The General Principles of the European Law Applicable to the Taxation 12

Contents

12.1 The General Principles of the EU Law

In addition to the rules and principles explicitly stated in the rules of the Treaty it may be recognised a number of principles with an implicit character—and therefore not formalized and expressed in specific EU rules—which take still a primary importance in the axiological plot of the European legal order.

These principles are determined by the Court of Justice on the basis of an inductive and teleological examination of the EU law (and therefore with reference to the Treaty rules and to the derivate EU law); or because of the recognition of common principles laid down in the national laws of the Member States which may express a homogeneous legal substratum of the European Union; or even by virtue

P. Boria, *Taxation in European Union*, DOI 10.1007/978-3-319-53919-5_12

of an extension within the European legal order to the legal principles established in other regulatory documents of an international character (especially with regard to the European Charter of Human Rights proclaimed in Nice).

Particularly, it may distinguish two categories of principles in the European law:

a. the "*structural principles*", which define the architecture of the European legal order and operate as a guarantee for the legal common space; these principles mark up the competence of EU bodies and Member States and, therefore, contribute to the process of integration; in this category it may be included the principles of subsidiarity, effectiveness, proportionality, fair cooperation among the States;
b. the "*general principles*" (sometime also defined in the ECJ jurisprudence as "fundamental principles"), which promote the protection of the individual rights and freedoms, and are oriented to guarantee the equality, the justice, the liberty; in this category it may be included the principle of legal certainty, the protection of good faith, the principle of the fair trial and the fair administrative proceedings.

Whatever may be the logic of identification, these principles take the nature of "general norms" of the EU law, establishing as the real rules of orientation and limitation of the normative power of the Member States. Consequently, these principles assume a dual legal function: at first, they operate as a parameter for assessing the legitimacy of the exercise of a legislative power, and therefore represent a super-legislative limit with respect to the validity and effectiveness of the rules contained in the Regulations and in the Directives; secondly they assume the function of a guidance in the normative and legislative interpretation, particularly with regard to the decisions of the Court of Justice, such as criteria of selection in the various possible interpretations of the EU law.

As for the effectiveness of the general principles of the EU law it is discussed often if they, although endowed with direct effect because they are binding on Member States, are considered also as directly applicable, thus founding the claim on the part of individual citizens. It seems preferable in this regard to evaluate separately each case, considering that the implementation of the general principle requires an internal discipline to be effectively applied in the legal system (with the consequence that the general principles appear frequently with a direct effect, and also without a direct applicability).

With regard to the area of taxation it is possible to identify a plurality of values that assume the character of the general principles of the EU law. To these values it has been recognized the nature of primary and fundamental aims to the process of European integration as capable to ensure the achievement of the purposes expressed by the Treaty; therefore they should be adequately protected by the EU legal order also with respect to some possible inconsistencies in the national law.

12.2 The Principles of Legal Certainty and Legitimate Expectations

The Court of Justice has repeatedly observed that in the EU legal order a vital role is represented by ensuring the citizens, the Member States and the European institutions to the principles of legal certainty and legitimate expectations. The aim of these principles is to preserve the continuation of existing legal situations, avoiding an unexpected and unpredictable compression of subjective situations as a result of the introduction of some new regulation.

These principles, although not explicitly formulated in the Treaty and in legislative acts (namely in the EU Regulations or Directives) have been deemed applicable peacefully with reference to tax matters, in order to enable the operators to know precisely the extent of the tax obligations imposed by law (case 12/15/1987, *Kingdom of the Netherlands vs. Cee Commission*; case 02/22/1989, C-92/87 and C-93/87, *Commission vs. France and the United Kingdom*).

The EU law may not produce a temporal effect before its publication, and therefore it should be regarded under the principle of non-retroactivity (case 11/22/2001, the *Kingdom of the Netherlands vs. Council the EU*; case 04/29/2004, *Finanzamt Sulingen vs. Sudholz Walter*). Exceptions to this principle are allowed only in some limited cases, where it is necessary for the achievement of the purposes of the regulatory act, and without prejudice to the legitimate expectations of those concerned.

