the above mentioned definition provided by the CJEU, i.e. establishment of a certain minimum size which has both the human and technical resources necessary for the provision of the services on a permanent basis. On the contrary, it assumed that a subsidiary, since it is a legal entity, in itself possesses a general structure with its own technical and human resources. In order to understand whether or not the subsidiary is distinct from its parent,[219] the Supreme Court relied on Article 5 (4) and (5) of the OECD Model.[220] Additionally, the Supreme Court affirmed that it was necessary to check whether the Italian subsidiary had authority to conclude contracts in the name of the enterprise. This condition is the main criterion in assessing the existence of an agent PE under the OECD Model Convention. Although the author is not going in depth in the reasoning of the Italian Supreme Court, these elements of the decision illustrate that it relied on the OECD understanding of PE.

The first - specific - remark of the author is that the ability to conclude contracts is not enough to comply with the requirement of the the *existence of a structure which has a sufficient degree of permanence and from which the business transactions can be effected on an independent basis*.[221]

More generally, the author believes that the suggestions made by some scholars as to whether the guidance available for the interpretation of the treaty PE concept may be used to interpret the VAT concept and *vice*

[216] For example in *Berzholz* it is defined as the establishment *of a certain minimum size and both the human and technical resources necessary for the provision of the services are permanently present*.

[217] Court of Cassation, Nos. 3367 and 3368 of 7 March 2002.

[218] It is worth to mention that *Italian tax law does not distinguish the concept of fixed establishment from the concept of permanent establishment. In this respect the Italian VAT Act uses the same expression (permanent establishment) that is also used for income tax purposes as a key concept in (tax) treaty law. In fact, until recently, the tax authorities and certain Italian scholars attempted to derive the concept of FE for VAT purposes from the concept of PE, notably the concept provided for by the OECD Model Tax Convention, since Italian tax law does not captain a definition of either PE or FE.* (Michele Iavagnilio, *Concepts of Permanent and Fixed Establishment under Italian Law – The Philip Morris Case,* International Bureau of Fiscal Documentation, 2002, pp. 470 - 471).

[219] Only a subsidiary which is not distinct from its parent can be qualified as a fixed establishment, otherwise it is an independent taxable person according to Article 9 VAT Directive.

[220] The Italian Supreme Court argued that the management activity of the subsidiary, notably supervisory and coordinating functions in connection with the execution of the contracts stipulated by other companies of the group, did not amount to an activity of a preparatory or auxiliary character, which does not constitute a PE according to paragraphs 4 and 5 of Art. 5 of the OECD Model.

[221] See in particular Case C-260/95, *DFDS A/S v. Commissioners of Customs and Excise,* where the Court dealt with the situation of a tour operator established in one Member State, who provided services to travelers through the intermediary of a company operating as an agent in another Member State; hence a situation which involved an agent/intermediary.
In this respect also Michele Iavagnilio, *Concepts of Permanent and Fixed Establishment under Italian Law – The Philip Morris Case,* International Bureau of Fiscal Documentation, 2002, page 475.

versa[222] must be examined with great caution, especially when we consider the different logic and purposes of the VAT Directive and bilateral treaties against double taxation in the field of direct taxation. In fact, even if both the *fixed establishment* and *permanent establishment* concepts are necessary for the allocation of taxing rights between different jurisdictions, in the case of VAT, the concept of fixed establishment is also strictly interrelated with the nature of VAT as a consumption tax: taxing consumption where it takes place. This aspect is obviously missing in the case of direct taxation, where the aim is to tax where the business generates profits.

Place of Supply and The Value of Explanatory Notes

Explanatory notes are instruments of soft law which are not legally binding and whose aim is to provide informal and practical guidance on how to implement EU law. They are not exhaustive, meaning that, even if they are very detailed, they do not provide each and every rule which is relevant in a certain field, additionally they are not a final product, since they simply reflect the state of play at a certain moment in time.[223]

Explanatory notes are adopted by the Commission's Directorate General for Taxation and Customs Union in cooperation with Member States and businesses which were requested to send suggestions and participate to *ad hoc* meetings. Even if the explanatory notes are not binding neither for the Member States, nor for the Commission, most of national interpreters, when dealing with the disciplined issues, rely on them.[224]

Explanatory notes are usually very useful in order to implement technical or complex legislation, this was the case with Explanatory Notes 3 April 2014 which were enacted in order to provide a better understanding of Regulation (EU) No 1042/2013 of 7 October 2013, regarding the place of supply of services related to telecommunications, broadcasting and electronic services. These explanatory notes were enacted nine months before the entry into force of the Regulation.

They are particularly relevant since the changes introduced by Regulation 1042/2013 in this respect are prominent: in order to better comply with a taxation which takes place in the country in which goods and services are consumed; the new Article 58 Directive states that, even in the case of B2C transactions, taxation should take place in the country where the customer belongs. Before this change, taxation took place according to Article 45 VAT Directive (country where the supplier is established), since the supply of electronic services, differently from the supply of goods or other services is easy to be managed far from the place where the service is provided, such a discipline allowed many suppliers of electronic services to establish in low rate jurisdictions and pay lower levels of VAT.[225]

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[222] J. Sasseville & A.A. Skaar, *Is there a permanent establishment?: General Report, in IFA Cahiers de droit fiscal international, Is there a permanent establishment?*, Vol. 94a (Amersfoort: Sdu Fiscale en Financiële Uitgevers, 2009), pp. 61 - 63.

[223] Ad Van Doesum, Herman Van Kesteren, Gert-Jan Van Norden, *Fundamentals of EU VAT Law*, 2016, page 18.

[224] *Ibidem*.

[225] *Idem*, page 185.

It is worth to mention that paragraph 1.6. of the Explanatory Notes provides a glossary where the significance of all the relevant words (e.g. place the customer belongs, broadcasting services, electronically supplied services, telecommunication services, fixed land line, spot etc.) is provided.
Even if most of the concepts listed were already defined elsewhere (e.g. the concept of telecommunications services is already defined by Article 24 (2) of the VAT Directive, broadcasting services were already defined within the framework of Regulation 1042/2013 etc.) the Guidelines deal with important aspects related to these concepts.[226]

Even if the explanatory notes have no binding value and the same explanatory notes specify that each Member State is free to implement its own national guidance, it is not difficult to understand that, due to the technicalities of some of the issues, such as the presumptions to establish the location of the customer (Art. 24A and 24B VAT Regulation), most Member States will rely on the content of the Explanatory Notes.

