

# De doorwerking van algemene rechtsbeginselen in de BTW : als uitgelegd door het Hof van Justitie EU

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## SUMMARY

Application and role of general principles of law within VAT  
as interpreted by the European Court of Justice of the EU

### *Introduction*

The present study investigates the influence of the general principles of law on the VAT-Directive. In particular, I focus on the following principles: equality, proportionality and legal certainty.

The subject of this research is to explore and analyse the place of the aforementioned principles in European case-law, their scope of application, their comparative effects and impacts on each other as well as their possible relationship with and influence on other aspects of VAT law. In this study I restrict my analysis by the case-law of the European Court of Justice of the EU (Court) concerning the VAT-Directive.

As it becomes evident from the VAT literature and case-law, the VAT system cannot function without its own inherent principles. In the second chapter I give their description and henceforth specify them as classic VAT principles. Here I make an analytical review of the following principles: consumption (paragraph 2.2), neutrality (paragraph 2.4), territoriality (paragraph 2.3.1) and destination or origin (paragraph 2.3.2).

To assure the proper insight into the subject of my study, I went first to analyze the general principles of law. In the third chapter I worked out their definition, as well as their place of application in the EU law. General principles of law are: prominently evident and conventionally accepted as judicially valid. The principles of equality, proportionality and legal certainty fully qualify to this definition. It's obvious that these three principals are not only universally acknowledged, but also have enough weight to exercise the influence on the whole legislative system. Classic VAT principles (principles of consumption, territoriality and destination or origin) do not meet the above-mentioned requirements and therefore cannot be defined as general principles of law. Thus, the coverage area of principle of consumption is restricted to VAT itself; principle of destination or origin is applied exclusively in order to avoid conflicts of jurisdictions; and the role of the principle of territoriality is being undermined as it becomes more difficult for a single Member State to preserve its own independent tax system. Fiscal neutrality has two possible applications. First it can operate as a systemic VAT principle (relief of a taxable person of the burden of input VAT). In this sense it is exclusively applicable within the boundaries of VAT itself and therefore does not qualify as general principle of law either. Nonetheless, it can actually fall under the category of general principles whenever, in matters relating to VAT, it expresses the principle of equality.

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The principle of prohibiting of abuse of rights is also a general principle of law considering its indisputable place in the EU juridical system as a whole. Ban on abusive practices is supported by the universal foundation of the law. This principle comes into action in situations when the interpretation of the law differs from the literal meaning of a certain provision, but nonetheless stays in conformity with its spirit and purpose, which this very provision targets to achieve (paragraph 5.3).

I differentiate between a substantive law and a so-called procedural law which defines a formal procedural relationship between a public authority (e.g. Tax Administration) and a taxable person (paragraph 3.3.1). With respect to the tax legislation which defines a taxable person, tax obligations, deduction of input VAT, taxable transactions, etc., in other words, the aspects which belong to the substantive law, the general law principles act as principles of interpretation. In this scope of application general principles of law are especially of use in interpreting or explaining the underlying purpose of the provision and, whenever appropriate, in justifying the appliance of analogical argumentation. These very principles also operate in the area of legal relationships between a public authority and a taxable person, acting as a standard to which performance of the public authority is bound to adhere. Thus, in this study I make the following distinction in the application of the general principles of law:

- within the spectrum of the formal relationship between a public authority and a taxable person;
- as a principle of interpretation of VAT law.

Furthermore, I use the definition of restrictive and extending working of the general principles of law on the VAT rules. Herewith I mean that the Court can broaden the interpretation of a VAT rule with the result that a taxable person would either benefit from a certain deduction or exemption or, on the contrary, would not be able to make use of it. The extent of this stretch can vary. It's not exceptional for the Court to extend application of the rule beyond the boundaries which have already been established by the previous juridical practice. Naturally, it can also be the case, that the Court chooses not to apply a certain obligation which would mean that a VAT rule has been interpreted in a more narrow or restricted perspective. Consequentially, in cases when these two working mechanisms result in the disadvantage for a taxable person, it can potentially lead to an inherent conflict with the principle of legal certainty (analogical argumentation, paragraph 4.4.3.4, the principle of prohibition of abuse of rights, paragraph 5.3).