The protection of legitimate expectations should be realized also as a result of interpretative rulings by the Court of Justice that present a reconstruction of the EU provision in a different manner than the previous interpretation (and in any case in a different way than the legal presentation formulated into national law), as the need to safeguard the legal position of the parties affected by the retroactive effects of interpretative rulings by the European Court of Justice have the same axiological background than the recipient of the enactment of the legislation.

However, it should be noted that just in tax matters the Court of Justice has repeatedly exercised the right to limit the temporal effect of its interpretations, recalling in particular the principle of legal certainty, in view of the problems that could be accounted under the judgment in the context of the legal relationships established in good faith in the past.

Another corollary of the above mentioned principles of legal certainty and legitimate expectations can be identified in the requirement of adequate transparency of the activity by the EU institutions in the interests of the recipients of the administrative procedures (case 02/22/1984, *Kloppenburg*; case 06/21/1988, *Commission vs. Italy*); this rule has thus led to the identification of a reasonable deadline with reference to the issuance of rulings of the Commission on the compatibility of the tax reliefs with the State aids regulations.

In particular, it was deemed necessary to protect the good faith and the expectations of the recipient of the tax reliefs subsequently found to be incompatible with the rules on the State aids, where the conduct of the EU institutions has

contrarily led to the admission of the favourable tax regulation. At this purpose the Court of Justice assumed a rigorous approach, since it bares the burden of proof on the recipients to ascertain whether the competent State bodies have notified the draft State aid to the Commission and if it has commenced a decision-making procedure in matter; at the same time the Court denies any relevance to the behaviours assumed by the national authorities on the presumed validity of the tax reliefs.

12.3 The Principle of Effectiveness

The principle of effectiveness finds an explicit codification in the Treaty under art. 4 TEU, being expressly provided for the duty of individual States to apply the provisions of the EU law and to carry out all activities aimed to facilitate and not to aggravate the accomplished and effective statement of the rules related to the organization of the EU. The determination of the duty to cooperate also applies to the Member States in order to establish the claim of the EU institutions and citizens to the proper implementation of the EU obligations.

As corollaries of this rule it is identified typically the principle of effectiveness in the narrow sense and the principle of equivalence in the wide sense, both functional to ensure a balance between the procedural autonomy of the legal systems of the Member States and the effective protection of the rights laid down by the EU law (case 12/14/1995, *Van Schijndel*).

The principle of equivalence requires that the recognition and the protection of rights under the EU law is made available to European citizens by the same mechanisms provided by domestic law for the protection of the rights of internal source; in essence the exercise of the EU rights is not placed in deteriorate conditions compared to the national rights. This principle is found at every procedural level and applies to ensure the identification of the legal mechanism and of the procedure used for the protection of subjective legal situations.

The principle of "strict effectiveness" ensures that the provisions of domestic law do not make too difficult or too costly the exercise or the protection of a subjective legal situation determined under the EU law. It is determined on the basis of the suitability of a procedural rule to ensure the protection of some concrete and effective EU rights.

It should be evident that the principle of effectiveness regards typically the area of the implementing of the scope of the EU rights and therefore has a conforming function about the procedural systems of the Member States.

Accordingly, the parameters of effectiveness are to be found mainly in the criteria of good administration and due process. Indeed, it is well established in the ECJ case-law that this principle applies to establish the European regulations of relations between governments and citizens. In particular, with reference to the administrative procedure the Court of Justice has clearly identified these parameters

of effectiveness in the principles of legal certainty, good faith, impartiality, efficiency, and transparency of the administration, as well as the principles of cross examination with the counterparty, motivation of the administrative provisions and proportionality with the produced effects. With reference to the process, the Court has instead outlined a series of legal criteria deducted by the logic of a fair trial (also formalized in the art. 6 of the European Convention on Human Rights of Nice), which provides basically the impartiality and fairness of the Court and the reasonable duration of the due process.