Chapter 2.3.2. of Explanatory notes 3 April 2014 specifies that the definition provided for broadcasting services is largely *derived from the Audiovisual Media Services Directive*[227] *as indicated in Recital 2 of Regulation 1042/2013, but it is not intended to replicate the definition put in place for regulatory purposes. Changes in that field would therefore not impact the definition in the VAT Implementing Regulation.*
A basic principle of EU law is that concepts need to be applied consistently across the legislation. This means that in EU VAT legislation a concept such as broadcasting services is relevant not only for determining the place of supply but also with regard to the rate that could be applied to that supply.
The specification raises a number of doubts:
Does - and if the answer is affirmative, to what extent - unity of law justify to use a concept which is typical of a certain field of EU law in other contexts? Does the fragmentation which is typical of EU tax law have any consequence on the answer to these questions? In the opinion of the author, since the competences of the European legislator are limited to certain areas, it is difficult to invoke unity of law as a justification for using concepts related to a certain area for others, unless the legislation explicitly provides in this respect (such as in this case). Additionally, depending on the level of harmonization joined in each area of competence, the impact of European Law changes, hence, using, for example, concepts related to VAT in the field of direct taxation would not be appropriate.

3.3.2.4. The EU Legal Concepts Relating to The Exemptions

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226 Just to provide an example, while Art. 6b of Regulation 1042/2013 provides a definition of broadcasting services, namely those services *consisting of audio and audiovisual content, such as radio or television programmes which are provided to the general public via communications networks by and under the editorial responsibility of a media service provider, for simultaneous listening or viewing, on the basis of a programme schedule,* the explanatory notes specify when programmes are *'provided to the general public'*, when programmes are for *'simultaneous listening or viewing'* etc.

227 Directive 2010/13/EU of the European Parliament and the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ L 95, 15.4.2010, p. 1).

The largest number of EU concepts can be found in the context of exemptions. In order to understand the reason, it is necessary to focus on the consequences that qualifying a certain transaction as an exemption has.

We talk about exemptions when the supplier does not have to charge VAT on the supplies to the customers; VAT Directive contemplates many types of exemptions but the main distinction is between exemptions with right to deduct VAT (Articles 132-137 VAT Directive) and exemptions without right to deduct VAT (Articles 138-166 VAT Directive). The rationale behind the two types of exemptions is different: the first are justified by reasons of public interest, by difficulties to tax certain supplies or because of the close relationship with immovable property; the reason for the existence of this type of exemption, especially in the case of reasons of public interest, is to keep the price of the supply as low as possible for the consumer.[228] However, this aim is not always pursued. In fact, the supplier which is involved in an exempt supply that cannot recover input VAT will be likely to include this non recoverable amount into the price which is charged to the customer. If the customer is not a final consumer, when he will supply that good or service in a subsequent transaction, he will charge VAT on an amount which also includes the VAT that he has not been able to recover: this phenomenon is called cascading of VAT and is not in line with the neutrality of the system.[229] This ascertainment is crucial for understanding the reasons underlying the qualification of this type of exemptions as EU concepts. The second type of exemptions relates to intra-community supplies and export supplies, where the singular structure of the supplies of goods and the objective of granting neutrality and the destination principle require such a scheme. In this case, since a right of deduction exists there is no risk of cascading.

In the case of exemptions without right of deduction, the Court has been given many times the opportunity to confirm that this type of exemptions has its own meaning under European Law[230] and to set the criteria to follow in the interpretation of these type of exemptions.

First of all, even if according to Article 131 VAT Directive it is up to Member States to determine the correct way for the application of the exemptions, bearing in mind that every type of evasion, avoidance or abuse should be avoided, those conditions cannot affect the definition of the subject-matter of the exemptions envisaged.[231]

Secondly, in case of doubts on whether a transaction is taxable or exempt, the doubts cannot be settled on the basis of national law; on the contrary, a uniform interpretation of European Law requires to provide an inter-

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[228] Ad Van Doesum, Herman Van Kesteren, Gert-Jan Van Norden, *Fundamentals of EU VAT Law*, 2016, page 18.

[229] *Idem*, page 263.

[230] See, for example, Case C-264/14, *Skatteverket v David Hedqvist*, Case C-526/13, *UAB "Fast Bunkering Klaipėda"" v Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos,* Case C-348/87, *Stichting Uitvoering Financiële Acties v Staatssecretaris van Financiën,* Case C-584/13, *Directeur général des finances publiques v Mapfre asistencia compañia internacional de seguros y reaseguros SA and Mapfre warranty SpA v Directeur général des finances publiques,*

[231] Case C-124/96 *Commission v Spain*, paragraphs 11 and 12, and Case C-76/99 *Commission v France*, cited above, paragraph 26, Case C-287/00, *Commission of the European Communities v Federal Republic of Germany.*

pretation which does not look at that provision in isolation but takes into account a comparison with the other existing linguistic versions.[232]

Finally, since the general principle is that VAT should be levied on all goods and services supplied by a taxable person, every exemption is to be interpreted strictly[233] while every exception to the exemption has to be interpreted broadly[234] because it re-establishes the general principle of neutrality. In any case the interpretation must still grant that the objectives of the provision are pursued: the exemption should not *be construed in such a way as to deprive the exemptions of their intended effect*.[235]

Before addressing in detail the case-law and the specific parts of the Directive which have been qualified as independent concepts of European law it is necessary to stress the fact that it is exactly in relation to exemptions that the case-law of the CJEU is more fruitful. According to the author, the reason is that the need for uniformity is more urgent in the hypothesis which are likely to threaten neutrality: this danger is self-evident in the case of exemptions which are declared derogations from the normal regime, whose aim is to balance the exigence of neutrality underlying VAT with other exigences which are of vital importance to Member States.

It is also worth to mention that the CJEU stresses the fact that, although States are free to set the conditions for the application of the exemptions any time there is a risk of tax evasion, avoidance of abuse, these conditions cannot affect the content of the exemptions themselves which is defined at the European level and cannot be modified by the Member States.[236] One of the most important consequences of such a reasoning is that Member States cannot oppose the non-transposition of the rules setting these conditions as an obstacle for the application of the exemptions: the rules setting the conditions for the application of the exemptions are not substantive rules but rather rules which are instrumental to the pursuance of the aim of the exemption itself. In fact, not only the categories used within the exemptions are qualifiable as European concepts, but also those definitions which are used in the rules setting the conditions for the enjoyment of the exemptions.[237]

In the remaining part of the paragraph the author will focus on some of the concepts contained within Articles 132 - 137 VAT Directive and on the most relevant decisions of the CJEU concerning them. Arti-

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[232] Case C-296/95 *The Queen and The Commissioners of Customs and Excise v EMU Tabac SARL, The Man in Black Ltd and Jhon Cunningham*, Case C-321/96 *Wilhelm Mecklenburg v Kreis Pinneberg - Der Landrat*, Case C-498/03 *Kingscrest Associates Ltd, Montecello Ltd v Commissioners of Customs and Excise*.

