

Summary of Contents

Editors	v
Contributors	vii
Foreword	xxxv
Preface	xxxvii
CHAPTER 1	
BEPS, ATAP and the New Tax Dialogue: A Transatlantic Competition? <i>Reuven Avi-Yonah & Gianluca Mazzoni</i>	1
PART I	
European Construction, Competences in Tax Matters and the Development of Anti-avoidance Rules	37
CHAPTER 2	
The European Union, the State Competence in Tax Matters and Abuse of the EU Freedoms <i>Gloria Marín Benítez</i>	39
CHAPTER 3	
The Role of Negative Harmonization in the European Tax Arena: Special Reference to the Cross-Border Loss Relief Regime <i>Andrés Sánchez López, Paula Benítez Régil & Diego Arribas Plaza</i>	61
CHAPTER 4	
The BEPS Project in the European Union: Working Up the ATAP Package <i>Roberta Poza</i>	81

Summary of Contents

PART II	
Council Directive (EU) 2016/1164 of 12 July 2016 Laying Down Rules Against Tax Avoidance Practices That Directly Affect the Functioning of the Internal Market	99
CHAPTER 5	
The Scope of the Directive and the Principle of Subsidiarity <i>Cristino Fayos</i>	101
CHAPTER 6	
The General Anti-abuse Rule of the Anti-tax Avoidance Directive <i>Andrés Báez Moreno & Juan José Zornoza Pérez</i>	113
CHAPTER 7	
Interest Limitation Rule <i>Beatriz Parejo</i>	145
CHAPTER 8	
Harmonization of Controlled Foreign Corporation Rules in the European Union: The Spanish Perspective <i>José Manuel Almudí Cid</i>	159
CHAPTER 9	
Hybrid Mismatch Arrangements <i>Silvia López Ribas</i>	173
CHAPTER 10	
Exit Taxes: One Size Should Not Fit All <i>Pablo A. Hernández González-Barreda</i>	191
CHAPTER 11	
The Switch-Over Clause in the 2016 Proposal for an Anti-tax Avoidance Directive <i>Félix Daniel Martínez Laguna & Félix Alberto Vega Borrego</i>	227
PART III	
Administrative Cooperation in Tax Matters: A Need for a Full Applicability of European Freedoms and a Guarantee to Tax Effectiveness	245
CHAPTER 12	
Administrative Cooperation in the Recovery of Claims: Directive 2010/24/EU – A Spanish Approach <i>José María Cobos Gómez</i>	247

CHAPTER 13		
Change of Paradigm in Administrative Cooperation Directives: Automatic Exchange of Information		
<i>Antoinette Musilek</i>		279
CHAPTER 14		
Amendment of Directive 2011/16/EU as Regards Mandatory Automatic Exchange of Information on Tax Rulings		
<i>Ascensión Maldonado García-Verdugo</i>		301
CHAPTER 15		
Country by Country Reporting		
<i>María del Mar Barreno Asensio</i>		315
CHAPTER 16		
Mandatory Disclosure Rules for Tax Planning Schemes and Automatic Exchange		
<i>Jorge A. Ferreras Gutiérrez</i>		325
CHAPTER 17		
The New Tax Dispute Resolution Mechanisms in the European Union: The ‘Arbitration Directive’		
<i>Jaime Mas Hernández</i>		339
CHAPTER 18		
Code of Conduct on Withholding Tax and the OECD TRACE System		
<i>Javier Doldán Varela & Plácido Martos Belmonte</i>		353
CHAPTER 19		
Elimination of Double Taxation in the European Union: Former Article 293 TEEC, EU Competences and Controversial Aspects of the Arbitration Directive		
<i>Aitor Navarro Ibarrola</i>		369
PART IV		
Tax Treaties and the External Dimension of the European Union in Tax Matters		391
CHAPTER 20		
The Recommendation on Tax Treaties and the Legal Framework of Tax Treaties Between Member States and with Third States Within EU Law		
<i>Brian Leonard</i>		393