It is worth noting that the principle of effectiveness requires by its very nature the abandonment of the formalistic patterns often adopted into national law in favour of legal mechanisms and institutional instruments inspired by a concrete and substantial protection of the EU rights (according to the logic of the "*substantia versus formam*"). It is thus affirmed the belief that the rules of procedure and proceedings may not unreasonably compress the possibility of a legal recognition of the infringed right.

In tax matters the principle of effectiveness has found an application especially with reference to the cases of unfair taxation, permitting to recognize and to protect the actions of tax refund by taxpayers against procedural foreclosures often provided for by the laws of the nation-States.

At this purpose it should be noted that, where a national tax has been considered incompatible with the EU law, the taxpayer is entitled to bring an action for the recovery of the tax in the face of administrative and/or judicial national authorities, in order to obtain a refund of taxes (or public charges) levied in breach of the EU rules (qualifying the legal position of the taxpayer in terms of a perfect subjective right). In accordance with the principle of effectiveness, it was indicated that in each case the terms of prescription and limitation, the terms and conditions of the repetition of undue tax established by the internal discipline may not be adjusted so as to make excessively burdensome the action given to a taxpayer (especially to a resident of another Member State) and in any case these internal rules must be consistent and responsive to the common standards of reasonableness and proportionality.

12.4 The Principle of Proportionality

12.4.1 The Principle of Proportionality Within the EU Law

A further general principle which has developed in the European sensitivity regards the proportionality of regulatory means adopted by Member States to the aims pursued by the European legal system.

In fact, the case law of the Court of Justice adopted frequently the checking about the instrumental and gradual suitability—and thus about the proportionality—of the material scope of domestic law to achieve the goal systematically assigned by the Treaty or by the EU derivate legislation. It is a way of

measuring the teleological interpretation of the rule, whose application is entrusted to some probabilistic judgments and to a prognostic analyses on the purpose of the regulatory act within the EU legal order.

The assessment of proportionality is used by the Court of Justice to determine whether the compression of individual rights or of subjective legal rights recognized by the EU law by reason of the pursuit of national public interest is the only possible and reasonable option or if there are other forms of balance between the European order and the national interests which are less costly to the individual positions. The principle of proportionality thus responds to a logic of balancing for the conflicting interests (European and national) according to an assessment of instrumental and gradualist efficiency of the law.

Therefore, the national legislature and the public administration may not impose (by means of legislation or even by administrative measures) obligations or restrictions of individual rights and freedoms to an extent beyond what is strictly necessary to achieve the public purpose to be pursued, making a comparison between the public benefits and the individual disadvantages.

In particular, the proportionality of internal regulations involves the verification of three different standards: suitability, necessity, appropriateness. The suitability is the potential ability to pursue the goal set by the national legislation so as to allow assessment of the adequacy of the means to the aim. The necessity is identified in the lack of an alternative to the legislative choice, given the absence of other equally effective means to achieve the target set by national law. The appropriateness represents the adequacy of the discretionary activity of balancing the involved values (and, especially, the public and the individual interests affected by the regulatory solution chosen).

12.4.2 The Applications of the Principle of Proportionality in Tax Matters

The case law of ECJ has recognized that the principle of proportionality assumes a great importance in the field of taxation, as it is an essential criterion to ensure that the pursuit of the aims of national law produces the least possible detriment to the European purposes (case 07/05/1977, C-114/76, *Bela-Mhle*; case 12/18/1997, C-286/94, C-340/95, C-401/95, *Molenheide*; case 03/21/2000, C-110/98 to C-147/98 *Galbafrisa*).

There are some decisions of the Court of Justice in which it is made explicit recourse to the principle of proportionality in order to criticize certain provisions of the national law which, despite being intended to protect the public interest, generate an evident damage to the individual interest through a measure found not adequately proportional.

