

Chapter 1 – The Sources of EU Law Relevant for Direct Taxation

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I. The Nature of the EU Legal System

A. Supremacy

- 1 As the EC Treaty (the predecessor of the Treaty on the Functioning of the European Union (hereinafter TFEU)) was silent on the issue of the relation between EU law and national legal orders, the CJEU has had to clarify it. In the *Costa v E.N.E.L.* case the Court made clear that ...**the law stemming from the Treaty ... could not...be overridden by domestic legal provisions...** and in the case of a conflict between an EU law provision and a national provision the former takes precedence over the latter.¹ Later, the Court further clarified that every national court is obliged to apply EU 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 EU law provision.² In addition, the Court held that an EU law provision even takes precedence over a national constitutional provision.³ According to the subsequent jurisprudence of the CJEU, the national administration is also required to ensure the supremacy of EU law over national law.⁴

B. Direct Effect

- 2 A **directly effective provision** of EU law confers **legally enforceable rights** on an individual so that an individual may rely on these before a national court or a national administrative authority. As a result of the supremacy theory, a national provision that is in conflict with a directly effective EU law provision has to be set aside.
- 3 A **directly applicable provision** of EU law constitutes a **part of national law**.⁵ This means that they are **automatically effective** in the national legal orders without a need to enact implementation measures. The TFEU expressly recognizes the direct applicability of provisions of EU Regulations. However, the TFEU remains silent on the direct effect of treaty provisions, directives and the international agreements concluded by the EU. For this reason, the Court has had to elaborate on these issues.

1. Direct Effect of the TFEU Treaty Provisions

- 4 Regarding the direct effect of an EC Treaty (now the TFEU) provision, it was the renowned *Van Gend & Loos* decision that has proved to be crucial.⁶ In this judg-

1 CJEU, 15 July 1964, Case C-6/64, *Costa v E.N.E.L.*, ECLI:EU:C:1964:66.

2 CJEU, 9 March 1978, Case C-106/77, *Simmenthal*, ECLI:EU:C:1978:49, para. 21.

3 CJEU, 17 December 1970, Case C-11/70, *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114.

4 CJEU, 29 April 1999, Case C-224/97, *Erich Ciola and Land Vorarlberg*, ECLI:EU:C:1999:212.

5 Weatherill, *Cases and Materials on EU Law* (2007) p. 129.

6 CJEU, 5 February 1963, Case C-26/62, *Van Gend en Loos*, ECLI:EU:C:1985:104.

ment the Court held that the **EC Treaty (now the TFEU) constitutes more than an international agreement** since the Member States have limited their sovereign rights in certain fields by transferring powers to the EU institutions, creating thereby a new, *sui generis*, system of law. The Court recognized that the provisions of the Treaty are directly effective and that there is no need to implement them into domestic law.

In order to be directly effective, a TFEU provision has to fulfil the following conditions: 5

- it must be **clearly** and **precisely** worded,
- it must be **unconditional** and **independent** from any national implementation measure.

2. Direct Effect of the EU Directives' Provisions

Since Member States are responsible for implementing the directives into domestic law, there is an inherent risk of possible incorrect implementation or non-implementation, which might undermine the uniformity of EU law application. Therefore, it is extremely important for individuals to be entitled in any case to rely on the “true meaning” of a directive provision. In the *Van Duyn* case the Court ruled there that “it would be incompatible with the binding effect attributed to a directive [...] to exclude in principle, the possibility that the obligation which it imposes may be invoked by those concerned. [...] It is necessary to examine in every case, whether the nature, general scheme and wording of the provision in question are capable of having direct effects on relations between Member States and individuals”.⁷ In the *Ratti* case the CJEU established that Member States may not rely on a non-implemented directive against its own citizens (the *estoppel* principle).⁸ In addition, the Court clarified that an individual may rely on an unconditional and sufficiently precise provision of the directive if the time limit for implementation has elapsed and the Member State has not implemented the directive⁹ or has failed to do so correctly.¹⁰ Consequently, *Wattel* argues that taxpayers are given a choice: they can either apply national provision which is contrary to EU law or refer directly to a directive provision. As a result, non-compliance of Member States may result in “provision shopping”.¹¹ 6

In principle, an individual may not rely on a non-implemented or incorrectly implemented directive against another individual (“**horizontal direct effect**”). This 7

7 CJEU, 4 December 1974, Case C-41/74, *Van Duyn v Home Office*, ECLI:EU:C:1974:133.

8 CJEU, 5 April 1979, Case C-148/78, *Publico Ministero v Ratti*, ECLI:EU:C:1979:110.

9 CJEU, 19 January 1982, Case C-8/81, *Becker*, ECLI:EU:C:1982:7.

10 CJEU, 17 October 1996, joined Cases C-283/94, C-291/94 and C-292/94, *Denkavit International, VITIC Amsterdam and Voormeer*, ECLI:EU:C:1996:387.