Summary of Contents

CHAPTER 21	
The 2016 Communication on the Strategy on External Action and the External Dimension of the EU in Tax Matters: Balancing Internal Market and Tax Sovereignty	
<i>Edoardo Traversa & Alejandro Zubimendi</i>	407
CHAPTER 22	
The EU List of Non-cooperative Jurisdictions for Tax Purposes	
<i>Manuel Santaella Vallejo</i>	429
PART V	
Other European Measures to Prevent Tax Avoidance: State Aid and the Code of Conduct for Business Taxation	447
CHAPTER 23	
The Revision of the Code of Conduct for Business Taxation	
<i>Domingo Jesús Jiménez-Valladolid de L'Hotellerie-Fallois</i>	449
CHAPTER 24	
Application of the State Aid Regime to Tax Rulings	
<i>Juan Salvador Pastoriza Vázquez</i>	467
CHAPTER 25	
The Commission's State Aid Decisions on Advance Tax Rulings: Criticisms and Potential Impact on the Future of Direct Taxation Within the European Union	
<i>Giulio Allevato</i>	483
CHAPTER 26	
The Difficult Relationship Between the Fundamental Freedoms and the Nexus Approach as a Criterion for Applying Preferential Regimes Within the European Union: Special Reference to IP Boxes	
<i>María Cruz Barreiro Carril</i>	497
PART VI	
The Future of European Taxation	519
CHAPTER 27	
Case Law of the Court of Justice of the European Union: A Reflection for the Future	
<i>Elena Rodríguez Ruiz de Alda</i>	521

Summary of Contents

CHAPTER 28	
Study of the Proposal for a Council Directive on a Common Corporate Tax Base	
<i>Eduardo Tapia Tejedor</i>	541
CHAPTER 29	
A Preliminary Assessment of the EU Proposal on Significant Digital Presence: A Brave Attempt That Requires and Deserves Further Analysis	
<i>Eva Escribano</i>	559
Index	601

Table of Contents

Editors	v
Contributors	vii
Foreword	xxxv
Preface	xxxvii
CHAPTER 1	
BEPS, ATAP and the New Tax Dialogue: A Transatlantic Competition? <i>Reuven Avi-Yonah & Gianluca Mazzoni</i>	1
§1.01 Introduction: The US and BEPS	2
§1.02 Past Accumulations	4
§1.03 Future Accumulations	8
§1.04 Base Erosion	14
§1.05 BEPS Action 6: Should the US Reconsider the Rejection of the PPT?	18
§1.06 Anti-hybrid Provisions	28
§1.07 Conclusion: The Future of BEPS	35
PART I	
European Construction, Competences in Tax Matters and the Development of Anti-avoidance Rules	37
CHAPTER 2	
The European Union, the State Competence in Tax Matters and Abuse of the EU Freedoms <i>Gloria Marín Benítez</i>	39
§2.01 The Approach to the Issues	39
§2.02 ECJ Jurisprudence on the Use for Tax Reasons of EU Freedoms	42

Table of Contents

[A]	Anti-avoidance Rules Enacted <i>Motu Proprio</i> by Member States	42
[1]	Exit Taxes	43
[2]	CFC Rules	44
[3]	Thin Capitalization Rules	46
[B]	Anti-avoidance Rules Grounded on Rules of Secondary EU Law	48
[C]	Lack of Domestic Specific Anti-avoidance Rule: General EU Principle Forbids Abuse of Rights	51
[1]	Case C-255/02 <i>Halifax</i>	51
[2]	Case C-321/05 <i>Kofoed</i>	54
§2.03	Status Quo on Abuse of EU Law for Tax Reasons	55
§2.04	Some Remarks on the Eventual Influence of the Anti-avoidance Directive on the Status Quo	56
[A]	On the Purpose of the Directive and Its Eventual Implications	56
[B]	On the Source of Measures Adopted	57
[C]	On the Concept of Abuse Deriving from the General Anti-abuse Rule Contained in Article 6	58
CHAPTER 3		
	The Role of Negative Harmonization in the European Tax Arena: Special Reference to the Cross-Border Loss Relief Regime	
	<i>Andrés Sánchez López, Paula Benítez Régil & Diego Arribas Plaza</i>	61
§3.01	Negative Harmonization of Taxation	61
§3.02	The System for Cross-Border Set-Off of Losses	65
[A]	The European System for Cross-Border Set-Off of Losses	65
[B]	The Spanish Cross-Border Loss Relief Regime	71
[1]	The Spanish System for Cross-Border Set-Off of Losses	71
[2]	The System for Cross-Border Set-Off: Historical Development	72
[a]	Up until 2012	72
[b]	2013–2016	73
[c]	2017	75
[d]	Conclusions	77
[C]	Final Remarks	78
CHAPTER 4		
	The BEPS Project in the European Union: Working Up the ATAP Package	
	<i>Roberta Poza</i>	81
§4.01	Introduction	81
§4.02	Background	87
§4.03	Anti-tax Avoidance Package	91