A term, which falls under 'independent European Union law concept', is generally used in its autonomous sense, often apart from its meanings in the national legislative systems. The primary goal of this concept is to prevent divergencies in the interpretation of VAT rules among different Member States (paragraph 4.3).

The Court expects the interpretation of the national law to be made in a manner compatible with the VAT-Directive. This requirement becomes explicitly clear if the Court indicates a certain term as having an independent community meaning. Under

this condition Member States cannot deviate from it and the National Legislator is bound to assure that the National Law uses this term in conformity with the designated meaning. It is a settled case-law of the Court to interpret VAT-Directive in conformity with the general principles of law. The National Court, in turn, has an obligation to make an interpretation in compliance with the Directive as well as with general principles of law (paragraph 4.7).

*Principle of Equality*

The term 'fiscal neutrality' can have two meanings. On the one hand it can mean the equality in fiscal relationships and, on the other hand, it stands for a relief of the taxable person of the burden of input VAT. The former is a reflection, in matters relating to VAT, of the principle of equality (4.4.2). In this meaning it is applicable by the defining of the following:

- taxable person (especially concerning a starting enterprise (paragraph 7.2.2) and public bodies (paragraph 7.4));
- taxable amount (paragraph 9.4);
- exemptions (paragraph 10.4);
- deduction of input VAT (paragraphs 4.4.4.2, 13.2.1).

Therefore, in its first meaning, principle of fiscal neutrality operates as a fundamental principle of equality for the common system of VAT which precludes treating similar goods and services, which are in competition with each other, differently for VAT purposes. Naturally, the general principle of equality has a broader application scope. Thus, in matters relating to tax, it also can be employed against other kinds of discriminations which affect traders who are not necessarily in competition with other, but who are nevertheless in similar situation in other respects. In some cases when a matter of dispute cannot be covered by the principle of fiscal neutrality it however can be addressed by the general principle of equality (paragraph 6.5) or by the principle of non-discrimination in the Treaty of the Functioning of the EU (paragraph 12.3.1.3).

Principle of fiscal neutrality has a leading role by the interpretation of VAT-Directive. Here it's of importance to mention that fiscal neutrality, as an expression of the principle of equality, imposes a question: when can activities be considered as having a similar nature? The answer to this question depends on the criteria which have been chosen to compare the cases. It almost always requires to have a guideline to make a proper judgment. The purpose of the provision plays here a prominent role.

The analogical argumentation is applicable for cases which are not literally described in the legislation, but essentially exhibit a strong similarity with cases which have been documented there (paragraph 4.4.3.2). Both the analogical argumentation and principle of fiscal neutrality aim to handle similar cases in a similar manner and both are often based upon the purpose of the provision.

Therefore, fiscal neutrality operates as principle of interpretation only when, in matters related to VAT, it reflects the principle of equality. Whereas the latter has a broader application and also acts as a standard to which public authorities are to comply in their formal relationships with taxable persons.

As I stated earlier the principle of fiscal neutrality, apart from being an expression of principle of equality, is also used in case-law in a meaning which has little to do with general principles of law, but operates exclusively within the system of VAT (to relieve the trader of the burden of input VAT, paragraphs 2.2 and 2.4). Thus, Community VAT system guarantees completely neutral taxation of all economic activities provided these activities are VAT liable (paragraphs 7.2, 11.4 and 12.2.2).

*Principle of legal certainty*

The principle of legal certainty is a fundamental principle of EU law which requires the rules to be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may act accordingly. The principle of legitimate expectations is being seen as a subpart of the principle of legal certainty and implies that a public authority respects the expectations it has elicited by a taxable person.