11 Terra/Wattel, *European Tax Law* (2012) p. 82.

possibility was explicitly rejected by the CJEU. There were given two main arguments for that. First of all, it was emphasised that a directive is imposed on states and not on private parties.¹² Secondly, legal certainty prevents the directives from creating obligations for individuals without being implemented into EU law.¹³ Nevertheless, a directive might have horizontal and/or inverse vertical effect.¹⁴ This would happen if e.g. an individual brought appeal on the basis of an EU environmental directive against environmental permit already granted to undertaking. In its case law the CJEU emphasizes that, based on the principle of interpretation in conformity with EU law, national courts are obliged to ensure that the directive at issue is fully effective. As a result, national courts should follow the methods of interpretation which help to avoid any inconsistency with EU law,¹⁵ both before and after the implementation period has expired.¹⁶

3. Direct Effect of the Provisions of EU International Agreements

- 8 As regards international agreements, the Court has been willing to accept that their specific provisions are capable of having direct effect, as long as the following three conditions are met:
- **clear and precise wording of a given provision,**
 - lack of conditionality and independence of any national implementation measure,
 - **the object and purposes** do not preclude their direct effect.¹⁷
- 9 Nevertheless, it seems that in its recent case law the CJEU has reopened a debate on the relationship between international law and EU law. Particularly in the *Kadi I*¹⁸ and the *Kadi II*¹⁹ cases, the separate and autonomous character of EU law was emphasized.
- 10 In the *Kadi I* case the Court had to decide on economic sanctions set up by the UN Security Council and adopted in a special regulation by the Council of the EU. The measures applied were alleged to pose a breach of certain fundamental

12 CJEU, 14 July 1994, Case C- 91/92, *Paola Faccini Dori v Recreb Srl.*, ECLI:EU:C:1994:292, paras. 22-23.

13 CJEU, 7 January 2004, Case C-201/02, *The Queen, on the application of Delena Wells v Secretary of State for Transport, Local Government and the Regions*, ECLI:EU:C:2004:12, para. 56.

14 Terra/Wattel, *European Tax Law* (2012) p. 82.

15 CJEU, 5 October 2004, joined cases C-397/01 to C-403/01, *Pfeiffer a. o.*, ECLI:EU:C:2004:584, paras. 114-119.

16 CJEU, 4 July 2006, Case C-212/04, *Konstantinos Adeneler*, ECLI:EU:C:2006:6057, paras. 114-117.

17 CJEU, 9 February 1982, Case C-270/80, *Polydor Limited and RSO Records v Harlequin Records Shops and Simons Records*, ECLI:EU:C:1982:43, para. 12; CJEU, 11 May 2000, Case C-37/98, *Savaş*, ECLI:EU:C:2000:224.

18 CJEU, 3 September 2008, joined Cases C-402/05 P and C-415/05 P, *Kadi I*, ECLI:EU:C:2008:461.

19 CJEU, 18 July 2013, joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Kadi II*, ECLI:EU:C:2013:518.

rights: the right to be heard, the right to respect for property, and the right to effective judicial review. Although the CJEU acknowledged that it is not allowed to review the lawfulness of the UN Security Council measures, it pointed out that it does not exclude the review of the EU law measures. Hence, the Court reviewed the legal act transposing the UN resolution and highlighted the insufficient protection of fundamental rights at the UN level. This seems to pose a departure from a “distinctive fidelity to international law”²⁰ which the CJEU adhered to in the past. Nevertheless, this could also be perceived differently. In this way the CJEU may be indicating a possible opening to allow for precedence for UN Security Council measures, if sufficient safeguards for human rights are created.²¹

The balance between the imperative need to combat international terrorism and the protection of fundamental rights and freedoms of suspected terrorists within the EU legal framework was once again considered in the *Kadi II* case. The CJEU ascertained that “none of the allegations presented (...) are such as to justify the adoption, at European Union level, of restrictive measures (...) either because the statement of reasons is insufficient, or because information or evidence which might substantiate the reason concerned, in the face of detailed rebuttals submitted by the party concerned, is lacking.”²²

C. Legal Remedies

The following remarks explain how rights arising from EU law can be enforced (see m.nos. 17 et seq.) and how breaches of EU law are redressed (see m.nos. 26 et seq.). For a further understanding the relevant EU institutions for direct taxation and their competences are listed below (see m.nos 13 et seq.).