[233] Case C-44/11, *Finanzamt Frankfurt am Main V-Hochst v Deutsche Bank AG*.

[234] Case C-175/09, *Commissioners for Her Majesty's Revenue and Customs v AXA UK PLC*.

[235] Case C-445/05, *Werner Haderer v Finanzamt Wilmersdorf*, para 18, Case 284/03 *Temco Europe*, paragraph 17, and also, in relation to university education, *Commission v Germany,* paragraph 47.

[236] Case C-124/96 *Commission v Spain*, paragraphs 11 and 12, and Case C-76/99 *Commission v France*, cited above, paragraph 26, Case C-287/00, *Commission of the European Communities v Federal Republic of Germany.*

[237] See Angela Piri, Stefania Gianoncelli, *La disciplina delle esenzioni IVA*, in *Lo stato della fiscalità in Europa*, page 12.

cles 132 - 134 VAT Directive discipline the exemptions for certain activities in the public interest, Articles 135 -137 VAT Directive discipline other exemptions.

- Article 132 VAT Directive: exemptions for certain activities in the public interest

  The main issue concerning these exemptions is that, although the formulation of the exemption is structured in such a way to exempt certain activities, it also takes into consideration which economic operators are allowed to make these supplies. Accordingly, there could be some problems concerning the application *ratione personae* of the rule. This has relevant consequences in terms of the approach that the interpreter should follow in dealing with the exemptions: in the case of the exemptions which fall within Article 132 VAT Directive, the interpreter can pose limits both in relation to the taxable object and subject, while, in the case of exemptions which fall within Article 135 VAT Directive, the interpreter cannot put into discussion the subjective conditions set by Member States.

  As to Article 132 VAT Directive, the Court specified that:

  - the words *public postal services* in Article 132 (1) (a) VAT Directive should be interpreted in such a way to exempt only the management bodies of those performing postal services;[238]

  - the words *bodies* and *institutions,* used in more than one part of Article 132, is aimed at underlying that the addresses of these provisions are only legal persons;[239]

  Other problems were related to the object of these type of exemptions:

  - the word *closely related activities* used in reference to those activities which are closely related to hospital and medical care[240] means that these activities *must be regarded as ancillary to a principal service they do not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied*.[241] Accordingly, not all the activities carried out in the context of the exercise of health professions are exempted but only those which have a therapeutical purpose.

  - Article 133 VAT Directive provides for additional conditions which Member States are free to decide to impose or not when implementing Article 132 VAT Directive. The Court specified that these conditions cannot modify the scope of the provision.[242] The author has already expressed the view that also these are EU concepts.

- Article 135 VAT Directive: other exemptions

  Most of the interpretative problems related to this type of exemptions concern the interpretation of the core elements of the concepts used.

  - in the case of the exemption concerning *insurance and reinsurance transactions,*[243] the definition was

[238] Case C-107/84, *Commission v Germany.*

[239] Case C-453/93, *Bulthuis-Griffioen c. Inspecteur der Omzetbelasting*.

[240] Article 132 (1) (b) VAT Directive.

[241] Case C-76/99, *Commission of the European Communities v French Republic*.

[242] Case C-124/96, *Commission v Kingdom of Spain*.

[243] Article 135 (1) (a).

provided by the CJEU starting from the fact that the main feature of such transactions is that the insurer, on the condition of the payment of a insurance premium, supplies to the insured the service accorded at the moment of the conclusion of the contract, when the risk covered takes place. It is not indispensable that the supply which the insurer offers consists in an amount of money, since also an assistance activity is enough. Also the activities performed by a subject who is not an insurer but makes use of the facilities of a third party is covered by the exemption;[244]

- the notion of *leasing or letting of immovable property* in Article 135 (1) (l) must be interpreted as involving *the landlord of property assigning to the tenant, in return for rent and for an agreed period, the right to occupy his property and to exclude other persons from it;*[245]

- *management of special investment funds as defined by Member States:*[246] the exemption concerning the management of investment funds is problematic in that it leaves the definition of the investment funds to the discretion of the implementing jurisdictions. In *JP Morgan*[247] the CJEU specified that, although States are in principle free to determine the coverage of the concept of *special investment funds,* such freedom has to be exercised in accordance with the objective of the provision, i.e. *to facilitate investment in securities for investors through investment undertakings, while guaranteeing the principle of fiscal neutrality from the point of view of the levying of VAT on the management of special investment funds which are in competition with other special investment funds such as funds falling within the scope of the UCITS Directive.*[248] Additionally, the fact that the provision leaves some discretion to the Member States in the definition of the investment funds does not mean that the provision does not have direct effect.

- *supplies of goods used solely for an activity exempted under Articles 132, 135, 371, 375, 376 and 377, Article 378(2), Article 379(2) and Articles 380 to 390b, if those goods have not given rise to deductibility and the supply of goods on the acquisition or application of which VAT was not deductible, pursuant to Article 176*:**[249]** in this situation the Court specified that *even if the amount of VAT due in the event of double taxation would in fact be insignificant, that cannot absolve Italy from properly implementing Article 13B(c) of the Sixth Directive whose very purpose is to avoid double taxation contrary to the principle of fiscal neutrality inherent in the common system of value added tax*.[250]

- the issue concerning *financial transactions* under Article 135 (b) to (g) is more because of the growing importance of this sector and because of the close interrelation with free movement of capitals. The Court emphasized the objective nature of the exemption and that the application of such an exemption cannot be

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[244] Case C-349/96, *Card Protection Plan Ltd (CPP) v Commissioners of Customs & Excise*.

[245] Case C-108/99, *Commissioners of Customs & Excise and Cantor Fitzgerald International*.

[246] Article 135 (1) (g) VAT Directive.

[247] Case C-363/05, J*P Morgan Fleming Claverhouse Investment Trust plc, The Association of Investment Trust Companies v The Commissioners of HM Revenue and Customs*.

[248] *Idem*, paragraph 54.

[249] Article 136 VAT Directive.