The Court permits a certain extent of freedom in exercising the principle of legal certainty on the national level. At the same time it also imposes a restrictive condition implying that the effectiveness of the EU law cannot be compromised.

In the fifth chapter I make an overview of three areas of application where principle of legal certainty plays a role in a formal relationship between a taxable person and a public authority:

- formal legal force;
- ban on retroactive application of legislation;
- delayed validity of the Court's decisions.

Interpretation of a substantive law is not a concern of this overview.

In the 'hierarchical' relationship between EU legislator and the implementing Member State, the principle of legal certainty gives protection to the Member State (formal legal force and delayed validity of the Court decisions). Time-limits for bringing legal proceedings can be seen as a product of the legal certainty and good-working procedural economy.

It's evident that the principle of legal certainty plays a predominant role in the area of delayed validity of the Court decisions (paragraph 5.6). Also here the principle protects Member States against unexpected developments within EU law. It's of importance to note that whenever a judicial decision acts with the delayed validity a proper balance should be sought between the correct interpretation of the EU law and the principle of legal certainty, especially wherever legal relationships (between

a public authority and a taxable person) established in good faith are threatened to be compromised.

In 'hierarchical' relationship between a national legislator and a taxable person the principle of legal certainty protects the latter (ban on retroactive application of legislation). The Court's decision precludes national laws, which fall under EU law, from taking effect from a point in time before its publication. The exceptions however can be made where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected.

It's up to the individual concerned to weigh carefully and beforehand the practical consequences of a certain handling. Once the choice is made the principle of legal certainty starts to operate as a principle of interpretation (paragraph 10.0) wherefrom its effect on VAT becomes clear.

According to the Court's decision, EU law precludes from giving protection in cases of abuse of rights (paragraph 5.3) or pursuit of fraudulent ends (paragraph 6.3). This starting point applies for the whole EU law. In case of abuse of rights the choice of handling of the individual concerned is made in pursuit of certain beneficial ends. In this situation it is often the case that the concerned party accepts the risks it undertakes with regard to the discrepancy between the chosen handling and the purpose of the rules. In other words, the party concerned is often well aware that the chosen tactic calls into question its justification from the perspective of legal certainty. Nonetheless, in the court proceedings, it can be a challenge to avoid a conflict with the principle of legal certainty in cases of abuse of rights. One of the necessary conditions in order to ascertain the case as an abusive practice is to determine that the handling in question is in contradiction with the very purpose of the provision the latter aims to achieve. That the purpose of the provision is known to the individual concerned is often apparent from the artificial nature of the chosen transactions. An attempt to frustrate the purpose of the rules in such a deliberate manner exposes the fact that the party concerned is well aware of this very purpose what makes the conflict with the principle of legal certainty non-existent.

The case-law concerning carousel fraud demonstrates that two forces are to be balanced against each other in this case. On the one hand there is a principle of legal certainty, which supports an objective approach and turns a blind eye to the purpose of the chosen handling. On the other hand it's the decision of the Court which prohibits a taxable person from making an appeal to the EU law in case of abuse of rights and fraud. As it becomes apparent from Kittel-doctrine that whenever these two forces are in stride with each other the principle of legal certainty has to give way.

The interpretation directed at the purpose of the provision can cause some tension with the principle of legal certainty. It's especially the case when the Court makes an interpretation to the disadvantage of a taxable person (DFDS, Levob, RAL, BUPA and Centralan) (paragraphs 4.4.3.4 and 5.3). In these cases the party concerned resorts to an artificial nature of the transactions in order to reduce the tax burden. Here in its

decision making process the Court applies reasoning which are not based on general principle of abuse of rights. Centralan-case is most outstanding in this respect because the Court explicitly mentions that the chosen interpretation is not to be found in VAT-Directive. In this case the Court frustrates the applied construction with the analogical argumentation which finds its origin in the purpose of the provision. In my opinion, the chosen manner of analogical interpretation is in conflict with the principle of legal certainty as it's logical to suggest that a taxable person could not possibly predict this way of approach. Thus, from the perspective of legal certainty such artificial constructions should be challenged by means of applying the principle of prohibiting abusive practices which would guarantee avoidance of a conflict between the chosen manner of interpretation and the principle of legal certainty. It's especially true in order to meet the requirement that it should become obvious on the basis of objective factors that the essential aim of the transaction is to obtain a tax advantage.