1. EU Institutions

Art. 13 of the Treaty on European Union (TEU) provides for institutions of the European Union. Three of them, namely the European Parliament, the Council and the European Commission, may have an impact on the shape of EU direct taxation, even if powers in the field of direct taxation remain mostly in the hands of the Member States.

The **European Parliament** and the **Council** can be seen as two chambers of the legislative branch of the EU with its competences being officially distributed between both institutions. The Treaty of Lisbon has somehow also strengthened the powers of the European Parliament in fields that may be relevant for direct taxation, as the amendment on Arts. 64 and 65 TFEU (ex Arts. 57 and 58 EC) prove.

²⁰ De Burca, *Harv. Int'l L.J.* 2010, p. 47.

²¹ Kokott/Sobotta, *EJIL* 2012, pp. 1015-1016.

²² CJEU, 18 July 2013, joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Kadi II*, ECLI:EU:C:2013:518, para. 163.

However, some relevant differences can still be noted in comparison to those given to national legislatures, such as for instance the fact that in principle the power of legislative initiative is neither for the European Parliament, nor for the Council, but is instead exclusively reserved to the European Commission. Therefore, while the European Parliament can amend and reject legislation, the Commission has to initiate the legislative procedure.

- 15 Besides its competences in the legislative process, the **European Commission** monitors the Member States' compliance with EU law and whenever it finds that a Member State does not comply with EU law, it may initiate an infringement procedure. Moreover, the Commission often issues non-binding soft law measures directed to the Member States.
- 16 In its capacity as single judicial body competent to interpret EU law, the role of the **Court of Justice of the European Union** is to ensure that EU law is observed. In doing so, the Court reviews the legality of the acts of the institutions of the European Union (including when it acts as appellate body for the decisions of the European General Court in domains such as, for instance, State aid), controls the Member States' compliance with obligations under the Treaties and interprets EU law at the request of the national courts and tribunals with the aim of ensuring the uniform application and interpretation of EU law.

2. The Enforcement of EU Law

- 17 Like every legal system, EU law possesses mechanisms to ensure its proper enforcement. Accordingly, there are **two ways of protecting rights arising from EU law**. The measures incompatible with EU law may be challenged either at the EU level under an infringement procedure or at the national level by nationals invoking directly effective EU law provisions before a national court.²³

a) European Union Level

- 18 The Commission serves as the guardian of the Treaties and the watchdog of Member States' compliance with European Union law. Usually, **an infringement procedure** comes into play when a Member State has enacted or kept in force domestic provisions incompatible with EU law or if a Member State has failed to implement a directive in a timely or accurate fashion. If an individual whose rights are infringed by a given national provision or by the lack of action by a Member State (non-implementation of a directive) makes a complaint to the Commission, it is under no obligation to commence an action, but this complaint may serve as an "inspiration" to start an infringement procedure. The Commission has re-

23 It should be noted that, in principle, a Member State national enjoys a right to rely on EU law before a national administrative body, which is, on the other hand, obliged to comply with EU law. However, the administrative body is not entitled to refer a preliminary question to the CJEU.

cently more often employed this procedure in order to tackle potential infringements of the fundamental freedoms by national direct tax provisions. This increasing activity has resulted so far in several cases decided by the CJEU and in even more still pending before the Court.²⁴

Once the Commission considers that a Member State has breached EU law it is obliged, in accordance with **Art. 258 TFEU** (ex Art. 226 EC), to launch an **infringement procedure**. As a first step the Commission should notify the Member State involved of its reservations. Having received observations from a Member State, it should deliver a reasoned opinion. Unless the Member State complies with the position presented in the reasoned opinion within the period laid down therein, the case may be brought before the CJEU. **19**

