MANUAL FRANCIS LEFEBVRE

ECJ case-law on VAT

Disponible en nuestra plataforma Strada International Tax (SIT)
Available on our platform Strada International Tax (SIT)

Update on 24th January 2019

Esta obra es el resultado
de un estudio técnico cedido
a **Francis Lefebvre** por

Javier Sánchez Gallardo
Economist

Amparo Sanchis Sierra
Lawyer

This work is the result of the strictly personal reflections of the authors on EU regulations and case-law in relation to VAT.
The comments made therein constitute the personal opinion of the authors, derived from the study of the EU provisions related to VAT and the corresponding case-law; consequently, they should not be considered as official opinions of any administrative body or professional firm or organization.
Therefore, neither the authors nor the publisher will accept responsibility for the consequences caused to the persons or entities that act or fail to act as a result of the opinions, interpretations or information contained in this work.

© Francis Lefebvre
Lefebvre-El Derecho, S. A.
Monasterios de Suso y Yuso, 34. 28049 Madrid. Teléfono: (91) 210 80 00. Fax: (91) 210 80 01
www.efl.es
Precio: 131,04 € (IVA incluido)

ISBN: 978-84-17544-91-1
Depósito legal: M-10180-2019

Impreso en España
por Printing'94
C/ Orense, 4 (2ª planta) – 28020 Madrid

Cualquier forma de reproducción, distribución, comunicación pública o transformación de esta obra solo puede ser realizada con la autorización de sus titulares, salvo excepción prevista por la ley. Diríjase a CEDRO (Centro Español de Derechos Reprográficos, www.cedro.org) si necesita fotocopiar o escanear algún fragmento de esta obra.

General Plan

No.

Part I. General issues

Chapter 1. Introduction 10
Chapter 2. General aspects........ 300

Part II. Case-law related to Dir 2006/112

Title I. Subject matter and scope 1900
Title II. Territorial scope 2050
Title III. Taxable person........ 2100
Title IV. Taxable event 2700
Title V. Place of supply of the transactions........ 3400
Title VI. Chargeable event and chargeability of VAT 4000
Title VII. Taxable base 5100
Title VIII. Tax rates 5700
Title IX. Exemptions 6050
Title X. Deductions 7500
Title XI. Obligations of taxable persons and non-taxable persons........ 8800
Title XII. Special schemes 9800
Title XIII. Derogations 10400
Title XIV. Miscellaneous Provisions 10600
Title XV. Final provisions 10770

Annexes 11000

Table of contents of this book, including articles of the Dir 2006/112, and related case-law 11050
Table of chronological index of judgments contained in this book 11150

Page

Table of concepts........ 2627

Principal Abbreviations

art. article
CJEU Court of Justice of the European Union
Dir Directive
ECJ European Court of Justice
EDJ El Derecho Jurisprudencia
EU European Union
Par. Paragraph
VAT Value Added Tax

PART I

General issues

SUMMARY

Chapter 1. Introduction 10
Chapter 2. General aspects 300

CHAPTER 1

Introduction

10

SUMMARY

I. The VAT and the sources of the law 20
II. The VAT and the EU law 25

I. The VAT and the sources of the law

20

As any other tax, VAT is regulated, in the Estates where is regulated, by corresponding pieces of Law, according to the system of sources, soft-law, case-law and the rest of administrative criteria or instructions governing its levying. From this perspective, there is no speciality on this regard.
Nevertheless, it exists a main difference between the VAT and other taxes applying in the Member States: VAT is a harmonized Tax within the EU, with **EU provisions** that regulate it with a great level of detail. There is a large number of ECJ Cases interpreting the application of these provisions. The existence of these legal sources, different from those that might have been traditionally existing as internal sources in the different Member States, supposes the need to take into account elements of judgement different that those to be considered in case that only internal regulations were to apply for the application of this Tax.
The presence of the EU law as an «**additional legal source**» triggers the need to interpret the internal regulations attending to this. This obliges to analyse the internal regulations from a different perspective, not only studying the scope or content of the concepts that compose it according to the internal law but also looking at the sense that these elements can have from an EU law point of view.
This consideration does not mean that the configuration in the internal regulations of the Member States are to be disregarded in relation with the elements that can be relevant for the purposes of applying the VAT but rather to proceed to interpret them based on the EU regulations. Thus, it can be said that, at risk of oversimplification, in order to determine the VAT treatment of any transaction, two **stages** would proceed:
1st In a first instance, and for any transaction or circumstance in which the application of the VAT would result controversial, the **rights and obligations** derived from the operation must be analysed and proceed to its qualification. This analysis or qualification must be done based on the internal regulations that result applicable.