[250] Case C-45/95, *Commission of the European Communities v Italian Republic*.

made dependent on the subject performing it.[251]

Additionally, it is also unnecessary that the supply is performed by the bank which has contacts with the final client, being also possible that the transaction is carried on by a third party if this is perceived by the client as a service of the bank itself. So, the definition of bank activities provided by the Court is broad and complex and can also cover the supply of a mere technical service, such as the possibility to use a computer system, however, the qualification in such a case depends on the conformation of the responsibility of the computer center with the bank.[252]

- Article 137 VAT Directive: options

Article 137 VAT Directive grants to the taxpayers the possibility to opt for taxation of some of the listed activities which would otherwise be exempted.[253] The CJEU clarified that Article 137 VAT Directive should be interpreted as meaning that, in the case where the State decides to implement this option, the final choice on the exercise of the option itself should be left to the taxpayer and not to the State.[254] The Member States still have a wide discretionary power in this context, in which they are free to decide *whether they should or should not introduce the right of option, depending on what they consider to be expedient in the situation existing in their country at a given time. The freedom to grant or decline to grant the right of option is not restricted in time or by the fact that a contrary decision had been adopted in the past. Member States may therefore, within the sphere of their national powers, also revoke the right of option after having introduced it and return to the basic rule that letting and leasing of immovable property are exempt from tax*.[255]

It is evident from this analysis that it was crucial for the CJEU to qualify the exemptions envisaged by Articles 132 - 137 VAT Directive as independent concepts of European Law, concepts whose content is independent from the discretion of the national legislator during the phase of transposition, for the purpose of preserving the principle of neutrality, presidium of the most effective scheme of taxing consumption.[256]

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[251] In Case C-2/95, *Sparekassernes Datacenter (SDC) contro Skatteministeriet,* point 59.
Points 3 and 5 of Article 13B(d) of the Sixth Directive are to be interpreted as meaning that the exemption is not subject to the condition that the transactions be effected by a cer- tain type of institution, by a certain type of legal person or wholly or partly by certain electronic means or manually.

[252] Angela Piri, Stefania Gianoncelli, *La disciplina delle esenzioni IVA*, in *Lo stato della fiscalità in Europa*, page 11.

[253] *Article 137*
1. Member States may allow taxable persons a right of option for taxation in respect of the following transactions:
(a) the financial transactions referred to in points (b) to (g) of Article 135(1);
(b) the supply of a building or of parts thereof, and of the land on which the building stands, other than the supply referred to in point (a) of Article 12(1);
(c) the supply of land which has not been built on other than the supply of building land referred to in point (b) of Article 12(1);
(d) the leasing or letting of immovable property.
2. Member States shall lay down the detailed rules governing exercise of the option under paragraph 1.
Member States may restrict the scope of that right of option.

[254] Case C-8/81, *Ursula Becker v Finanzamt Muenster-Innenstadt*, paragraph 38.

[255] Case C-381/97, *Belgocodex SA v Belgian State*.

[256] Adriano Di Pietro, *Detrazione e Neutralità*, in *L'imposta sul valore aggiunto,* Aspetti economici e giuridici, Atti del convegno Assonime-LUISS del 21 e 22 Settembre 2009, Giur. Impr. Volume LXXXII - 2009, page 116.

4. The Consequences of The Development of The EU Legal Concepts

4.1. Introduction

The development of EU concepts has had consequences which can be analyzed from two perspectives: in the previous chapters the author has focused on the development of EU concepts from the perspective of the European Union paying particular attention to the reasons and difficulties related to their development. This development has undoubtedly had consequences also for the Member States which had to deal with concepts which were born and developed to comply with the needs of a different system; this resulted in complexities at the moment of transposition and application.

The first concern is related to the identification of EU concepts by States: since, as mentioned at the beginning, the approach adopted in practice was not to attribute a unique and peculiar meaning to each and every concept within European legislation but, instead, their development and the clarification of their meaning were often left to the CJEU, how should the legislator identify these concepts and provide a definition for them, when the CJEU has not intervened yet?

The national legislator, in transposing European legislation, can consider two ways, it can either follow faithfully the phrasing of the European legislation or it can make use of national categories.

One of the main concerns, in the second case, is tracing the threshold until which national Courts can remediate to imperfect implementation through consistent interpretation and when, on the contrary, it is necessary to set aside the national provision.

However, the existence of independent concepts of European law is not only relevant for the legislative bodies, judicial bodies and tax administration of the Member States but also for the taxpayers, since the doubts related to the identification and application of the concepts have serious consequences on their position, in terms of legal certainty.

4.2. The Consequences for The Member States

4.2.1. The General Consequences

The first consequence of the introduction of EU legal concept has already been mentioned several times: national interpreters had to adapt the national categories and concepts to the European ones, to develop new categories and to deal with the ambiguities which such a phenomenon had. Even if the interpretation according to autonomous notions was already known at national level in all those situations where a notion which belonged to one field of law referred to the definition provided by another field of law,[257] the issue, in the case of the interaction between European and national law, is rather different since it entails a

[257] Barbara Pozzo, Marina Timoteo, *Europa e Linguaggi Giuridici*, Le lingue del diritto, 2008.

comparison and an integration between different systems, as a consequence, legal interpreters of one country are less familiar with them and have to face more challenging issues.[258]

Furthermore, these concepts serve purposes which are different from national ones, this is particularly relevant in the tax field, where the tax itself is not perceived in its financing and re-distributive dimension but rather in the view of facilitating trade and the free movements within the Internal Market.[259]

One of the most striking differences is that European concepts are much more general than national ones; this is due to the fact that, in developing them, the European organs had to take into account the conciliation of different legal traditions[260] Secondly, these definitions usually coincide with the economic core of each legal concept, in fact there is a tendency to adapt legal definitions to the economic situation of reference.[261] This is due to the fact that, on the one hand, looking at the economic substance allows to overcome the divergencies in national categorization and, on the other hand, such approach is more in line with the purpose of the creation of the Internal Market. For example, in the field of VAT, the interpreter, had frequently relied on the concept of *market* which is not typical of the legal tradition but rather of the economic one.[262] In this context, economic considerations become crucial every time the right of deduction is at stake.

Therefore, although EU law is a supranational and autonomous legal system,[263] distinct from the national ones, it interacts and permeates to a great extent the national systems of the Member States; this interaction resulted also in an exchange of notions and concepts between the European jurisdiction and national jurisdictions. From a national perspective, this entails the introduction of new categories and concepts which differ from national ones.

4.2.2. The Consequences for The Legislator

Since VAT is mainly disciplined by Directives, the national legislator is the first, in chronological order, who has to deal with the transposition of EU concepts in national legislation. Admittedly, Directives differ from Regulations in that they are not legally binding, hence, they require to be transposed by national legislators.

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[258] Katalin Gombos, *EU Law Viewed Through the Eyes of a National Judge,* Brussels, 2014, in Quality of Legislation Seminar "EU Legislative Drafting: Views from those applying EU law in the Member States", page 5.

[259] Adriano Di Pietro e Thomas Tassani (a cura di), *I Principi Europei del Diritto Tributario,* Il diritto tributario d'Europa, 2014, page XVI.

[260] Katalin Gombos, *EU Law Viewed Through the Eyes of a National Judge,* Brussels, 2014, in Quality of Legislation Seminar "EU Legislative Drafting: Views from those applying EU law in the Member States", page 9.