Under **Art. 260(1) TFEU** (ex Art. 228(1) EC), once the Court finds the Commission action well grounded, the Member State involved is under an obligation to amend its domestic legislation so as to make it EU-compatible. Failure to do so within a reasonable time triggers another action of the Commission, on the basis of **Art. 260(2) TFEU** (ex Art. 228(2) EC). If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. If the Court finds that the Member State concerned has not complied with its judgment, it may impose a “lump-sum or penalty payment” on it. The Commission must specify the amount of the “lump-sum payment or penalty payment” to be paid by the Member State concerned which the Commission considers appropriate in the circumstances. **20**

In accordance with **Art. 259 TFEU** (ex Art. 227 EC), it is possible for a Member State to bring a **case before the CJEU against another Member State** for its breach of EU law. This procedure has not been frequently put into use and has never so far been used in direct tax cases. However, it seems that this provision may unexpectedly prove helpful for a Member State in a case involving a direct tax issue. Imagine a situation where Member State A has to credit taxes imposed by Member State B taxes on dividends received by its resident.²⁵ Member State A feels that its residents are discriminated against by Member State B, which imposes higher taxation on dividends received by non-residents than on dividends obtained by its residents. From Member State A’s point of view elimination of discrimination of its residents and lowering the tax burden borne by them in Member State B means less tax credit to be given. Therefore, Member State A may have good reasons to bring a case against Member State B before the CJEU. **21**

24 See the list of cases relevant for direct taxation available at <http://ec.europa.eu/taxation_customs/resources/documents/common/infringements/case_law/court_cases_direct_taxation_en.pdf> accessed 21 July 2015.

25 CJEU, 7 September 2004, Case C-319/02, *Manninen*, ECLI:EU:C:2004:484.

b) National Level (Preliminary Reference Procedure)

- 22 The enforcement of EU law on the national level consists in the combined result of the principles of direct effect and of supremacy as well as a preliminary reference procedure. Under **Art. 267 TFEU** (ex Art. 234 EC), the CJEU has jurisdiction to give **preliminary rulings** concerning the interpretation of the TFEU. The aim of this provision is to ensure the uniform application of EU law throughout all Member States. When a question concerning the application or interpretation of EU law is raised before a court or a tribunal, it *may* request the CJEU to give preliminary ruling thereon if it believes that such a ruling is necessary for delivering a decision. However, when such a situation occurs before a court or a tribunal against whose decisions no legal remedies are available in national law (for example, a Supreme Court or a Constitutional Court), it is obliged to pose questions to the CJEU.
- 23 A national court does not have to make reference to the CJEU in a case which requires EU law interpretation when the ***acte clair* and *acte éclairé* doctrine** applies. This doctrine was forged in the **CILFIT** case²⁶ where the Court recognized the national court's discretion to ascertain whether a decision on questions of EU law is necessary to enable it to give a judgment.²⁷ Therefore, once a national court has established that an EU law issue is irrelevant for the outcome of the case, it does not have to refer the case to the CJEU.²⁸ Moreover, the national court is under no obligation to do so also when "the EC provision in question has already been interpreted by the Court" (*acte éclairé*) or "the correct application of EC law is so obvious as to leave no scope for reasonable doubts" (*acte clair*).²⁹
- 24 The ***acte clair* and *acte éclairé* doctrine** allows a national court a large area of discretion regarding the necessity of referring the preliminary ruling. On the one hand, it speeds up the enforcement of EU law by allowing national courts to decide cases with EU law aspects without time-consuming preliminary references to the CJEU. On the other hand, the national courts in several Member States have reportedly been misusing this doctrine with the result of leaving the CJEU outside the litigation process even with respect to cases involving unclear EU law issues.³⁰ Therefore, some commentators suggest to reform the ***acte clair* and *acte éclairé* doctrine** by providing it with new criteria of interpretation which would ensure a limitation on the discretionary power of national courts without shifting an excessive burden onto the CJEU.³¹

26 CJEU, 6 October 1982, Case C-283/81, *CILFIT*, ECLI:EU:C:1984:91.

27 For more on this issue, see Dourado, Is it *Acte Clair*? General Report on the Role played by CILFIT in Direct Taxation, in Dourado/da Palma Borges (eds.) *The Acte Clair in EC Direct Tax Law* (2008), pp. 13 et seq.