Precisions The fact that the scope of the areas where the EU regulations impact are increasing makes that this first study must also consider the existence of **relevant EU regulations where appropriate**. In any case, this would not be proper VAT regulations but rather sectoral rules or rules corresponding to any other nature that might result relevant.

22

2nd In a second stage, the **VAT treatment applicable** would be determinate. Is in this phase where the EU regulations regarding VAT must be taken into account.
This implication, can be structured, simplifying once again, in two levels or based in two **principles**:
a) In terms of the **interpretation** of the internal rules in the light of the EU regulations. This interpretation guideline results compulsory, as indicated by the ECJ itself in a number of judgments (see no. 176).
b) From the perspective of the **primacy of the EU law** over Member States' domestic law. This question results more controversial and has certain nuances. Ultimately, this primacy should lead to either the derogation of the national regulations by the legislative authority or the non-application of said regulations, although still into force, by the public judiciary and administration. Needless to say, the latter are cases

less frequent than the former, in which the national regulations are simply interpreted according to the EU law.
Regarding the application of the EU law in the VAT, there are two basic **questions**:
a) The adequate comprehension of the EU law regulating VAT, and not only regarding the regulatory provisions that may exist but also the case-law issued based on their interpretation.
b) The more in-depth study of the **relationship** or interaction between the EU law and the national VAT regulations.

II. The VAT and the EU law

25

SUMMARY

A.	The VAT regulations in the European Union	27
B.	The primacy of EU law	36
C.	The autonomy of EU law	60
D.	The direct effect of EU law	106
E.	The obligation to pay damages for breach of the EU law	212

A. The VAT regulations in the European Union

27 The main regulation related to VAT in the EU is the Directive 2006/112, of 28 November, recasting Council Sixth Directive on the common system of VAT.

Precisions **1)** This Directive was published in the OJEC, serie L, dated 11-12-2006, L 347/1, named as «Council Directive 2006/112/CE, of 28 November 2006 on the common system of value added tax». Dir 2006/112 art.411 establishes the derogation of the Directives Dir 67/227, First VAT Directive, which was still in force, and Dir 77/388/CEE, Sixth VAT Directive, to which the **recast** text refers to.
2) From now on, we will refer to this Directive as VAT Directive or **Dir 2006/112**.

Due to its recasting character of the First and the Sixth VAT Directives, in general, the case-law issued by the ECJ regarding these Directives also apply for the interpretation of Dir 2006/112. Moreover, even the case-law regarding the Second VAT Directive (Dir 67/228), abolished when the Sixth Directive was approved, results also applicable, bearing in mind the common legislative aim of all of them.

Precisions Obviously, the above comment has to be understood with the exception of the **new provisions** later, which will be referred to when necessary.

29 There are **other EU Directives** which regulate **specific aspects** of the tax:
a) Dir 86/560, of 17-11-1986, arrangements for the refund of VAT to taxable persons not established in the EU.
b) Dir 2006/79, of 5-10-2006, on the exemption from taxes of imports of small consignments of goods of a non-commercial character from third countries.
c) Dir 2007/74, of 20-12-2007, on the exemption from VAT and excise duty of goods imported by persons travelling from third countries.
d) Dir 2008/9, of 12-2-2008, laying down detailed rules for the refund of VAT to taxable persons not established in the Member State of refund but established in another Member State.
e) Dir 2009/132, of 19-10-2009, determining the scope of Dir 2006/112 art.143.b) and c) as regards exemption from VAT on the final importation of certain goods.
The aforementioned Directives are completed with several **decisions of the EU Council of Ministers**. Regarding VAT, these decisions usually refer to authorizations to the Member States for introducing exceptions to the Dir 2006/112, although this has not always been the case. Some of the decisions adopted, for example, based on Dir 2006/112 art.395 are set out in the corresponding chapter (see no. 10530) when they, or some of their contents, have been, in a certain way, challenged in front of the ECJ.