So it was considered unlawful a rule that precluded the right to the tax reimbursement in relation to the submission of a duplicate of the original invoice lost for reasons not attributable to the taxpayer, judging unnecessary (and therefore

disproportionate and excessive) the foreclosure of the reimbursement compared to the purpose of preventing tax fraud (case 11.6.1998, C-361/96, *Société Generale des grandes sources*).

In another occasion the Court of Justice has ruled against the national regulation which absolutely prevents the taxpayer to provide proof of having actually incurred certain expenses for the purposes of tax deductibility, as disproportionate to the purpose, although abstractly appreciable, of preventing tax avoidance; indeed, there is the possibility to identify alternative rules that oblige the taxpayer to produce documentary evidence enabling the tax authorities to ascertain clearly and precisely the nature and genuineness of the incurred expenses (case 8.7.1999, C-254/97, *Baxter*).

In the mentioned cases the principle of proportionality shows considerable contiguity with respect to the principle of effectiveness, as it expresses the need to secure effective protection to the citizens in respect of the EU rights, ensuring that the national rules pose burdens and obligations not excessively burdensome for the exercise of such rights.

Moreover, the Court of Justice seems to use the principle of proportionality as a decisive criterion for the implementation of the "rule of reason" in order to judge the legitimacy of exceptions coming from the national legislation with respect to the implementation of the EU freedoms and to the non-discrimination of non-residents.

In this regard it can be mentioned, for its high symbolic importance, the decision on the cross-border losses (case 11.7.2002, C-62/00, *Marks & Spencer*) in which it was held to be incompatible with the EU law the domestic legislation that prevented to use the losses of the subsidiary company resident in a Member State to offset the profits of the parent company resident in another Member State, believing that the needs of protection of the tax could be protected with other regulatory mechanisms not disproportionate to the restriction imposed on taxpayers. The Court of Justice held that, if the losses are not used anymore in the State of source (because it may not be offset against profits from previous years or no longer carried forward), it should be allowed to offset against the profits of the parent company resident in another member State as a fair and reasonable rule of balancing the national interests of the State of residence of the parent company and the fundamental principles of the Treaty (and in particular the freedom of establishment).

Thirdly, the Court of Justice has made use of the principle of proportionality in assessing the reasonableness of sanctions and penalties of the national law to combat the tax violations relating to significant operations for the European trade; in particular it was considered disproportionate the extension of penal protection to violations of the intra Community VAT regime, based on a comparison with the milder sanctions imposed for the violations relating to the supply of goods within the State (case 02/25/1988, C-299/86, *Drexl*).

12.5 The Abuse of Law

12.5.1 The Abuse of the Law as a General Principle of the EU Law in the Elaboration of the Court of Justice

In the EU law the concept of "abuse of law" originates from a well-established series of decisions of the Court of Justice where it was stated the general principle that the formal and literal application of regulations may not extend to the abusive practices carried out by economic agents (case 12/11/1977, C-125/76, *Cremer*; case 03/03/1993, C-8/92, *Milk Products*; case 02/05/1996, C-206/94, *Paletta*; case 05/12/1998, C-367/96, *Kefalas*; case 02/09/1999, C-212/97, *Centros*; case 09/30/2003, C-167/01 *Diamantis*; case 03/03/2005, C-32/03, *Fini H*.; case 02/21/2006, C-255/02, *Halifax*; case 04/06/2006, C-456/04, *Agip Petroli*; case 09/12/2006, C-196/04, *Cadbury Schweppes*; case 06/28/2007, C-79/06, *Planzer*; case 07/05/2007, C-321/05 *Kofoed*.).

In essence, the Court recognizes the application of the principle of substance over form, believing that the formal compliance with the literal meaning of the law shall not permit, under any circumstances, to carry on transactions that produce results quite contrary to the purpose which is inspired by the same law and are therefore characterized by a fraudulent intent.