28 CJEU, 6 October 1982, Case C-283/81, *CILFIT*, ECLI:EU:C:1984:91, para. 21.

29 CJEU, 6 October 1982, Case C-283/81, *CILFIT*, ECLI:EU:C:1984:91, para. 21.

30 For more on this issue, see Dourado/da Palma Borges (eds.) *The Acte Clair in EC Direct Tax Law* (2008).

31 For more on this issue, see Vukčević, *Intertax* 2012, pp. 654-665.

As such, the procedure of preliminary rulings should work as a “dialogue” between the CJEU and national courts. Nevertheless, past year’s experience proves the contrary. In particular, “open” judgments of the CJEU have been criticized. One of the most striking examples is the *FII* saga in the judgments delivered by the CJEU. In one and the same group litigation on the former UK franked litigation investment income tax system, preliminary questions were referred to the CJEU as many as three times.³² The reason for this was the difficulty national courts had in deciding their cases on the basis of the answers of the CJEU. These types of cases call into question the effectiveness and the purpose of preliminary reference procedure.³³ 25

3. Effectiveness of EU law

a) Procedural Aspects of Redressing Breaches of EU Law

It is settled CJEU case law that, in the absence of EU measures, a Member State should remedy a breach of EU law on the basis of national provisions, designate the competent courts as well as set out the detailed procedural rules for restitution proceedings (**principle of national procedural autonomy**).³⁴ This principle is, however, subject to two important limitations. First, “the substantive and procedural conditions for reparation of loss and damage laid down by the national law of the Member States must not be less favourable than those relating to similar domestic claims”³⁵ (**principle of equivalence**). Second, those conditions “must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation”³⁶ (**principle of effectiveness**). 26

The Court applied the **principle of equivalence** in the *Edis* case where it held that if a tax has been imposed in violation of EU law a taxpayer will be able to successfully bring an action for recovery of the tax only in accordance with the national procedural rules that govern the recovery of taxes unduly paid, including time limits applicable to such actions.³⁷ The exception to this principle was established in the *Emmot* case where the CJEU ruled that the fact that the provisions of a directive were not duly (or timely) transposed into national law prevents a Member State from invoking a time limit provided by its domestic law as long as the Mem- 27

32 CJEU, 12 December 2006, Case C-446/04, *FII Group Litigation*, ECLI:EU:C:2006:774; CJEU, 13 November 2012, Case C-35/11, *FII Group Litigation*, ECLI:EU:C:2012:707; CJEU, 12 December 2013, C-362/12, *FII Group Litigation*, ECLI:EU:C:2006:774.

33 For more on the interaction between national courts and the CJEU, see Sarmiento/Jimenez-Valladolid de L’Hotellerie Fallois (eds.) *Litigating EU Tax Law in International, National and Non-EU National Courts* (2014).

34 CJEU, 16 December 1976, Case C-33/76, *Rewe*, ECLI:EU:C:1976:167, para. 5; CJEU, 24 September 2002, Case C-255/00, *Grundig Italiana*, ECLI:EU:C:2002:525, paras. 33 and 42.

35 CJEU, 19 November 1991, joined Cases C-6/90 and C-9/90, *Francovich*, ECLI:EU:C:1995:372, para. 43.

36 *Ibidem*.

37 CJEU, 15 September 1998, Case C-231/96, *Edis*, ECLI:EU:C:1998:401, paras. 17-19. See also Dassesse, *Bulletin* 2004, p. 511.

ber State has not properly implemented the provisions of the directive into its domestic law.³⁸