Additionally, attention should be given to the existence of two **EU Regulations** which specifically deal with VAT, which are:
a) Reg (EU) 904/2010, of 7-10-2010 on administrative cooperation and combating fraud in the field of VAT.
b) Council Implementing Reg. (EU) 282/2011, of 15-3-2011, laying down implementing measures for Dir 2006/112 on the common system of VAT.

Precisions May be, it is worth remembering that the EU law does not contemplate a **priority** of the applicable provisions. Therefore, the EU Regulation is at the same level as the Directive. The difference between both is that the Regulation is directly applicable, without the need of being transposed, whilst the Directive is not directly applicable in the Member States but only in specific situations, that will be afterwards analysed, since the internal transposing regulations are generally being applied.

32 The approval of all these regulations is justified by the configuration of VAT as one of the own resources of the EU Institutions. Thus, the **taxable base** of this tax is used for calculating one of the mentioned own resources, making that this base is compulsorily harmonized within the Member States. For this reason, decided that this was one of the financing bases of the Institutions when the system of contributions of the Member States was eliminated, a Directive of harmonization of this item between the Member States became necessary in order to avoid significant discrepancies between them that could impact in the mentioned financial resource. This was the Sixth VAT Directive.

Precisions In fact, the proper name of the Sixth Directive made already reference to the uniform taxable base. This reference was removed in the denomination of the Dir 2006/112.

34 The existence of an **internal market**, and the free movement that it entails, also impact in this harmonization but only regarding certain elements of the Tax, since there are certain points of this that do not cut across Member State borders.
It is important to point out that all this EU law constitutes a **harmonization regulation** but it is not the only set of rules that apply in the EU Member States (exception made of the two mentioned Regulations). In this regard, in the Directives related to VAT:
a) There are many **options and discretions** granted to the Member States. Insofar as the Member States make use of them differently, the resulting regulation may not coincide between them. A clear example of this would be that related to the tax rates, with notable differences between the Member States regarding both the general rates and the reduced ones.
b) There are aspects that are not sufficiently regulated and that the Member States complete as they see fit, according to the **principle of subsidiarity (**Article 5 (3) of the Treaty on European Union), which allows, among other issues, that the EU law is completed in this way. This would be the case, for instance, of the design and application of the control procedures (see no. 906).
c) There are many questions in which, without prejudice to a future harmonization, the EU regulations allow the Member States to maintain their own internal regulations. In this regard, the ECJ refers to **«partial harmonization»** (judgments of 13-7-2000, Idéal tourisme, C-36/99, and of 5-12-1989, ORO, C-165/88).
In any case, despite the fact that they are harmonization regulations, the ECJ has pointed out the binding character through their **direct effect**, ruling out the possibility of considering them as purely programmatic regulations (judgment of 19-1-1982, Becker, C-8/81).
As a consequence of all these circumstances, even in the case of similar regulations regarding its structure, there are significant differences in the VAT regulations of the Member States. It can be said that there is a number of common points on VAT which constitute the skeleton of the tax and which allow the understanding of the majority of the problems arising from the levy of the tax in any of the EU Member States, but in no way can be stated that there is a EU VAT applied in all of them.

Precisions As direct consequence of the above, it is convenient to be extremely prudent when transposing directly the VAT regulations from one Member State to another or assuming

that any treatment given to an specific transaction in one member State will be accepted in others.

B. The primacy of the EU law

36 Once the EU regulations regarding VAT have been exposed, the interaction between these and the national regulations must be analysed, being that the relationship between both legal sources is based in the supremacy of the EU law, as repeatedly stated by the ECJ.