[261] The author has highlighted this aspect especially in the course of Chapter 3.3.2.2. (in dealing with the issue of lease contacts and transfer of ownership).

[262] The idea of the market is crucial both for the purposes of qualifying the illegal transactions as economic activities and for the purposes of Article 13 VAT Directive (the special regime applicable to public bodies). For a more detailed analysis concerning the influence of certain economic considerations in the field of VAT, in particular in relation to the principle of neutrality see Andrea Mondini, *Il Principio di Neutralità nell'IVA, tra "Mito" e (Perfettibile) Realtà*, in Adriano Di Pietro e Thomas Tassani (a cura di), *I Principi Europei del Diritto Tributario,* Il diritto tributario d'Europa, 2014, page 275 ss.

[263] Opinion 1/91 Re a Draft Treaty on European Economic Area (ECR I-6079).

National legislators can take two approaches in transposing a Directive: either remaining extremely faithful to the original version, almost copy-pasting the text of the Directive, or making use of national notions. For example, in transposing the notion of *economic activity,* the Luxembourg legislator mentions the notion of *economic activity*[264] and transposes almost word-by-word the definition of Article 4 (2) VAT Directive. The same happens in France.[265] This approach was followed by the majority of European countries which made use of the notion of *economic activity* and referred to concepts characterized by a certain degree of autonomy from the other fields of law, in order to respect the features of the tax, which are more economic than legal.[266]

On the contrary, other countries, such as Italy, used of the concept of *entrepreneur* ("impresa") and *self-employment* ("lavoro autonomo"). These two concepts belong to the Italian civil law tradition and the same definition of *entrepreneur*[267] makes reference to Articles 2135 and 2195 Civil Code. Also Spain employed the concepts of *entrepreneur* ("empresario") and *self-employed* ("profesionales").[268] The same happened in The Netherlands where the legislator referred to the concept of *entrepreneur* ("ondernemer") and *enterprise* ("onderneming");[269] the entrepreneur is defined as anybody ("ieder") who independently exercises a business activity ("bedrijf"). The meaning of business activity is any profession which entails the exploitation of a patrimonial element in view of obtaining income on a continuous basis. Hence, even though the concept of *entrepreneur* is used, the meaning is rather economic.[270]

The advantage of the first approach is that it is more respectful of European law, while, under the second approach, it is easier for the national interpreter to connect each category with the related rights and obligations. However, this approach does not only create problem of coordination with the European discipline but also with other fields of national law. For example, in the Italian case, the notion of entrepreneur is much broader for tax purposes than for civil law purposes. This could create likelihood of confusion for the interpreter.

Nonetheless, even a faithful transposition does not eliminate all the difficulties related to the implementation of European categories within national law: although such an approach solves the problems related to the *identification* of EU concepts, there is still place for an imprecise or erroneous *interpretation* and *application*. This possibility is particularly plausible when European legislation does not provide a definition of the concepts that it uses. For example, remaining in the bounds of the *economic activity*, before *Romple-*

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264 Article 4.1. L.lux. TVA.

265 Article 256A Code général des impôts (CGI).

266 Marc Bourgeois, *I Soggetti Passivi: la Nozione di Attività Economica e i Diversi Tipi di Attività Economica e Commerciale*, in *Lo Stato della Fiscalità in Europa*, page 3.

267 Article 4 d.P.R. 633/1972.

268 Article 4 l.n. 37/1992.

269 Article 7 (1) de wet op de omzetbelasting 1968.

270 It is worth to mention that, in the case of The Netherlands, the use of national concepts in the transposition of Directives has diminished and nowadays most of Directives are implemented through "copy-pasting" European legislation.

mann[271]*, Mol*[272] or *Happy Family*[273]*,* it would have been at least not obvious, for national interpreters, whether or not to include preparatory acts and illegal activities within the scope of Article 9 VAT Directive. According to the author, the European legislator, in enacting Directives, should give guidance on the meaning to attribute to the words used by the Directives. Such guidance should be provided in advance and not *ex post* (through the case-law of the CJEU), so to respect the principles of legal certainty and legitimate expectations. Explanatory provisions could be the right tool in this respect.

4.2.3. The Consequences for The Judiciary

If the European legislator does not provide any guidance on the identification and definition of the EU concepts and the national legislator confines itself to a mere copy-pasting of European legislation or makes recourse to (maybe imprecise) national categorizations, the problem of granting the compatibility between the national system and the European one is shifted to the judiciary.

In fact, the difficulties related to the transposition of European law into national law entail the risk that the legislative bodies operate a wrong or imprecise transposition of European legislation.[274] In such a circumstance, the CJEU has been stable in repeating that national interpreters have to *make use of all their hermeneutical resources in order to grant the pursuance of the objectives of the European system*.[275] Accordingly, the transposition of European Law into national law becomes a two steps activity: firstly, the intervention of the national legislator which is limited in time since it consists in the moment of transposition, later, the judiciary has a continuous obligation to adapt national law to European one through the instrument of interpretation.[276]

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[271] Case C-268/83, *D. A. Rompelman and E. A. Rompelman-Van Deelen, Amsterdam, and Minister van Financiën [Minister for Finance].*

[272] Case C-269/86, *Mol v Inspecteur der Invoerrechten en Accijnze*.

[273] Case C-289/86, *Vereniging Happy Family Rustenburgerstraat v Inspecteur der Omzetbelasting*.

[274] It is worth to specify that this paragraph, as well as the previous one, analyzes the issue taking into account the situation where VAT legislation is implemented through Directives. In the case of Regulations, all the difficulties related to transposition do not exist since Regulations can be considered as European law in themselves, without any need to transpose them into national legislation.

[275] See, among the others, Case C-106/89, *Marleasing and La Comercial Internacional de Alimentación SA*, paragraph 8, which states that *in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty;* or,
Case C-321/05, *Kofoed,* paragraph 45, which states that *all authorities of a Member State, in applying national law, are required to interpret it as far as possible in the light of the wording and purpose of the Community directives in order to achieve the result pursued by those directives. Moreover, although it is true that the requirement of a directive- compliant interpretation cannot reach the point where a directive, by itself and without national implementing legislation, may create obligations for individuals or determine or aggravate the liability in criminal law of persons who act in contravention of its provisions, a Member State may nevertheless, in principle, impose a directive-compliant interpretation of national law on individuals.*

[276] Carla Acocella, *Interpretazione Conforme al Diritto Comunitario ed Efficienza Economica: il principio di concorrenza*, in Marilisa D'Amico e Barbara Randazzo, *Interpretazione Conforme e Tecniche Argomentative*, Atti del convegno di Milano svoltosi il 6-7 Giugno 2008, page 96 ss.