- 28 At the core of the dispute in *Weber's Wine World* was the Austrian provision shortening the **time limit for claiming unduly paid taxes** with the exception of taxes paid in violation of the Constitution. The Court held that the principles set by the national law regarding time limits applicable to refunds of taxes paid unconstitutionally have to apply also with respect to taxes imposed in violation of EU law.³⁹
- 29 On the other hand, in certain circumstances the **principle of effectiveness** requires that a final administrative decision issued by a national administrative authority has to be reversed. In the *Kühne & Heitz* case a Netherlands company had to pay back export subsidies already received due to the erroneous interpretation of EU law adopted by the Netherlands authorities and the Netherlands courts. The CJEU ruled in favour of the claimant by holding that EU law obliges national authorities to “**review a final administrative decision** where an application for such review is made to it, in order to take account of the interpretation of the relevant provision given in the meantime by the Court where
- under national law, it has the power to reopen that decision;
 - the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance based on a misinterpretation of Community law without asking the Court for a preliminary ruling;
 - the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court.”⁴⁰
- 30 It is believed that the decision in the *Kühne & Heitz* case may prove helpful for a taxpayer in forcing the tax authorities to rescind a ruling denying a taxpayer's earlier claim for a tax paid in violation of EU law when it subsequently turns out that the taxpayer's position was well grounded.⁴¹
- 31 The judgment in the *Kühne & Heitz* case stirred up a lot of discussion about the relationship between the finality of administrative decisions and the principles of effectiveness and supremacy of EU law. It also has pushed the national courts to ask the CJEU to clarify whether the *res iudicata* principle may fend off the EU law.
- 32 As a rule, *res iudicata* holds firmly. It was confirmed in the *Kapferer* case where the Court made clear that a national court is not under obligation to ignore its procedural provisions in order to void a final court judgment, even though this judgment is contrary to the EU law.⁴² However, this principle is subject to exceptions that are permanently extended by the CJEU.

38 CJEU, 25 July 1991, Case C-208/90, *Emmott*, ECLI:EU:C:1991:333. See also Dassesse, *Bulletin* 2004, p. 512.

39 CJEU, 2 October 2003, Case C-147/01, *Weber's Wine Word*, ECLI:EU:C:2003:533, para. 117.

40 CJEU, 13 January 2004, Case C-453/00, *Kühne & Heitz*, ECLI:EU:C:2004:17, para. 28.

41 Dassesse, *Bulletin* 2004, p. 513.

42 CJEU, 16 March 2006, Case C-234/04, *Kapferer*, ECLI:EU:C:2006:178.

In the *Lucchini* case the CJEU decided that EU law precludes the application of a provision of national law which seeks to lay down the principle of *res judicata* in so far as the application of that provision prevents the recovery of State aid granted in breach of EU law which has been found to be incompatible with the common market in a decision of the Commission which has become final.⁴³ 33

In the *Fallimento Olimpiclub* case the CJEU ruled that the interpretation of the *res judicata* principle following which final judgments on tax obligations in period X are also binding in period Y infringes the principle of effectiveness and, therefore, should be ignored.⁴⁴ 34

b) Remedies against breaches of EU law

In principle, a taxpayer who has paid taxes in violation of EU law has two kinds of claims at his disposal. Firstly, entitlement to claim a refund of charges levied by a Member State in breach of EU law stems from rights conferred on nationals by directly effective EU law provisions prohibiting such charges.⁴⁵ Secondly, an individual is also entitled to obtain compensation for losses resulting indirectly from payment of unduly charges, for example interest on reimbursed charges resulting from the unavailability of sums of money as a result of tax being levied prematurely.⁴⁶ This second claim comes into play only as a corollary of a Member State's liability for a breach of EU law. 35

One should not overlook the Court's decision in *Littlewoods Retail and Others* where it was held that a taxable person who overpaid tax under national law provisions that are contrary to the EU law should be reimbursed together with interest on the amount of the overpayment. The interest should be calculated as simple interest unless in the case of similar claims based on domestic law a taxpayer is entitled to receive a more generous remedy (for instance, compound interest), in which case this more favourable treatment should be extended to reimbursement of taxes paid in violation of EU law.⁴⁷ 36

Member States tend to preclude the individuals' right to a refund of unduly levied charges that have been subsequently passed down the economic chain so that their economic burden is borne by third parties and a refund would prompt **unjust enrichment** of the claimant. This unjust enrichment argument was initially accepted by the Court, but later has been subjected to several conditions and effectively watered down. 37

43 CJEU, 18 July 2007, Case C-119/05, *Lucchini*, ECLI:EU:C:2007:434.

44 CJEU, 3 September 2009, Case C-2/08, *Fallimento Olimpiclub*, ECLI:EU:C:2009:506.

45 CJEU, 9 November 1983, Case C-199/82, *San Giorgio*, ECLI:EU:C:1983:318; see also Dougan, *Cambridge Yearbook of European Legal Studies* (1998) pp. 233 et seq.

46 CJEU, 13 March 2007, Case C-524/04, *Test Claimants in the Thin Cap Group Litigation*, ECLI:EU:C:2007:161, para. 112.

47 CJEU, 19 July 2012, Case C-591/10, *Littlewoods Retail and Others*, ECLI:EU:C:2012:478.