Table of Contents

§4.04	Procedure in the Council: Approval of the Measures	93
§4.05	Adoption of the Last BEPS-Related Measures	96
PART II		
	Council Directive (EU) 2016/1164 of 12 July 2016 Laying Down Rules Against Tax Avoidance Practices That Directly Affect the Functioning of the Internal Market	99
CHAPTER 5		
	The Scope of the Directive and the Principle of Subsidiarity <i>Cristino Fayos</i>	101
§5.01	Introduction	101
§5.02	Subsidiarity and Proportionality of the Measure	104
§5.03	Scope of Application	106
	[A] 'Corporate Income Tax' for the Purposes of the ATAD	106
	[B] Subjective Scope of Application: 'Taxpayers Subject to Corporate Income Tax'	107
	[1] General Features	107
	[2] Considerations on Tax Residence and PEs	108
	[3] Excluded Taxpayers	108
	[a] Transparent Entities	108
	[b] Individuals	109
CHAPTER 6		
	The General Anti-abuse Rule of the Anti-tax Avoidance Directive <i>Andrés Báez Moreno & Juan José Zornoza Pérez</i>	113
§6.01	Introduction	113
§6.02	The Fight Against Tax Abuse in the Internal Market: The Justification for the ATAD	115
§6.03	From the Anti-abuse Case Law of the ECJ to a General Anti-abuse Rule	120
§6.04	A Specific Analysis of the General Anti-abuse Clause of the ATAD Directive	124
	[A] The Legal Hypothesis Established by the General Anti-abuse Rule Contained in the ATAD Directive	125
	[1] The Subjective Test: The Obtainment of a Tax Advantage as the Main Purpose or One of the Main Purposes of the Arrangement	126
	[2] The Objective Test: The Obtainment of a Tax Advantage Must Defeat the Object or Purpose of the Applicable Tax Law	128

Table of Contents

	[3]	The Valid Commercial Reasons Test: A Falsified Arrangement in the Sense That Valid Commercial Reasons Have Not Been Established That Reflect Economic Reality	131
	[B]	The Legal Consequence of the General Anti-abuse Rule Contained in the ATAD Directive	132
§6.05		Epilogue: An (Unforeseen) Consequence of the ATAD's General Anti-abuse Clause	134
CHAPTER 7			
		Interest Limitation Rule	
		<i>Beatriz Parejo</i>	145
§7.01		Introduction	145
§7.02		Existing Measures on the Limitation of Deductibility of Financial Expenses	147
§7.03		Consideration of Costs of Indebtedness	148
§7.04		General Rule of the Fixed Ratio: EBITDA	150
§7.05		Contributors to Those That Are Applicable to the Ratio Rule	152
§7.06		Exempt Minimum Threshold	152
§7.07		Exception Relating to Excessive Expenditure Derived from Certain Loans with Conditions	153
§7.08		Group Ratio	155
§7.09		Treatment of Non-deductible Financial Expenses	156
§7.10		Special Sectors	157
§7.11		Conclusions	157
CHAPTER 8			
		Harmonization of Controlled Foreign Corporation Rules in the European Union: The Spanish Perspective	
		<i>José Manuel Almudí Cid</i>	159
§8.01		Introduction	159
§8.02		Controlled Foreign Corporation	160
	[A]	Definition and Object of Control	160
	[B]	Taxation of the Controlled Foreign Company	162
§8.03		Tainted Income	163
	[A]	Tainted Income According to Its Legal Nature	163
	[B]	Tainted Income According to the Capacity and the Means of the Foreign Entity	167
§8.04		Limits to the Inclusion of the Tainted Income in the Taxable Base of the Shareholder	169
§8.05		Temporal Issues	170
§8.06		Rules to Eliminate Double Taxation	171