*Principle of proportionality*

Principle of proportionality rests upon three following pillars:

- appropriateness;
- necessity;
- counterbalance.

Not in all cases, where this principle comes into action, all three of the aforementioned aspects can be clearly distinguished. The principle of proportionality can utilize them in variable proportions.

The Court employs the principle of proportionality in order to confine the borders of application of EU law (paragraph 4.5.2.5). In the absence of rules (VAT-Directive does not have a clause which covers this area) it is for the legal systems of the Member States to determine its own working boundaries of VAT, provided it stays within the limits of the whole EU law and gives a duly respect to the general principles of law and, in particular, to the principle of proportionality.

The restrictive role of principle of proportionality can be of importance during authorization of measures designed to simplify the procedure for charging the tax or for prevention of certain types of tax evasion and avoidance. In my study I have paid a more detailed attention to the authorization of the following derogative provisions:

- legal measures to prevent tax evasion and avoidance in general (paragraph 5.2);
- minimum basis for charging VAT (paragraph 9.2.1);
- limitation of the right for deduction (paragraph 11.5.1).

As it becomes obvious from Sudholz-case, it's essential that Member States provide enough support to demonstrate that the proposed measures are adequate and sufficient for the purpose of achieving the desired goal without being excessive or leading to unwonted results.

With regard to the principle of proportionality in its interpretational role I address the following subjects:

- exemption with the right of deduction of input VAT, in particular concerning delivery of goods and services within the EU (paragraph 10.2);
- risk distribution of consequences of fraud (paragraphs 5.2, 6.3, 10.7);
- evidentiary rules (paragraphs 6.3, 12.3).

The Member States should not only employ means with which the desirable target can be achieved, but also to make an effort to keep the objectives and principles of the affected EU law intact. Similar with the principle of equality, the purpose of the provision plays a role by applying the principle of proportionality. To find the balance the Court is to weigh the desired goal against the chosen means to achieve it.

Thus, the principle of proportionality exercises its influence from a double perspective: acting within the spectrum of procedural law (relationship between a public authority and a taxable person) and as a principle of interpretation of VAT-Directive.

*Relationship between general principles of law and classic principles of VAT*

Both principle of proportionality and fiscal neutrality (as an expression of principle of equality) rely upon the purpose of the provision. In turn, the purpose of the provision can be traced back to the primary goal of VAT – to target the consumption (principle of consumption), and through it to come back to fiscal neutrality (as a systemic VAT principle) which is also one of classic principles of VAT. As this research demonstrates classic VAT principles establish the legal nature of VAT. In fact, the two aforementioned general principles of law cannot guarantee ideal interpretation of VAT law without being supported by classic VAT principles. Therefore, both the principle of proportionality and the principle of fiscal neutrality (as an expression of principle of equality) need to have the purpose of the provision which, at the endpoint, depends upon the principle of consumption and coherent to it fiscal neutrality (as a systemic VAT principle).

Principle of legal certainty offers protection not only to the Member States (formal legal force and delayed validity of the Court's decisions), but also to a taxable person (ban on retroactive application of rules). These doctrines also demonstrate how this principle functions with respect to formal relationship between a public authority and a taxable person. Additionally, the principle of legal certainty acts as a principle of interpretation of VAT-Directive. Among different methods of interpretation the literal method takes the first place, it is followed by the teleological method and finally by prohibition of abuse of rights. We do not see jurisprudential examples of relationship between principle of legal certainty and classic principles of VAT. The reason for that can be found in a simple fact that it is primarily words and their plain meaning which are meant to give certainty and therefore should be respected and relied upon for the best clarification of the primary goal of the rules.