In particular, the Court of Justice has repeatedly stated that "*the fact that there is an abusive practice requires, on the one hand, a set of objective circumstances in which, despite formal observance of the conditions laid down by the EU legislation, the goal pursued by that legislation has not been reached. It requires, however, a subjective element consisting in the intention to obtain an advantage from the EU rules by creating artificially the conditions necessary for its achievement*".

The abuse of the right thus requires two elements:

- the objective circumstances that indicate the lack of a concrete economic basis for the activity carried on;
- the subjective purpose to obtain an undue advantage and especially an illegal benefit not provided for by the EU legislation.

Originally drafted in the areas of EU undergone extensive regulatory legislation (and especially in maritime law, the common agricultural policy, the corporate law), the prohibition of abuse is only recently landed in the area of taxation on the basis of a relevant case law of the Court of Justice (case 02/21/2006, C-255/02, *Halifax*, to be considered a real leading case on the abuse of rights in the field of taxation).

12.5.2 The Abuse of Law in Tax Matters

Although references to the prohibition on abusive transactions in tax matters are found in some rules devoted to combat fraudulent behaviours of taxpayers with

respect to the application of EU regulations (see art. 11, no. 1, letter A) of Directive n. 90/434/EEC; art. 1, par. 2, Directive n. 90/435/EEC; art. 5, Directive n. 2003/49/EC), the concept of abuse of law has been formulated only recently by the Court of Justice.

In fact, the Court has identified an autonomous concept of abuse of tax law firstly with reference to the rules of VAT, specifying that the taxpayer is not entitled to deduct the VAT paid on inputs if "*transactions from which derive that right constitute an abusive practice*" (case 02/21/2006, C-255/02 *Halifax*) and then with regard to the direct taxation, stating that the tax restrictive effect on the freedom of establishment of the company is not allowed "*unless it relates only to wholly artificial arrangements intended to escape the normally payable national tax*" (case 09/12/2006, C-196/04, *Cadbury Schweppes*).

In both decisions, the Court of Justice held that the transactions entered into by persons resident in the European Union, although really wanted and immune from surveys of formal validity, which are artificially constructed and show "essentially the purpose of obtaining a tax benefit" in contrast with the purposes pursued by the Treaty, must be qualified as a typical kind of abuse of law.

In this case the behaviour of taxpayer may qualify as an expression of abuse of law if the transactions present the following qualifying elements (case 02/21/2006, C-255/02, *Halifax*):

1. notwithstanding formal application of the rules and conditions laid down by EU law and by transposing national legislation, these transactions are characterised by the "*essential purpose*" to obtain a tax advantage whose grant is contrary to the purpose pursued by the EU regulations;
2. the essential purpose of obtaining a tax advantage must be based on a set of objective factors.

The Court of Justice therefore proposes to include in the tax matters the same ideas already expressed for other legal matters in the elaboration of the general principles, stating that the transaction should be recognized abusive because of a subjective element (the purpose of obtaining a tax advantage contrary to the EU law) to be identified on the basis of a set of objective circumstances.

The Court of Justice also stated that the identification of the tax advantage such as "essential purpose" of the operations is not able to formulate a general condition for the recognition of the abuse, but it identifies a minimum threshold of unacceptability of abuse of rights (case 02/21/2008, C-425/06 *Part Service*).

Given that the taxpayer has the right to choose the form of the management of its business that will reduce the tax liability, the concrete identification of abusive behaviour is considered through the artificial deviation compared to the standard of the market as a decisive index for the recognition of abuse of rights. In this regard, formally distinct measures should be considered as segments of a single unitary transaction, if special circumstances reveal, in a consequential and convergent way, that the correlated acts form functionally a single and indivisible economic chain; in this case the tax treatment of the various acts, which would artificially separate, is

that one provided for the principal operation (case 02/21/2008, C-425/06 *Part Service*).