CHAPTER 9		
Hybrid Mismatch Arrangements		
<i>Silvia López Ribas</i>		173
§9.01	Introduction: From ATAD 1 to ATAD 2	173
§9.02	Concept, Characteristics and Typology of Hybrid Mechanisms	174
§9.03	General Principles of Hybrid Anti-asymmetries Rules	176
§9.04	Hybrid Financial Instrument Mismatch	177
§9.05	Hybrid Entity Mismatch	178
	[A] Hybrid Payer Entity	179
	[B] Reverse Hybrid Entity	180
§9.06	Hybrid PE Mismatches	182
	[A] Disregarded PE	182
	[B] Double Deduction	183
	[C] Deduction Without Inclusion	183
§9.07	Hybrid Transfers	184
§9.08	Imported Mismatches	185
§9.09	Tax Residency Mismatches	187
§9.10	Reverse Hybrid Mismatches	189
§9.11	Transposition of ATAD 2	189
CHAPTER 10		
Exit Taxes: One Size Should Not Fit All		
<i>Pablo A. Hernández González-Barreda</i>		191
§10.01	Introduction	191
§10.02	Concept and Types of Exit Taxes	194
	[A] The Concept of Exit Tax	194
	[B] Types of Exit Taxes	197
§10.03	The Court of Justice of the European Union Case Law on Exit Taxes	200
	[A] The Impact of Transfer of Seat Jurisprudence on Exit Taxes	201
	[B] Proper Exit Taxes and the Court of Justice's (Negative) Legislative Role	206
	[1] Restriction	207
	[2] Rule of Reason: Justification of Exit Taxes and the Balanced Allocation of Taxing Powers	209
	[3] Proportionality: Deferral, Guarantee and Interests	212
§10.04	Exit Tax and the Anti-tax Avoidance Directive	217
	[A] Scope of Application: Transactions Included and Excluded from the Directive Exit Tax	217
	[1] Scope of Application	217
	[2] Transactions Covered by the Exit Tax	218
	[B] Deferral in Instalments, Guarantees and Interests	219
	[C] Valuation and <i>Step-Up</i>	222
	[D] Minimum Standard	224

Table of Contents

§10.05	Final Comments	225
CHAPTER 11		
The Switch-Over Clause in the 2016 Proposal for an Anti-tax Avoidance Directive		
<i>Félix Daniel Martínez Laguna & Félix Alberto Vega Borrego</i>		
§11.01	Introduction	227
§11.02	Switch-Over Clauses, Subject-to-Tax Clauses and Exclusion Clauses	229
	[A] Preliminary Remarks	229
	[B] Switch-Over and Subject-to-Tax Clauses	230
	[C] Exclusion Clauses	233
	[D] Some Preliminary Conclusions	236
§11.03	The Switch-Over Clause in the ATAD Proposal	236
§11.04	Other Issues Regarding the Switch-Over Clause	240
§11.05	Final Remarks	243
PART III		
Administrative Cooperation in Tax Matters: A Need for a Full Applicability of European Freedoms and a Guarantee to Tax Effectiveness		
245		
CHAPTER 12		
Administrative Cooperation in the Recovery of Claims: Directive 2010/24/EU – A Spanish Approach		
<i>José María Cobos Gómez</i>		
247		
§12.01	Introduction	247
§12.02	Scope of the Directive	249
	[A] Subject Matter	249
	[B] To Whom the Directive Applies	250
	[1] Active Subjects	250
	[2] Passive Subjects	252
§12.03	Mutual Assistance Arrangements for the Recovery of Claims	252
	[A] Common Issues	253
	[1] Standard Forms and Means of Communication	253
	[2] Use of Languages	254
	[3] Disclosure of Information	255
	[4] Refusal to Handle a Request	257
	[B] Assistance for Obtaining Information	257
	[1] Exchange of Information with Prior Request	257
	[2] Spontaneous Exchange of Information or Exchange of Information Without Prior Request	259
	[3] Presence and Participation in Acts of Assistance	259
	[C] Assistance for the Notification of Documents	261