The rationale underlying the statements of the CJEU in *Marleasing* and *Kofoed*[277] seems to be the assumption that the interaction between national systems and the European one should not be a conflictual interaction but should be operated with the aim of conciliating and integrating the two systems. In fact, even if, in the perspective of some national courts,[278] the obligation to provide a consistent interpretation stems from the principle of primacy of European law, in the perspective of the CJEU it derives from Article 4 (3) TUE which encompasses the duty of sincere cooperation: every body of the State has to grant the application of European law, even in the absence or incorrect transposition by the legislature.[279]

When dealing with consistent interpretation of European tax law, it is necessary to bear in mind that one of the specificities of this field concern the parameter in respect of which to operate it: even if, in principle, this parameter is constituted by all the sources of European law, notwithstanding whether they are transposed into primary or secondary legislation, depending on the different level of integration in the different areas of tax law, the degree of compliance which is requested changes. In fact, while in the field of direct taxation it is enough to respect the principle of non discrimination, in the case of indirect taxation it is necessary to take into account all the relevant and characterizing aspects of a certain tax: the conditions for its application, the territorial scope, the tax base, the exemptions etc. Additionally, also the setting of the procedural rules, although not being precisely disciplined at the European level, has to respect some fundamental principles, such as the principles of equality and effectiveness.[280]

While, moving to the rules which have to undergo such a test, it is worth to specify that these are not only the rules which are direct transposition of European law but also those which in any way can influence it, independently from whether they have legal effects or not. In *Centrosteel*[281] the CJEU advised the application of consistent interpretation also to settled case-law while, in *Commission v. Italy,*[282] the Court, instead of relying on the specific wording of Italian legislation - which provided that the refund of taxes which were incompatible with European law had to be granted on the condition that the burden of the tax was not transferred onto other subjects - relied on the rule as interpreted by the public administration.[283]

The duty of consistent interpretation undergoes some limits: in fact, even if the national interpreter has to use any hermeneutical means in order to ensure compliance with European rules, it cannot arrive to

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[277] *Supra*, note 21.

[278] For example see Granital, decision of the Italian Supreme Court.

[279] Giangiacomo D'Angelo, *Integrazione Europea e interpretazione del diritto tributario*, Padova, 2014, page 48 ss.

[280] Giangiacomo D'Angelo, *Integrazione Europea e interpretazione del diritto tributario*, Padova, 2014, page 56.

[281] Case C-456/98, *Centrosteel Srl v Adipol Gmbh*, paragraph 17, in which is stated that *the national court, in applying provisions of domestic law or settled domestic case- law, as seems to be the case in the main proceedings, must therefore interpret that law in such a way that it is applied in conformity with the aims of the Directive*.

[282] Case C-129/00, *Commission of the European Communities v Italy.*

[283] Italian legislation interpreted the rule as meaning that it created a presumption that the tax was not shifted.

the point of providing an interpretation which is *contra legem*.[284] In this scenario the interpreter has to set aside the rule.

All this has consequences in respect of the issue of the EU concepts. First of all, it means that, in interpreting the transposition of European concepts, the national interpreter has to provide a meaning which is line with the European significance; this entails a deep knowledge and understanding of European rules. However, in practice, it is quite hard for national interpreters to have access to all the relevant information at the European level and to act in accordance with the decisions of the CJEU, which are often the result of a case-by-case approach, instead of a systematic understanding of the overall legal system. Additionally, there could be problems in determining whether to opt for reconciliatory interpretation or whether to set aside the rules.

Another complex issue concerns the doctrine of *acte clair* and *acte éclairé*. According to this doctrine, whose formulation dates back to CILFIT,[285] in accordance with article 267 TFEU, a national court against whose judgment there is no higher appeal must refer a question to the CJEU when a question on the interpretation of European law arises, unless the answer is *so obvious as to leave no scope for any reasonable doubt (acte clair)*. However, this general obligation suffers an exception when the provision has already been interpreted by the CJEU or the CJEU has already ruled on an identical question (*acte éclairé*). The *acte clair* doctrine can be analyzed in the broader framework of those landmark decisions of the CJEU which aim at creating a full system of legal remedies in the EU and to protect legal unity.[286]

It could be wondered when the concepts used by the Directives are *so obvious as to leave no space for any reasonable doubt*. According to the author, since few concepts are defined by the legislation itself, following strictly the statement of the CJEU would mean that many preliminary rulings would be raised, creating an unaffordable burden for the Court. This is one more reason to make use of explanatory provisions which clarify the meaning of the rules in advance.

4.2.3. The Consequences For The Tax Administration

The tax administration has to apply the rules, either of national origin, either of European origin, to concrete situations.[287] In fact, the European Union is not a tax authority, so, the management, application and collection of taxes is left to national tax authorities. By virtue of the duty of faithful cooperation, the tax authorities have the duty to fully implement European law. Thus, as the judiciary, they have the duty to operate the consistent interpretation and, in case of failure of the latter, to set aside national rules.

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[284] Case C-80/86, *Kolpinghuis Nijmegen*.

[285] Case C-283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*.

[286] Van Gend en Loos, Costa v Enel, Simmenthal, Ratti etc.

[287] Lorenzo Del Federico, *Tutela del Contribuente ed Integrazione Giuridica Europea. Contributo Allo Studio Della Prospettiva Italiana*, Collana L'ordinamento tributario italiano, 2010, page 121.

Nonetheless, in the opinion of the author, the tax authorities, when faced with ambiguities in the meaning of European legislation, will tend to make use of national categories. This is obviously likely to endanger the primacy and uniform application of European law. Moreover, there is the risk that different tax authorities adopt different solutions to deal with similar situations, with risks of serious harm to legal certainty and legitimate expectations. Again, the suggestion of the author is to provide detailed Guidelines to the tax authorities, concerning the application of European rules, so to avoid the risk of divergent application of the rules - with the resulting legal uncertainty burdening the taxpayer - and the start of an infringement procedure by the Commission.

4.3. The Consequences For The Taxpayer

When dealing with the consequences for the taxpayer, we firstly have to mention the marginality that the protection of the taxpayer has in the European system[288] and the role that the CJEU has had in *using as much as possible the tools provided by the Treaties in order to grant a timely protection of the rights which are influenced or created by European law, especially when these are individual rights, in doing this it acted independently from any alignment with national law, on the contrary, it sometimes indicated explicitly the proper tools to grant such a protection when they were not contemplated by the national systems.*[289]

The peculiarity of the protection of the taxpayer in the European context lies in the fact that, even in the case of those taxes which constitute own resources of the European Union, the taxpayer has always to deal with national tax administrations to whom the application and collection of taxes is left, as a consequence, the protection of its rights does not take place in accordance with European procedures but rather through the infringement procedure under Article 258 TFEU and the preliminary reference procedure under Article 267 TFEU.[290] What the author means is that the taxpayer has not the possibility to invoke its rights directly in front of the CJEU; the need to protect the taxpayer arises every time the taxpayer has to pay taxes which are levied by a Member State in violation of European law, as a consequence, the protection of the rights of the taxpayer at the same time ensures the reaffirmation of European law which has been violated (in the case of Article 258 TFEU) or could be violated (in the care of Article 267 TFEU) by the State. Even if both Articles 258 TFEU and 267 TFEU are not typically designed for the protection of the taxpayer, in practice, they indirectly attain this objective.