In any case, the assessment of the existence of a fictional and artificial construction by the taxpayer should be made on for each case, basing on the circumstances of the activity actually carried on (case 09/12/2006, C-196/04, *Cadbury Schweppes*).

The same Court of Justice also points out the effect of new regulation of the abusive operation: and indeed, if there is any abusive conduct, it is stated that "*the transactions involved must be redefined so as to re-establish the situation that would have prevailed without the operations carried on through the abusive practice*" (case 02/21/2006, C-255/02, *Halifax*). It determines the failure of the effects produced by the abuse of law, with the consequent regeneration of the transaction according to the standards of behaviour normally applicable.

12.6 The Environmental Protection and the Principle "Who Pollutes Pays"

12.6.1 The Protection of the Environment as a Primary Value of the EU Legal Order; The Principle "Who Pollutes Pays"

In the EU law it is increasingly affirming the value of the environmental protection as a basic rule of coexistence in the European area. Especially, the environment is recognised as a universal value, to be protected e guaranteed in the interest of the whole society e, moreover, in the interest of the future generations.

After a first period where the environmental protection was limited to the market context, assuming a relevance as a precondition for the correct functioning of the commercial flows and of the economic activities, subsequently (since the Single European Act of 1986) it has been developing a process of promotion of the value "environment" as a specific purpose of the European Union, independent with respect to the economic freedoms. So, it has formed the conviction that the development of the European common market is strictly linked to adequate environmental standards, suitable to achieve a sustainable economic growth.

In this perspective, the EU law has promoted several legislative measures devoted not only to dictate incentives in favour of environment-friendly policies, but also to establish forms of punitive damages or otherwise generally disincentive with regard to political or industrial production (often unavoidable, at least in the short time) with a pollutant or anti-ecological content.

Particularly, it has been consolidating the principle "who pollutes pays" (expressly established by the art. 191 TFEU) as the basis for the establishment of environmental legislative measures, typically aimed at penalizing the use of production factors with a potential for pollution and, therefore, to promote the threefold aims of prevention, precaution and correction with respect to pollutants. This principle imposes to attribute a liability towards the community for the person (physical or juridical) who produces damage to the environment, legitimizing the

adoption of legislative measures suitable for the recovery of the damage and the environmental protection.

In the area of the legislative measures devoted to the environmental protection are evidently included also the environmental taxes, which are typically suitable to penalize the use of pollutant factors or, on the other side, to stimulate the adoption of environmental factors. So, the environmental tax is addressed to pursue the triple purpose of protection, promotion and correction with regard to the pollutant activities.

The use of fiscal institutions permits to address the economic operations towards a correct purpose under an environmental perspective, so as to favour the reset of the environment damaged by the pollutant factors. In this way tax is utilised as a leverage in order to achieve the best allocation of the economic and social resources within the community, reaching at a balance between the economic growth and the protection of the environment.

Therefore, the principle "who pollutes pays" is suitable to legitimize some legislative measures of fiscal nature as an expression of the "functional finance" in order to promote the protection and the development of the environmental values.

The rule contained in the art. 191 TFEU does not establish an unconditioned obligation for the Member States to adopt in its legal order neither specific environmental measures, nor environmental taxes; this rule establishes the power for the Member States to define and to execute some environmental policies, utilising adequate legislative measures (including the environmental taxation).

So, the decision in order to the concrete adoption of some environmental tax is attributed exclusively to the Member States, being referred typically to the national sovereignty. The EU bodies maintain only a role of coordination and promotion in order to the environmental policy, but not also a legislative function.

The principle "who pollutes pays" represents the juridical basis for the adoption of the environmental taxation, but it does not constitute a binding obligation for the Member States. So, this principle must be considered as well as a programmatic (and not preceptive) principle.

12.6.2 The Environmental Taxes

The provision of an environmental tax identifies a contribution to cover the cost incurred by the civil community for social environmental pollution to be borne by the economic agent who undertakes the polluting behaviours. The logical basis of the ecological tax is identified in the causal relationship that must exist between the production of pollution and the tax levy.