38 **Van Gend & Loos** (ECJ 5-2-63, C-26/62, EDJ 1963/3140) This is a judgment of a great relevance, being the one in which the ECJ established the principle of supremacy. Van Gend & Loos analysed a case in which the Dutch authorities required customs duties regarding imports of goods from Germany, which the claimant considered incompatible with the Treaty, appealing the assessment. The **operative part** of the judgment establishes:

> «(...) The Court, (...) hereby rules:
>
> **1.** Article 12 of the Treaty establishing the European Economic Community produces **direct effects** and creates **individual rights** which national courts must protect.
>
> **2.** In order to ascertain whether customs duties or charges having equivalent effect have been increased contrary to the prohibition contained in article 12 of the treaty, regard must be had to the duties and charges actually applied by the member state in question at the date of the entry into force of the treaty. Such an increase can arise both from a re-arrangement of the tariff resulting in the classification of the product under a more highly taxed heading and from an increase in the rate of customs duty applied. (...).»

It should be noted that the ECJ established this principle without any reference to the problems that the **National Courts** may have in its application, despite the fact that the Advocate General had already raised these problems from a constitutional point of view, especially in those countries whose constitutions do not grant primacy to the International Treaties over the internal legislation.
The ECJ argued that, based on the Treaties, the Member States had created a new system or order of things of a different nature to the legal order in place to date. This new order of things was derived from a certain **«auto-limitation» in its sovereignty** that was accepted by the Member States when the Institutions were created and whose functions, as such held by the ECJ, were entrusted to them.
The ECJ did neither make an explicit reference to the relationship between the national regulations and the EU law, nor to the supremacy of the latter but clearly stated that the Treaty creates a new legal system that becomes part of the own legislation of the Member States. The ECJ understood that the objectives of this new legal system could only be achieved if the Member States were diligent as regards its fulfilment, in a way that certainty would exist regarding the uniform enforcement of the EU rules in all the Member States. For that purpose, there are two circumstances, becoming **general principles**, which result necessary:
1º. The preference or **supremacy** of the EU law over the national legislations so, that in case of dispute, the former prevails over the latter.
2º. The **direct effect** of the EU law, which will be analysed in the following section.

Precisions It must be pointed out that this special nature of the EU law does not appear as such in the Treaties but it has been derived from a teleological interpretation made by the ECJ that configures them as constitutive of a system in which the EU regulations suppose a body of law different to other International Treaties.

This judgment has a great relevance not only because of its content but also because being the first one in which the ECJ stated the different nature of the legal system created with the European Institutions. The case-law related to this special configuration of the EU law and the way in which has been built on has its origin in this first outcome.

40

Simmenthal (ECJ 9-3-1978, C-106/77, EDJ 1978/7394) In the construction of this **doctrine**, this **judgment** results of crucial significance, facing the par.17 to 24 of the same this question as follows:

«**17.** Furthermore, in accordance with the **principle of the precedence of Community law**, the relationship between provisions of the Treaty and directly applicable measures of the Institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but –in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States– also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with community provisions.

18. Indeed any recognition that **national legislative measures** which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of the Community.

19. The same conclusion emerges from the structure of article 177 of the Treaty which provides that any court or tribunal of a Member State is entitled to make a reference to the Court whenever it considers that a preliminary ruling on a question of **interpretation** or **validity** relating to Community law is necessary to enable it to give judgment.

20. The effectiveness of that provision would be impaired if the national court were prevented from **forthwith applying** Community law in accordance with the decision or the case-law of the court.

21. It follows from the foregoing that every **national court** must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the community rule.

22. Accordingly any provision of a national legal system and **any legislative, administrative or judicial practice** which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law.

23. This would be the case in the event of a **conflict** between a provision of Community law and a subsequent national law if the solution of the conflict were to be reserved for an authority with a discretion of its own, other than the court called upon to apply community law, even if such an impediment to the full effectiveness of community law were only temporary.

24. The first question should therefore be answered to the effect that a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means.»

This outcome highlighted the **practical implications** of the principles of supremacy and direct effect. The National Courts must directly enforce any clear and unconditional EU provision, even in those cases in which an existing national regulation enters into conflict, irrespective of the status of this latter. Although these principles were already established, Simmenthal judgment raised a new problem: this obligation not only affected the National Courts legitimated for the valuation of the regulations, as it would be the case of the High, Supreme or Constitutional Courts, but also affects lower levels of the justice system. As later on commented, even the Administration, regarding VAT, the Tax Administration, will be bound by this obligation.