Since the majority of European law is enacted through Directives whose addressees are Member States and violations are mostly due to an erroneous transposition from the side of the national legislators or to an erroneous application by the national authorities, the value of the infringement procedure does not have to be underestimated. This procedure, which sees the Commission, with its role of "guardian of the treaties", as a

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[288] *Idem*, page 112.

[289] Giuseppe Tesauro, *Diritto Comunitario*, 2005, pp. 228-229.

[290] Lorenzo Del Federico, *Tutela del Contribuente ed Integrazione Giuridica Europea. Contributo Allo Studio Della Prospettiva Italiana*, Collana L'ordinamento tributario italiano, 2010, page 112.

protagonist, culminates in a decision adopted by the CJEU which is composed of two parts: a legislative part which is the one providing for the interpretation of European law with *erga omnes* effects and another part - the operative part - which consists, in the case the CJEU ascertained the existence of an infringement, in the obligation towards the Member State to comply with the statement of the Court. The infringement procedure presents many problematic issues: firstly, the leading role is left to the Commission while private parties only have a limited function; in fact, even though the initiative of the Court is often solicited by privates, associations etc., they have no role within the procedure and the final decision to initiate the procedure or not is left to the Commission.[291] Additionally, the infringement procedures are often concluded during the pre-litigation phase, since Member States prefer to adequate to the opinions of the Commission in order to avoid the adoption of an infringement decision which could be used by private individuals to ask for a compensation for damages. Thirdly, there are difficulties concerning the scope of the obligation to comply with the statement of the Court, the impossibility for the Court to directly enforce its decision and the liability of States.[292] In fact, the choice of the instruments to ensure compliance with the decision of the Court is finally left to the national judges which find a limit to their freedom in the duty to choose *without prejudice to the pursuance of the objective*; nonetheless, it is possible to notice a tendency of the Court to suggest the instruments which are more adequate, notwithstanding those which exist within national jurisdictions.[293]

The other instrument to grant protection to the rights of taxpayers is the preliminary reference procedure, this instrument has been object of a detailed discussion previously, but it is worth to stress the fact that the effect of a preliminary ruling is not an evaluation of the legitimacy of the act but simply a clarification over its interpretation. However, the Court often extends the scope of its decisions, also indicating to the judge the incompatibility of the internal rules.

According to the author, both these instruments are not adequate for the protection of the taxpayer, in the first place, because of the reasons mentioned above, secondly, because they are *ex post* remedies. In fact, especially when the violation of the rights of the taxpayer derives from difficulties in matching the European aims and notions with the national ones, the problem should be tackled in advance, at the moment of the enactment of the rules. Only such an approach would finally grant legal certainty for the taxpayer; additionally, it would be also more fair in respect to interpreters whose mistakes are most of the times due to difficulties in adapting to a new legal systems rather than to volunteer violations.

Another instrument to grant protection of the taxpayers' rights is the doctrine of direct effect, however, the interaction between it and the issue at stake is likely to raise problems: the doctrine of direct effect, enshrined in *Van Gend en Loos*[294], provides that individuals can invoke the provisions of a Directive, which

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[291] *Idem,* page 128.

[292] *Idem*, page 129.

[293] *Idem*, page 126.

[294] Case C-26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen.*

was not implemented into domestic law yet, in front of national courts provided that the provisions invoked are sufficiently clear and precise, unconditional on any other legal provision and they provide specific rights on which individuals can base their claims. If the requirements are met, the provisions of the Directive will have the same effects of those of regulations. In order for a provisions to be considered unconditional it is necessary that it *sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the institutions of the European Union or by the Member States*.[295] The existence of these conditions has created problems in relation to all those provisions of the VAT directive which rely on the existence of some requirements for their application, such as Article 11 VAT Directive. In its decision *Larentia + Minerva,*[296] the CJEU stated that, since in order to apply the rules on VAT Grouping it is necessary to meet the requirements concerning the existence of close financial, economic and organisational links, whose significance has to be specified at national level, the rule cannot be considered unconditional. Accordingly, in the event such provision was incompatible with European law and could not be interpreted compatibly, individuals could not invoke the doctrine of direct effect.

However, a complete opposite line of reasoning was followed in another case: *JP Morgan,*[297] concerning the old Article 13 (B) (d) (6) Sixth Directive which provided for an exemption for *management of special investment funds as defined by Member States*. The CJEU, after having specified that the degree of discretion left to Member States cannot be considered such as to allow it to exclude the management of special closed investment funds which allow investors to invest in securities and are in competition with funds which are exempt, faced the issue of the direct effect of Article 13 VAT Directive. It clarified that the mere fact that Article 13 VAT Directive leaves some discretion to Member States does not mean that individuals cannot rely on it when the Member States exceed the boundaries of their discretion.

This line of reasoning can be found also in prior decisions of the CJEU, such as *Linneweber and Akritidis*[298], where the same Article was tested in respect of gaming machines activities and the CJEU asserted that the discretion left to countries by certain provisions cannot be used to deny the rights of individuals related to an erroneous implementation since such an interpretation would *deprive of any significance Art. 189 para. 3 EEC Treaty disciplining the effects of Directives*.[299] The same is true in the case where the Member State has not provided a wrong implementation of the Directive but simply has not implemented a measures, in fact, in such a situation, the Directive itself requires a duty of action and the effectiveness of the rule itself requires individuals to be able to rely on it in the course of a proceeding in front of a national court.[300]

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[295] Case C-589/12, *Commissioners for Her Majesty's Revenue and Customs v GMAC UK plc*.

[296] Joined Cases C-108/14 and C-109/14, *Beteiligungsgesellschaft Larentia + Minerva mbH & Co. KG v Finanzamt Nordenham*, and *Finanzamt Hamburg-Mitte v Marenave Schiffahrts AG*.

[297] Case C-363/05, J*P Morgan Fleming Claverhouse Investment Trust plc, The Association of Investment Trust Companies v The Commissioners of HM Revenue and Customs*.

[298] Joined Cases C-453/02 and C-462/02, *Finanzamt Gladbeck Edith Linneweber and Finanzamt Herne-West Savvas Akritidis*.