Table of Contents

	[1]	Requests for Notification of Documents Made by the Spanish Authorities	262
	[2]	Requests for Notification of Documents Received by the Spanish Tax Authorities	263
[D]		Assistance for the Recovery of Claims or the Adoption of Precautionary Measures	263
	[1]	Commencement of the Procedure	263
	[2]	Handling of the Procedure	266
	[3]	Disputes During the Recovery Procedure	268
	[4]	Termination of the Procedure	272
	[5]	Request for Precautionary Measures	273
	[6]	Limits to the Requested Authority's Obligations	274
	[7]	Limitation Periods	275
	[8]	Costs	276
CHAPTER 13			
Change of Paradigm in Administrative Cooperation Directives: Automatic Exchange of Information			
		<i>Antoinette Musilek</i>	279
§13.01		First Automatic Exchange of Financial Account Information: 30 September 2017	279
§13.02		Key Elements of Automatic Exchange of Financial Account Information	281
	[A]	Legal Basis of AEOI	281
	[B]	Evolution Towards CRS	283
	[C]	Content of the CRS	288
	[1]	Account Holders of Reportable Accounts	288
	[2]	Financial Accounts and Financial Information to Be Reported	289
	[3]	Financial Institutions and Due Diligence Procedure	289
§13.03		Implementation of CRS Automatic Exchange of Financial Account Information	291
	[A]	Political Commitment to the New CRS AEOI Standard	292
	[B]	International and Domestic Legal Framework	293
	[C]	Confidentiality and Data Protection	294
	[D]	Identifying Interested Appropriate Partners	295
	[E]	Compliance with IT Requirements	295
	[F]	Global Forum Mandate: CRS Effective Implementation Monitoring and Technical Assistance	297
	[1]	AEOI CRS Effective Implementation Monitoring	297
	[2]	Technical Assistance: Developing Countries	297
§13.04		Forthcoming Challenges	298

Table of Contents

CHAPTER 14		
Amendment of Directive 2011/16/EU as Regards Mandatory Automatic Exchange of Information on Tax Rulings		
<i>Ascensión Maldonado García-Verdugo</i>		301
§14.01	Introduction	301
§14.02	Background	302
	[A] Model Instruction for the Spontaneous Exchange of Information on Tax Rulings (Code of Conduct on Business Taxation)	302
	[B] Action 5 of the BEPS Project: Spontaneous EOI on Tax Rulings	303
§14.03	Scope of the Directive	304
	[A] Obligation to Exchange Information on Bilateral/Multilateral APAs	305
	[B] Obligation to Exchange Information on Audit Settlements	306
§14.04	Type of Information Exchange	306
§14.05	Information Exchanged with Other Member States and the European Commission	307
§14.06	Limits on Exchange	309
§14.07	Periodicity of Exchange	310
§14.08	Directory Where the Information Is Stored	310
§14.09	Exchange Tracking	310
§14.10	Transposition of the Directive into Spanish Domestic Law	311
§14.11	Conclusions	312
	[A] Main Challenges for Tax Administrations	312
	[B] Main Challenges for Taxpayers	312
CHAPTER 15		
Country by Country Reporting		
<i>María del Mar Barreno Asensio</i>		315
§15.01	Introduction	315
§15.02	European Union Country by Country Reporting	316
	[A] Information Covered by the EU CBCR	316
	[B] Persons Covered	317
	[C] Implementation	318
	[D] Automatic Exchange	319
	[E] Directive Transposition into the Spanish Law	320
§15.03	Public Country by Country Reporting	321
§15.04	Conclusion	323

CHAPTER 16		
Mandatory Disclosure Rules for Tax Planning Schemes and Automatic Exchange		
<i>Jorge A. Ferreras Gutiérrez</i>		325
§16.01	Introduction	325
§16.02	Action 12 of the BEPS Action Plan	326
	[A] Who Is Obligated to Supply the Information	326
	[B] Information to Be Supplied	327
	[1] Multi-step System	327
	[2] Single-Step System	327
	[C] Timing for Providing the Information	328
§16.03	Commission Proposal to Modify Directive 2011/16/EU in Relation to Mandatory Rules for the Exchange of Information in Tax Matters	329
§16.04	Directive DAC 6	330
	[A] Preliminary Recitals	330
	[B] Personal Scope	331
	[C] Concept of Intermediary	332
	[D] Objective Scope	333
	[E] Hallmarks	333
	[F] Content of the Information Exchanged	335
	[G] Timing for the Application	336
	[H] Final Issues	336
	[1] Sanctions	336
	[2] Principle of Non-incrimination	337
	[3] Principle of Negative Silence	337
§16.05	Conclusion	337
CHAPTER 17		
The New Tax Dispute Resolution Mechanisms in the European Union: The ‘Arbitration Directive’		
<i>Jaime Mas Hernández</i>		339
§17.01	Background	339
§17.02	Elements of the New Procedural Framework	342
§17.03	Conclusion	350
CHAPTER 18		
Code of Conduct on Withholding Tax and the OECD TRACE System		
<i>Javier Doldán Varela & Plácido Martos Belmonte</i>		353
§18.01	Code of Conduct on Withholding Tax	353
	[A] Context	353
	[B] Origin and Description of the Code of Conduct	355
	[C] Further Actions	360