Needless to say, the form adopted within the National regulations that could enter into dispute with the EU regulations results irrelevant for the ECJ, as manifested in judgment of 29-4-1999, Ciola, C-224/97, which that expressly states that the obligation for non-application of the National regulations corresponds, in such a case, to judicial and administrative authorities as the infringement of EU law may be caused by legal or administrative provisions, including, in this last case, **specific and individual administrative decisions**.

Precisions It should be noted that par.22 of the judgment Simmenthal already referred to the judicial and administrative practices as possible sources of dispute with the EU regulations.

44 **Larsy** (ECJ 28-6-2001, C-118/00, EDJ 11750) The obligation for the preferential application of the EU law over the national regulations does not only lay on the judicial authorities, this obligation even reached the national administrative bodies, as stated in this judgment.
This issue results extremely important, beyond the theoretical importance, regarding the obligations imposed to Judges and Court or administrative officers dealing with the application of the VAT. In particular, it supposes two tasks and **obligations**:
1º. Firstly, they must **know the EU regulations** regarding VAT, which is not an easy task.
2º. Secondly, they must proceed to the **disapplication of a national regulation** duly approved internally, in case they evidence that this is contrary to the EU law, and that is no mean feat.

Precisions It should be noted that this behaviour model would only proceed in case there is a conflict between the national and the EU regulations. As previously mentioned, there are other situations where no conflict exists but there is a need to interpret the national regulations according to the EU ones. In this case, the national regulations must not go unapplied (see no. 176 regarding the principle of interpretation).

46 **IN.CO.GE.'90 and others** (ECJ 22-10-1998, joined Cases C-10/97 to C-22/97, EDJ 18838) It results necessary to refer to this case, in which it is analysed whether, once the incompatibility between the national and the EU regulations has been verified, the inapplicability of the national regulations would suffice or it would be necessary to consider it as null and void, so inexistent since its adoption.
The judgment states the following:

> «**21**. It cannot therefore, contrary to the Commission's contention, be inferred from the judgment in Simmenthal that the incompatibility with Community law of a subsequently adopted rule of national law has the effect of rendering that rule of national law **non-existent**. Faced with such a situation, the national court is, however, obliged to disapply that rule, provided always that this obligation does not restrict the power of the competent national courts to apply, from among the various procedures available under national law, those which are appropriate for protecting the individual rights conferred by Community law (...).»

This question connects with the possible **limits**, mainly of temporary order, existing regarding the confirmation of a provision of a Member State being incompatible with the EU law, especially when there is ECJ case-law that expressly state it. This question will be later on analysed (see no. 190).
Having established the principle of primacy or preference of the EU law over the national regulations of the Member States, little will be gained if this is treated as a purely theoretical principle, lacking mechanisms to ensure its implementation. This is not, fortunately, the case. As we will analyse, there are mechanisms that ensure the effective application of this supremacy of the EU law or the possibility to proceed to invoke it in those cases in which it becomes necessary.
This principle of primacy has also been stated in **judgments specifically related with VAT**.

48 **Commission v Italy** (ECJ 21-6-1988, C-257/86, EDJ 17078) In this regard, and referring to VAT, this case-law results enlightening. It was related to the VAT exemption of the **imports of free samples of low unitary value.** Italy was in this case condemned as a consequence of the existing administrative practices contrary to the Directive, even when the Italian regulations were compliant with the EU law.

50 **Metropol Treuhand** (ECJ 8-1-2002, C-409/99, EDJ 5559) Another example is this case, related to the restrictions to the right to deduct VAT quotas borne in the **acquisition or leasing of vehicles**. In this judgment, the ECJ points out that these principles of primacy and direct effect not only affect the regulations adopted by the Member States but also to any other lower level provisions or administrative practices. It literally established that: *«the term 'national laws' within the meaning of the second subparagraph of Article 17(6) of the Sixth Directive does not refer only to legislative acts in*

*the strict sense, but also to **administrative measures and practices** of the public authorities of the Member State concerned»* (par.49).
In the same line, and referring to the VAT refund procedure for taxable persons established in other Member States, regulated in Dir 79/1072 (currently, Dir 2008/9), the judgment of 14-12-1995, Commission v Spain, C-16/95, condemned Spain for non-accomplishing the six-month period to refund VAT established in the Directive. Judgment dated 3-6-1992, Commission v Italy, C-287/91, and the one dated 16-1-2006, Commission v Luxembourg, C-90/05, equally condemned such Member States as a consequence of exceeding the six-month period established in the Dir 79/1072 for the refund of VAT quotas borne by taxable persons of other Member States, even if the non-fulfilment was due to the administrative practices or the o inability to order the refunds in due time.

