

Werner Haslehner, Georg Koffer and Alexander Rust (Eds.), *EU Tax Law and Policy in the 21st Century*. Alphen aan den Rijn: Wolters Kluwer, 2017. 440 pages. ISBN: 9789041188151. USD 150.

This edited collection analyses EU tax law and policy in light of the integration objective of EU law. The present review gives a brief account of the individual chapters, but aims, in particular, to assess their complementarity.

To start off: Kemmeren (Ch.1) identifies international tax neutrality, capital and labour import neutrality, the ability-to-pay principle and an origin-based allocation of tax jurisdiction as benchmarks for an undistorted functioning of the EU internal market, then arguing that the ECJ should better develop the internal market concept. His view is based on the ECJ's failure in *Damseaux* (C-128/08) and *Levy-Sebbag* (C-540/10) to alleviate double taxation, and on its restricting the options of a deferred payment of exit taxes for migrating companies, to protect the tax revenue of the origin State. His conclusion raises the question whether the Directive on Tax Dispute Resolution Mechanisms (1852/2017) can suffice to avoid future cases of tax treaty override and eliminate the resulting double taxation. Will the Directive provide the ECJ with the necessary instrument to broaden the internal market concept? and, if so, would this lead the ECJ to revisit its earliest case-law on exit taxes, which appeared to prioritize the removal of obstacles for taxpayers? Chapter 2 (Rust) analyses the different scope of the non-discrimination principle in double tax treaties (DTTs) (where non-discrimination clauses are absolute but limited to direct forms of discrimination) and in EU law (where non-discrimination has a much wider scope, but can be derogated in case of justification). Rust notes that grounds for justification under EU law are necessary due to the broad scope of fundamental freedoms, and addresses the question whether reverse discrimination is prohibited in light of Articles 20 and 21(2) EU Charter. The potential for further expansion of the non-discrimination (and equality) principle is analysed. The message of these first two chapters is that future ECJ case law should take decisive steps to effectively contribute to a full realization of the internal market.

Chapter 3 (Rossi-Maccanico) – the first of four Chapters on State aids – proposes that, to overcome the uncertainty on the application of State aid rules to APAs (Advance Pricing Agreements), the Commission should issue a Directive under Article 106(3) TFEU. This would arguably relieve Member States of the obligation to notify the Commission of certain tax rulings, and would clarify that specific methodologies are regarded as valid. Bartosch (Ch. 4) stresses that, if the Commission finds a State aid under Article 107(1), it must investigate whether this aid potentially infringes other Treaty provisions. He argues convincingly that different criteria should apply for fiscal measures conferring a selective advantage or infringing a fundamental freedom. Although both sets of rules must be complied with, they have completely different purposes. Lang and Zailer (Ch. 5) distinguish between the discretionary power of tax authorities inherent in any legal system, and that resulting in selectivity, and thus State aid. They argue that if the margin of discretion remains within the framework of tax law, no State aid issue arises; use of criteria unrelated to the generally applicable tax law could lead to State aid. Traversa and Sabbadini (Ch. 6) argue that the Commission has been using its powers under State aid rules to pursue its own tax policy of fighting harmful tax competition, since the internal market objective conflicts with efforts to channel investments towards own

national markets. They also submit that the Commission's decisions against national tax rulings might not have been required if Member States had made greater efforts to coordinate their national tax systems, as they eventually did through the Anti-Tax Avoidance Directive (ATAD) and other exchange of information instruments.

Considering these Chapters, three points emerge. First, tax rulings potentially resulting in State aids should still be assessed by the Commission. Second, the Commission should continue applying the specific criteria to assess a fiscal measure under State aid rules, even if a Commission Directive under Article 106(3), ending the notification obligation, were issued for rulings meeting specific conditions. Third, the Commission has used its powers under State aid rules to pursue its own tax policy of fighting harmful tax competition, of which tax rulings have been an instrument. This raises three questions: might a Directive under Article 106(3), by making it easier for Member States to grant advance rulings, paradoxically facilitate them in using such rulings for tax competition?; should the Commission issue guidelines for normal discretionary power not resulting in State aids?; and should the Commission continue using its powers under State aid rules to fighting harmful tax competition, even if it further increases the Commission's discretion? The answers depend on whether the concept of "harmful tax competition" should be revised, to include *all* special and general tax measures causing revenue losses to other Member States.