Table of Contents

§18.02	OECD TRACE System	360
	[A] How the TRACE AI System Works	362
	[B] Benefits of TRACE	363
	[1] Benefits for Governments	363
	[a] Source Country	364
	[b] Residence Country	365
	[2] Benefits for Investors	365
	[3] Benefits for Intermediaries	365
	[C] Why Now Is a Good Moment to Implement TRACE?	365
§18.03	Summing Up	367
CHAPTER 19		
Elimination of Double Taxation in the European Union: Former Article 293 TEEC, EU Competences and Controversial Aspects of the Arbitration Directive		
	<i>Aitor Navarro Ibarrola</i>	369
§19.01	Introduction	369
§19.02	Elimination of Double Taxation in the European Union	370
	[A] Double Taxation and Alternative Dispute Resolution: The Origins of the Arbitration Directive	370
	[B] MAP and Arbitration: Pros and Cons	375
§19.03	Controversial Aspects of the Arbitration Directive	377
	[A] Determining the Scope of the Directive	377
	[B] Interaction Between the Involved Tax Authorities and the Taxpayer	383
	[C] Interaction of the Procedures Envisaged in the Directive with Domestic Legal Procedures and Other Means of Alternative Dispute Resolution	386
	[D] How to Resolve Double Taxation: Enforcement of the Decision	390
PART IV		
Tax Treaties and the External Dimension of the European Union in Tax Matters		
		391
CHAPTER 20		
The Recommendation on Tax Treaties and the Legal Framework of Tax Treaties Between Member States and with Third States Within EU Law		
	<i>Brian Leonard</i>	393
§20.01	The Role of Supranational Organizations in the Tax Affairs of the Member States: The OECD and the European Union	393
§20.02	The Relationship Between Conventions to Avoid Double Taxation and European Law	395

Table of Contents

[A]	Primacy of Community Law	396
[B]	Double Taxation and Community Law	398
[C]	Freedom of Movement	399
[D]	Freedom of Establishment	400
[E]	Anti-abuse Provisions	401
[F]	The ECJ's Jurisdiction over DTCs	401
§20.03	Future of Taxation in the European Union	402
CHAPTER 21		
The 2016 Communication on the Strategy on External Action and the External Dimension of the EU in Tax Matters: Balancing Internal Market and Tax Sovereignty		
	<i>Edoardo Traversa & Alejandro Zubimendi</i>	407
§21.01	Introduction: External Action in the EU in Tax Matters and the New Paradigm in International Tax Relations	407
§21.02	Legal Foundations for External Action	408
§21.03	Tax Base Erosion and International Tax Competition with Respect to Third Countries	411
[A]	Tax Base Erosion: Taxation Where 'Value Is Generated' as a New Paradigm to Achieve a Global Level-Playing Field	411
[B]	International Tax Avoidance Within the EU and Its Implications with Respect to Third Countries	414
[C]	Tax Competition by Third Countries	417
	[1] Tax Good Governance Criteria Update	418
	[2] European List of Non-cooperative Countries and Sanctions	419
[D]	Conclusion	421
§21.04	Limits to EU External Action Against Tax Avoidance: Community Freedoms	423
§21.05	Conclusion	427
CHAPTER 22		
The EU List of Non-cooperative Jurisdictions for Tax Purposes		
	<i>Manuel Santaella Vallejo</i>	429
§22.01	Introduction	429
§22.02	Background	430
[A]	An EU Common Approach Regarding Non-cooperative Tax Jurisdictions: The Platform for Tax Good Governance	430
[B]	The Pan-European List of Non-cooperative Jurisdictions of Third Countries Compiled by the European Commission from Member States' National Lists	431
§22.03	The EU List of Non-cooperative Jurisdictions for Tax Purposes	433