52 **Fallimento Olimpiclub** (ECJ 3-9-2009, C-2/08, EDJ 183761) In order to conclude, we will refer to this case, in which it was analysed the relationship between the primacy of the EU law and the **force of *res judicata***, as it is established in the Italian regulations. Olimpiclub was a limited liability company aimed to develop and manage sporting facilities. This entity owned a sports complex located in a land property of the Italian state. The entity subscribed with the «Associazione Polisportiva Olimpiclub», non-profit association where most of its founding members were also sharesholders on Olimpiclub, an agreement through which Associazione was allowed to use all the equipment installed in the sports complex. In turn, the Associazione assumed the payment of the tax related to the private use of the public domain (related to the concession of enjoyment of the land) to the Italian state, to pay yearly a fix pecuniary as reimbursement for the yearly expenses and, additionally, to transfer to Olimpiclub all the gross income of the Associazione, corresponding to the annual membership fees.
The Italian tax authorities considered that the transactions carried out constituted a case of **abuse of rights**, so attributed to Olimpiclub the entire gross income obtained by the Associazione, issuing the appropriate assessments. This conclusion resulted on the corresponding dispute. Regarding the same taxpayer, although related to previous years, two previous case-law existed, whereby its activity was accepted. The referring Court considered that it was bound, since such case-law definitively declared the real, lawful and non-fraudulent character of the bailment; however, it states that this can lead to the impossibility to examine the main proceedings in light of the EU regulations and the EU case-law in Case Halifax and following, for, in such a case, to declare the existence of abuse of rights.
The issue raised to the ECJ referred to whether the EU law is opposed to the application, in circumstances as those at the main proceedings, of a national regulation as article 2909 of the Italian Civil Code, that establishes the principle of force of *res judicata*, to which it is not possible to go back, in a litigation related to the VAT referred to a tax period for which there is not a definitive judgement issued yet, in case the relevant regulation jeopardize the consideration of the EU law related to the abusive practices bound to this tax by the judicial body.
The ECJ admitted the importance that the principle of *res judicata* has in both the EU regulations and the national ones, as guarantor of the stability of the Law and the legal relationships as well as the proper administration of justice. For this purpose, it is necessary that judicial decisions that have become final after all rights of appeal have been exhausted or after the expiry of the time-limits provided for by those proceedings, can no longer be called into question. According to this premise, it added:

> «**23**. Accordingly, Community law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would make it possible to remedy an infringement of Community law on the part of the decision in question (see *Kapferer*, paragraph 21).

> **24**. In the absence of Community legislation in this area, the rules implementing the principle of *res judicata* are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States. However, those rules must not be less favourable than those governing similar domestic actions (**principle of equivalence**); nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by Community law (**principle of effectiveness**) (see, to that effect, *Kapferer*, paragraph 22).»

Precisions The national Court referring the question for a preliminary ruling had mentioned the judgment of 18-7-2007, Lucchini, C-119/05; however, the ECJ understood that such Case could not challenge the previous analysis, as it dealt with a context where the principles that govern the distribution of competences between the Member States and the EU regarding State aids were discussed. In this regard, the Commission of the European Communities has exclusive competition for examine the compatibility of national measures for State aid with the common market.