[299] *Ibidem*.

[300] Case C-8/81, *Ursula Becker v Finanzamt Münster-Innenstadt*.

According to the author, the different outcomes are due to political reasons, in fact while old Article 13 VAT Directive was a binding provision, Article 11 VAT Directive is an optional provision, additionally its application touches very sensitive issues, as a consequence, even if probably there is not much difference in the degree of discretion which is left to national jurisdictions in the implementation under Article 13 VAT Directive and Article 11 VAT Directive, the CJEU has reached different conclusions.

5. Conclusions

The European Union is an autonomous *sui generis*[301] supranational legal system,[302] different from the legal systems of the Member States. In order to exercise the powers conferred by the latter ones, the European Union has its own legislative, executive and judicial bodies, as well as its founding treaties. Furthermore, it developed *its own growing body of legal terms and concepts*.[303]

The latter ones are crucial in pursuing harmonization, as one of the main sources of richness and, at the same time, complexities of the European Union is the coexistence of twenty-eight legal traditions with which European law interacts and which are, to a large extent, permeated thereby.[304] Indeed, the presence of different legal cultures could cause divergencies at the moment of transposition and interpretation of European legislation within national jurisdictions, hampering the uniform application of law. According to the author, the fulfillment of a truly uniform application of European law requires each and every concept of European legislation to have its own significance, independent from the meaning or the corresponding notions (if they exist) under national law. However, the European institutions did not create a set of "European legal notions" and definitions on which national legislators and interpreters could rely for the implementation and application of European law. It was mainly the CJEU to *ex post* provide guidance on the meaning of European law. Accordingly, it qualified certain notions of the Regulations and Directives as independent concepts of European law: notions whose meaning is determined at the European level, without leaving any discretion to the Member States.

In the field of taxation, the development of independent concepts of European law is particularly fruitful in the context of indirect taxation and especially of VAT; according to the author, the reason is that, being this field harmonized, the CJEU is more likely to limit the discretion of the Member States.

In analyzing the EU concepts in the field of VAT two key considerations must be borne in mind. The first is that, while Member States perceive taxes as tools to finance public expenditures, the European Union perceives taxes mainly as an obstacle to the creation of the Internal Market, to a truly free competition and to the full development of economic forces.[305] Accordingly, the meaning of the EU concepts is provided paying particular attention to the economic core of the underlying situation. This is evident, for example, in the case of the definition of *transfer of ownership,* for the purposes of Article 14 VAT Directive. The second key con-

[301] Uwe Leonardy, *The political dimension; German practice and the European perspective*, In Joachim Jens Hesse-Vincent Wright (eds.), *Federalising Europe? The Costs, Benefits, and Preconditions of Federal Political Systems*, Oxford University Press, Oxford-New York, 1996. pp. 86-87.

[302] In *Van Gend en Loos* the Court emphasized this difference stated that the European Union *constitutes a new legal order.., the subjects of which comprise not only Member States but also their nationals.*

[303] Katalin Gombos, *EU Law Viewed Through the Eyes of a National Judge,* Brussels, 2014, in Quality of Legislation Seminar "EU Legislative Drafting: Views from those applying EU law in the Member States", page 1.

[304] *Ibidem.*

[305] Ben Terra, Peter Wattel, *European Tax Law,* Kluwer, Deventer, 2012, page 8-9.

sideration is that the development of EU concepts is strictly intertwined with the core features of the tax: neutrality[306] and the general character of the VAT.[307]

The largest number of EU concepts can be found in the context of exemptions; the reason, according to the author, is that the exemptions constitute an explicit exception to the general scheme of the tax and a direct derogation from the principle of neutrality. Thus, the exigence to restrict their scope and to apply them uniformly within the European Union is more urgent. The qualification as EU concepts of the terms *goods*, *transfer of ownership* or *leasing contracts* are suitable examples to emphasize the role of the independent concepts of European law in overcoming the divergent applications that would arise if every country interpreted these notions according to its national law. In fact, especially in the framework of contract law, it is possible to notice great divergencies between national jurisdictions.

On the contrary, the notion of *economic activity,* which is the core of Article 9 VAT Directive, has never been explicitly labeled as a EU concept, even though the CJEU intervened several times to specify its meaning. Remaining within the context of the taxable person, the dubious qualification of the VAT Grouping as an EU concept appears as an opportunity to discuss whether the optional nature of VAT provisions prevents the qualification as independent notion of European law. The fact that the VAT Grouping regime is inspired by the German regime of the *Orgaschaft* proves that the influence between the European system and national systems is reciprocal: the concepts used by European law are frequently inspired by national traditions.[308]

The issue takes on special features in relation to the place of supply. Even though the centrality of the place of supply rules in the allocation of taxing rights between national jurisdictions suggests that fundamental terms such as *the place where the goods are located at the time when the supply takes place*[309] or *the place where transport begins*[310] should be labeled as EU concepts, their determination is a rather factual issue, accordingly, it is not necessary to qualify them as such. On the other hand, the meaning of *fixed establishment* is provided both by the case-law and by the VAT Regulation. According to the author, the critical issue of whether to use this concept for the purposes of direct taxation should be answered negatively due to the different purposes, features and levels of harmonization of these two fields of tax law.

The development of EU concepts cannot be analyzed only from the European perspective. National legislators, in transposing European legislation, can decide either to make use of national categories, with which the interpreters are already familiar, either to follow the phrasing of European legislation word-by-word. Whereas in the first case, the risk of an erroneous transposition is plausible, even the second option is not completely danger-free, since it is still possible to operate an imprecise interpretation of European law. According to the author, these risks would diminish substantially if the European legislator provided guidan-

[306] This is evident in the case of the EU concepts related to the exemptions.

[307] This is evident in the case of the EU concepts related to the taxable transaction.

[308] Katalin Gombos, *EU Law Viewed Through the Eyes of a National Judge,* Brussels, 2014, in Quality of Legislation Seminar "EU Legislative Drafting: Views from those applying EU law in the Member States", page 1.

[309] Article 31 VAT Directive.

[310] Article 32 VAT Directive.

ce on the meaning and interpretation of European law through explanatory provisions. The latter ones would be useful also for the tax administration and judiciary in the application and interpretation of law, especially when considering that language barriers, costs, lack of time, difficulty for national authorities to know and apply properly European law could cause legal uncertainty. This circumstance is particularly worrying in the case of the taxpayer who cannot invoke the violation of his rights directly in front of the European institutions.

Hence, the suggestion of the author is to clarify, at European level, both the identification criteria and the definition of the concepts used by Directives and Regulations. In the light of the principle of legal certainty, such clarification should not happen *ex post*, through the intervention of the CJEU, but rather *ex ante,* simultaneously with the enactment of European legislation.

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