Valente (Ch. 7) analyses the Model Taxpayer Charter in terms of taxpayers' rights and obligations, and explains the Commission's choice to publish its 2016 "Guidelines for a Model for a European Taxpayer Charter" and the underlying goals in terms of improved relations between taxpayers and tax authorities. In Chapter 8, Haslehner examines the ECJ case-law on the application of fundamental freedoms to direct taxation to see if this implies the application of EU fundamental rights, through general principles and the EU Charter. He identifies situations where fundamental rights can only be invoked as a result of applying fundamental freedoms, although the conditions and limits are not yet fully developed; he concludes that the ECJ's approach is cautious and mindful of national competence in direct tax matters. These Chapters raise the question whether – if national legislation of either the origin State or the destination State does not fully meet the benchmarks in the Guidelines for a European Taxpayer Charter – the ECJ should take a stronger stance in applying fundamental rights as a result of fundamental freedoms. This issue is even more relevant for Chapter 9 (Chaouche and Haslehner), which explores whether fundamental rights have been protected in cross-border exchanges of tax information. The authors, using EU Directives and DTTs based on the OECD Model, analyse the ECJ decision in *Sabou* (C-276/12), to see whether additional fundamental rights are applicable, and conclude that the standard of protection depends on the requested State. This suggests that the ECJ should indeed take a stronger stance in applying fundamental rights in the area of exchange of information, given the differing standards.

Chapter 10 (Smit) is on external relations. Reading the Treaty provisions on the free movement of capital (Arts. 64(2), 64(3), and 65(4)) with Article 207(1), Smit argues that the EU can adopt harmonization measures in the field of corporate taxation *vis-à-vis* third countries. He notes that, when interpreting these provisions, the ECJ has tended to favour taxpayers, and that the EU has legislated in the area of corporate taxation *vis-à-vis* third countries. He considers whether there are limits to EU competence in this area. Chapter 11 (Bizioli) indirectly answers this. The chapter highlights that in the direct taxation area, after the initial focus on removing all cross-border tax obstacles to fundamental freedoms within the internal market, the protection of domestic corporate tax systems became the new priority, and EU tax policy has been converging towards OECD tax policies in the fight against base erosion and profit shifting. Bizioli notes that such a policy shift does not appear to be supported by Article 115 and Article 5 TFEU, and supposes an advanced harmonization, not yet reached. In his view, EU tax policy in this area toward third countries should take a minimalist approach. In the direct taxation area, EU competence regarding rules affecting operations with third countries might not have any *policy limit* to the extent that EU policy converges towards OECD tax policy, but it should have precise *legal limits* for consistency with the Treaty. Indirectly, this raises the question of Treaty compatibility of the ATAD (Arts. 5, 7 and 4).

Chapter 12 (Vanistendael) proposes a substantial transfer of taxing and spending power, as well as economic decision-making power, from Eurozone Member States to a central governing body exercising such power under democratic control. This could possibly indicate a way forward for EU competence as regards relations with third countries too: if tax and spending power were transferred to a central governing body, the protection of the tax base would become inextricably linked to the very competence of this governing body. Within the new legal framework, the proper functioning of the single market would thus include the fight against BEPS toward these countries. In other words, the fundamental reform proposed here would also overcome the issue of incompatibility between Articles 4, 5, 7 ATAD and the Treaty. In Chapter 13, Kofler and Tumpel review all the initiatives which – since the 2012 Commission Action Plan against tax fraud and tax evasion – have been undertaken by the EU to ensure a coordinated implementation of the OECD BEPS Action Plan, for direct and indirect taxation. It shows that the ATAD and the extension of automatic exchange of information under Directive 2011/16 marked major progresses. Koszeghy (Ch. 14) examines the links between the CCCTB project and the ATAD, and questions whether the harmonization momentum of the ATAD can be repeated for the CCCTB. Koszeghy stresses that ATAD does not interfere too much with national tax policies, unlike the CCCTB. The persisting criticism against the CCCTB project seems to confirm his intuition.

Schroeder (Ch. 15) asserts that the many recent changes in tax systems should drive the judiciary to enhance the protection of taxpayers beyond the limits of traditional judicial scrutiny, and use fundamental rights as enshrined in constitutional principles as limits to sovereign taxing powers. Chapter 15 thus seems to suggest that common principles should be established at EU level, and that this may be assist the Internal Market. As a result, it also suggests the importance of assessing if the ECJ approach actually contributed to this goal. In this respect, Chapter 16 (de la Feria and Fuest) submits that the ECJ case law on corporate tax matters did not contribute to achieving a level playing field and tax neutrality within the EU, when – due to ECJ rulings – countries with high tax rates extend restrictive tax provisions from cross-border situations to domestic situations, and vice-versa. The authors argue that, when only one aspect of the tax system is made uniform, due to ECJ rulings, without systematic harmonization of tax base and tax rates, differences in tax bases and tax rates may become even more significant. This ultimately pleads for a systematic harmonization of tax rate and tax base, and, in essence, seems to suggest that the adoption of the CCCTB would mark a milestone. Accordingly, the conclusions of Chapter 16 can also be reconciled with the conclusions of Chapter 1: the CCCTB would contribute to the level playing field, and it would complement further developments of the ECJ case law for this purpose.

Overall, the book provides a comprehensive analysis of all aspects of EU tax law and policy, presenting complementary arguments in calling for a (greater) consistency in future developments between tax policy, the institutional framework and the ultimate purposes of EU law, especially the internal market (also in relations with third countries). The interconnected issues are to some extent left open for reflection. The book is of high quality.

Luca Cerioni
Edinburgh