The ECJ continued to analyse the **principle of effectiveness** and its compatibility with the force of *res judicata* principle. According to the latter, in the taxation disputes, the *res judicata* in a specific case, where it refers to a fundamental issue common to other cases, has binding force regarding this issue, although the considerations made in this case refer to a different fiscal year. The principle of *res judicata* is intended to the safeguarding of the principle of legal certainty. Ultimately, the relationship between both principles, effectiveness and legal certainty, was the issue raised before the ECJ.
The ECJ emphasized the proactive scope of this principle, that not only impeded to return to the issues already analysed by the Courts, but it also deployed future effects. Based on these premises, the ECJ stated the following:

> «**30**. Accordingly, if the principle of *res judicata* were to be applied in that manner, the effect would be that, if ever the judicial decision that had become final were based on an interpretation of the Community rules concerning abusive practice in the field of VAT which was at odds with Community law, those rules would continue to be misapplied for each new tax year, without it being possible to rectify the interpretation.
>
> **31**. In those circumstances, it must be held that such extensive obstacles to the effective application of the Community rules on VAT cannot reasonably be regarded as justified in the interests of legal certainty and must therefore be considered to be **contrary to the principle of effectiveness**.
>
> **32**. Consequently, the answer to the question referred is that Community law precludes the application, in circumstances such as those of the case before the referring court, of a provision of national law, such as Article 2909 of the Italian Civil Code, in a VAT dispute relating to a tax year for which no final judicial decision has yet been delivered, to the extent that it would prevent the national court seised of that dispute from taking into consideration the rules of Community law concerning abusive practice in the field of VAT.»

The reproduced paragraphs are eloquent; the ECJ finds compatible with the effectiveness of EU law that it gives in to procedural or protectionist considerations of the Member States, but without the possible transformation of these considerations into an absolute value. Consequently, a scope as such stated in article 2909 of the Italian Civil Law, which does not only impede to return to issues already judged but obliges to maintain the same conclusion in future years, is considered as excessive so it must give in to principle of effectiveness of the EU regulations.

56 Other related judgements

Becker	19-1-1982	C-8/81
Shipping and Forwarding Enterprise Safe	8-2-1990	C-320/88
SDC	5-6-1997	C-2/95
CPP	25-2-1999	C-349/96
Floridiene and Berginvest	14-11-2000	C-142/99
Commission v Spain	6-10-2005	C-204/03
Commission v Luxembourg	16-1-2006	C-90/05

JP Morgan	28-6-2007	C-363/05
Commission v Spain	12-11-2009	C-154/08
Campsa Estaciones de Servicio	9-6-2011	C-285/10
VSTR	27-9-2012	C-587/10
AES-3C Maritza East 1	18-7-2013	C-124/12
Traum	9-10-2014	C-492/13
Aspiro	17-3-2016	C-40/15
Farkas	26-4-2017	C-564/15

The EU law, therefore, prevails over the national regulations of the Member States (judgment of 5-2-1963, Van Gend & Loos, C-26/62, and later case-law). This prevalence or **primacy** principle affects the proper regulations of the Member States and the acts derived from its application, having to be respected by all public authorities, including both judicial (judgments of 5-2-1963, Van Gend & Loos, C-26/62, or of 9-3-1978, Simmenthal, C-106/77, and later case-law) and administrative authorities (judgment of 28-6-2001, Larsy, C-118/00).

C. The autonomy of the EU law

60

SUMMARY

1. The EU law as a legal autonomous body 62
2. The teleological interpretation of the EU law........ 76
3. The linguistic deviations in the EU law 90

1. The EU law as a legal autonomous body

62 Based on the consideration of the EU law as a legal body that prevails over the national regulations and practices of the Member States, although it is also part of its legal framework, one of the consequences derived from this is the **autonomous character** of the regulations integrating it. It would be pointless otherwise. If the EU regulations are to prevail over the national regulations of the Member States and they must be common to all of them, it would lack any logic that its interpretation is made according to the internal regulations of the Member States. At the same time, if one of the reasons that justify the referred primacy is the willingness for the referred EU regulations to grant an identical result for all the EU, it goes without saying that the national regulations of the Member States should play no part.in its interpretation. There is a number of cases in which the ECJ has stated and reinforced this principle of autonomy, many of them related to VAT, on which we will focus.