Table of Contents

[A]	Criteria for the Preparation of the EU List of Non-cooperative Jurisdictions	434
[B]	Process of Screening of Jurisdictions with a View to Establishing an EU List of Non-cooperative Jurisdictions for Tax Purposes	436
[C]	The EU List of Non-cooperative Jurisdictions for Tax Purposes	439
§22.04	Other Relevant Issues Associated with the EU List	443
[A]	Defensive Measures	443
[B]	Differences with the List of the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes: Criterion 2.2. – Facilitation of Offshore Structures	444
[C]	Future Considerations	446
PART V		
	Other European Measures to Prevent Tax Avoidance: State Aid and the Code of Conduct for Business Taxation	447
CHAPTER 23		
	The Revision of the Code of Conduct for Business Taxation	
	<i>Domingo Jesús Jiménez-Valladolid de L’Hotellerie-Fallois</i>	449
§23.01	Introduction	449
§23.02	The Code in the Pre-BEPS Period (1998–2012)	450
[A]	Objectives and Measures Affected by the Code	451
[B]	Political Commitments Arising from the Code	453
[C]	Effects of the Code in Relation to Harmful Tax Competition in the Pre-BEPS Period: An Examination of Unilateral Measures	454
[D]	Other Results of the Code: Horizontal Measures and Relations with Third States	457
§23.03	The Role of the Code in the Anti-tax Avoidance Action Plan in the EU	459
[A]	The EU Anti-tax Avoidance Package and the BEPS Project	459
[B]	Revision of the Code: New Tools for Combating Harmful Tax Competition	460
[C]	Work Areas and Recent Results of the Code in the Post-BEPS Framework	463
§23.04	Conclusions	464
CHAPTER 24		
	Application of the State Aid Regime to Tax Rulings	
	<i>Juan Salvador Pastoriza Vázquez</i>	467
§24.01	Introduction	467
§24.02	Preliminary Notes on the Concept of State Aid	469

Table of Contents

§24.03	The Concept of Selectivity in Tax Aid	471
§24.04	Selectivity in Relation to the Tax Rulings	474
	[A] The Example of the Decision in <i>Apple</i>	477
§24.05	Implementation of BEPS in the EU	479
§24.06	Conclusions	482
CHAPTER 25		
The Commission's State Aid Decisions on Advance Tax Rulings: Criticisms and Potential Impact on the Future of Direct Taxation Within the European Union		
	<i>Giulio Allevato</i>	483
§25.01	Harmful Tax Competition: National and Supranational Reactions	483
§25.02	The Commission's Recent State Aid Decisions	486
§25.03	Requirements for State Aid Assessment	489
§25.04	Main Criticisms Against the Commission's Decisions	490
	[A] The Arm's Length Principle as a Counterfactual	490
	[B] The Conflation of the Advantage and the Selectivity Requirements	493
§25.05	Final Remarks	494
CHAPTER 26		
The Difficult Relationship Between the Fundamental Freedoms and the Nexus Approach as a Criterion for Applying Preferential Regimes Within the European Union: Special Reference to IP Boxes		
	<i>María Cruz Barreiro Carril</i>	497
§26.01	Introduction	497
§26.02	Problems Arising from Patent Box Regimes as Regards the Functioning of the Internal Market	498
§26.03	Solutions Adopted Within the EU for the Problems Arising from Preferential Regimes: A Similar Path to That Taken by the OECD	501
	[A] First Steps	501
	[B] The Reactivation of the Fight Against Harmful Tax Competition Created by Preferential Regimes: The Nexus Approach	503
§26.04	Adoption of a Nexus Approach Based on Entity Instead of Jurisdiction in the Search for a Balance Between Fundamental Freedoms and the Need to Prevent BEPS in the Context of IP Boxes: Difficulties in Reconciling the Nexus Approach with the European Legal Order	505
	[A] The Nexus Approach Based on the Entity	505
	[B] Compatibility Problems with EU Law in the Nexus Approach Based on the Entity	509