In a legal perspective it is possible to introduce a basic distinction about the environmental taxes:

i. *the environmental tax* (in a strict sense) which shows an assumption characterised by the use of physical elements suitable to produce a damage to

the environment (where the physical elements may concern every pollutant substance or natural resources which are consumed); in this case the taxable base is represented by the mentioned physical elements;

ii. *the tax with an environmental purpose*, where the assumption is not directly referred to the environment, but is characterised by the aim to pursue the protection of the environment; particularly this tax may represent an incentive for avoiding the pollutant activities or may produce a redistribution of the resources in order to favour the reset (or the development) of the environment.

In any case, in the literature it has been formulated the unitary classification of the environmental tax whose qualifying feature is identified in the consumption or in the production or in the release in the environment of some physical elements suitable to produce a negative impact for the ecosystem.

Therefore, the concept of tax is expanded with respect to the ordinary model of taxation usually assumed in the national legal systems: the assumption of the tax contribution is not identified in an event suitable to represent the economic attitude to the fiscal contribution (expressive of the personal wealth), but is verified with regard to the social impact over a general interest of the community.

The environmental tax may assume several forms, because it can concern the negative emissions or the pollutant products or the economic activities which can produce a damage to the environment. However, this tax is founded over some monetary performances rendered by the tax payers for which there is not any specific public service; this feature distinguishes the environmental tax from the tariffs for public services.

12.6.3 The Tax Facilitations with an Environmental Purpose

Among the fiscal institutions suitable for the execution of the principle "who pollutes pays", is included certainly the use of tax facilitations with an environmental purpose.

Indeed, it is evident that the legal measures adopted for pursuing a tax facilitation to the tax payers represent an adequate tool in order to stimulate virtuous behaviours by the economic agents with regard to the protection or to the development of the environment. Especially, the tax facilitation may be utilised with the aim to promote the reduction of pollutant activities or to encourage some operations which produce benefit for the environment.

Particularly, the tax facilitations referred to the environment may be distinguished as follows:

a. *Tax facilitations with a structural environmental feature*, which include the environmental benefit inside the assumption or the taxable base; these facilitations determine a tax advantage which is determined on the basis of a calculation of the environmental benefit;

b. *Tax facilitations with a functional environmental feature,* whose purpose consists in the promotion of some virtuous behaviours with reference to the environment, but where the environmental benefit is not included in the assumption or in the taxable basis.

12.6.4 The Principle of Differentiation and the Observation of other European Principles

The Member States may execute the principle "who pollutes pays" through several legal tools with reference to the tax area. This is a choice referred typically to the evaluations of a single State which apply basically a primary principle of the European legal order.

However, the use of the fiscal tools must respect some conditions established by the Treaty:

i. the principle of differentiation;
ii. the observance of other European principles.

The principle of differentiation (established by the art. 191, par. 2 TFEU) envisages the environmental policy to be adopted in consideration of the various territorial situations, so as to the protection of the environment cannot be defined in a unique way in the European Union, but it must be verified through a differentiated logic according to the different characteristics of the various territories. It is outlined, therefore, the link between the environmental purpose and the territory, which attributes a remarkable relevance to the legislative power of the various governments at a sub-State level in order to emphasize the specific needs of the minor communities.

The observance of the other European principles requires to coordinate the use of the fiscal tools with an environmental purpose with the other principles emerging from the European legal order. This rule has been repeatedly enunciated by the jurisprudence of the Court of Justice in order to point out that the environmental purpose cannot represent a justification for avoiding the respect of other European principles and rules. Therefore, the institution of an environmental tax (or of a tax facilitation with an environmental purpose) cannot counteract with the principle of non discrimination or the European freedoms, with the prohibition of national customs or other equivalent levies, with the prohibition of State aids or with other European principles regarding the tax matters.