64 **Coöperatieve Aardappelenbewaarplaats GA** (ECJ 5-2-1981, C-154/80, EDJ 9451)
The usually known as the case of the Dutch potatoes, refers to the definition of **taxable base** (see the facts and additional comments in no. 5202). Par.9 of the judgment disposes, as a preliminary view, that: *«It should be noted in the first place that the expression in issue is part of a provision of the EU law which does not refer to the law of the Member States for the determining of its meaning and its scope; it follows that the interpretation, in general terms, of the expression may not be left to the discretion of each Member State».*
The concept of **«consideration»** contained in the Second Directive art.8.a), controversial point in this case, was the expression in question. Although not expressly, in this judgement it is being clearly stated the autonomous character of the EU law provisions, which cannot depend on the member States. This principle will be settled with more forcefulness and motivation in subsequent judgements.

66 **Shipping and Forwarding Enterprise Safe** (ECJ 8-2-1990, C-320/88, EDJ 19559) The concept of **supply of goods** is analysed in this case from the perspective of the compatibility of the national law of the Member States, in this case, the Netherlands, and the EU law. The response of the ECJ, when interpreting Sixth Directive art.5.1, which was at that in force, was the following:

> «**7.** It is clear from the wording of this provision that supply of goods' **does not refer to the transfer of ownership in accordance with the procedures prescribed by the applicable national law** but 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.
>
> **8.** This view is in accordance with the purpose of the directive, which is designed inter alia to base the common system of VAT on a uniform definition of taxable transactions. This objective might be jeopardized if the preconditions for a supply of goods –which is one of the three taxable transactions– varied from one Member State to another, as do the conditions governing the transfer of ownership under civil law.
>
> **9.** Consequently, the answer to the first question must be that supply of goods' in Article 5(1) of the Sixth Directive must be interpreted as meaning the transfer of the right to dispose of tangible property as owner, even if there is no transfer of legal ownership of the property.»

The way in which the ECJ declares this principle of autonomy is lapidary, so no further comment seems to be necessary.

68 **Commission v Spain** (ECJ 17-11-1993, C-73/92, EDJ 14720) This judgment refers, regarding the place of supply rules, to the **advertising** concept. The ECJ pointed out that the concept of advertising is an EU concept, as the unique way of ensure that that no conflicts between the Member States exist. The judgment concluded with a condemnation to Spain that, based on its internal regulations related to advertising, had considered that the promotional activities, such as cocktails or banquets aimed to promote products, did not fall under this concept nor followed the corresponding location rule.

70 **Goed Wonen** (ECJ 4-10-2001, C-326/99, EDJ 50568) Even in those cases where the main interpretation according to the Civil law of the Member States seems to lead to a specific conclusion, the ECJ has reconfirmed the autonomous character of the concepts included in the EU regulations and the need to interpret them as such. This judgement analyses the scope of the faculties of the Member States to consider as a supply of goods the constitution or transmission of **rights to use** and to assimilate these transactions to the lease of immovable property, which is VAT exempt.
Once accepted the criteria existing in the Dutch regulations which required to distinguish between supplies of goods and services in the constitution of rights in rem in immovable assets, the ECJ disposed the following with regards to the assimilation of these to the leasing:

> «**48.** In this regard, the argument put forward by the Stichting Goed Wonen' and the Commission to the effect that the Community definition of leasing and letting must be based on the **similarities** existing between the relevant legal concepts prevailing in the civil law of the Member States most heavily influenced by Roman law **cannot be accepted.**
>
> **49.** As the Advocate General points out in paragraph 71 to 75 of his Opinion, such an approach would ignore the significant differences existing between the legal systems of the Member States in the matter of rights *in rem* conferring on their holder a right of user over immovable property. Moreover, the Court has held that the concept of leasing or letting in Article 13B(b) of the Sixth Directive is broader than that existing in the various national laws (see *Commission* v *Ireland*, paragraph 54).»

The EU law is, therefore, a body of autonomous regulations and concepts whose interpretation cannot be done according to the national laws not even in the case of the existence of a prevalent understanding among them.
Probably due to the relevance of the specific concepts in which they rely, in the scope of the **VAT exemptions**, (Dir 2006/112 art.132 s.), there are many outcomes where the ECJ expressly states the autonomous character of the regulations related to these. As examples, the following judgements can be mentioned:
a) Judgement dated 15-6-1989, Stichting Uitvoering Financiele Acties, C-348/87, that analyses the application of the VAT exemption foreseen in current Dir 2006/112