Table of Contents

§26.05	The CCCTB as an Alternative to Patent Box Regimes: A Better Solution for Aggressive Tax Planning Behaviours Through IP Boxes Within the EU	515
§26.06	Concluding Remarks	517
PART VI		
	The Future of European Taxation	519
CHAPTER 27		
	Case Law of the Court of Justice of the European Union: A Reflection for the Future	
	<i>Elena Rodríguez Ruiz de Alda</i>	521
§27.01	Introduction	521
§27.02	The Court of Justice	522
	[A] Composition	522
	[B] Types of Proceedings	523
	[1] Preliminary Rulings	523
	[2] Actions for Failure to Fulfil Obligations	525
§27.03	Overall Review of Judgments	527
§27.04	Fundamental Freedoms	528
	[A] Free Movement of Persons (Articles 18 and 21 TFEU)	528
	[B] Freedom of Movement for Workers (Articles 45–48 TFEU)	529
	[C] Right of Establishment (Articles 49–55 TFEU)	529
	[D] Freedom to Provide Services (Articles 56–62 TFEU)	530
	[E] Free Movement of Capital (Articles 63–66 TFEU)	530
§27.05	Overriding Reasons of Public Interest	531
	[A] To Ensure a Balanced Allocation of the Power to Tax Between the Member States	531
	[B] Preventing Tax Evasion and Avoidance	532
	[C] Coherence of the National Tax System	532
	[D] The Need to Guarantee the Effectiveness of Fiscal Supervision	533
	[E] The Need to Ensure the Effective Collection of Taxes	533
§27.06	Significant Preliminary Rules	534
	[A] Anti-abuse Rules in Directives	534
	[1] Judgment of 8 March 2017, <i>Euro Park Service</i> , Case C-14/16	534
	[2] Judgment of 7 September 2017, <i>Eqiom SAS and Enka SA</i> , Case C-6/16	535
	[3] Judgment of 26 October 2017, <i>Argenta Spaarbank NV</i> , Case C-39/16	536
	[B] Administrative Cooperation	537
	[1] Judgment of 16 May 2017, <i>Berlioz Investment Fund SA</i> , Case C-682/15	537

Table of Contents

	[C] Exit Tax	538
	[1] Judgment of 14 September 2017, <i>Trustees of the P Panayi Accumulation</i> , Case C-646/15	538
§27.07	Conclusion	539
 CHAPTER 28		
Study of the Proposal for a Council Directive on a Common Corporate Tax Base		
	<i>Eduardo Tapia Tejedor</i>	541
§28.01	Introduction	541
§28.02	Subject Matter, Scope and Definitions	542
	[A] Subject Matter	542
	[B] Scope	542
	[C] Definitions	543
§28.03	Calculation of the Tax Base	543
	[A] General Principles	543
	[B] Calculation of the Tax Base	543
	[C] Interest Limitation Rule	546
§28.04	Timing and Quantification	547
	[A] Temporary Allocation Rules	547
	[B] Valuation Rules	548
§28.05	Depreciation of Fixed Assets	549
§28.06	Losses	550
§28.07	Rules on Entering and Leaving the System of the Tax Base	551
§28.08	Relations Between the Taxpayer and Other Entities	551
§28.09	Operations Between Associated Companies	552
§28.10	Anti-abuse Rules	552
	[A] General Clause	553
	[B] CFCs	553
	[C] Hybrid Mismatches	554
§28.11	Transparent Entities	555
§28.12	Administration and Procedures	555
§28.13	Final Provisions	555
§28.14	Prospects for the Future and Some Conclusions	556
 CHAPTER 29		
A Preliminary Assessment of the EU Proposal on Significant Digital Presence: A Brave Attempt That Requires and Deserves Further Analysis		
	<i>Eva Escribano</i>	559
§29.01	Introduction	559
§29.02	Policy Goals Pursued by the Proposal	562
	[A] The Alignment Between Taxation and Value Creation	564
	[B] The Contribution of Users to Value Creation	565

Table of Contents

	[C] The Challenge to Build a Proposal Based on These Parameters	567
§29.03	The Proposed Significant Digital Presence Threshold	569
	[A] The Taxpayer	570
	[B] Supply of Digital Services	571
	[1] Concept of Digital Services and Requirements	571
	[2] Digital Services That Are Deemed to Be Covered by the Clause	574
	[3] Consistency with the Alleged Policy Goals	580
	[C] Quantitative Thresholds	583
	[1] Revenue	584
	[2] Number of Users	590
	[3] Number of Business Contracts	591
	[4] Consistency with the Alleged Policy Goals	592
	[D] Attribution of Profits to the Significant Digital Presence	594
§29.04	Conclusions	598
	Index	601