

Time and Tax

Issues in International, EU, and
Constitutional Law

Edited by
Werner Haslehner
Georg Kofler
Alexander Rust



Published by:

Kluwer Law International B.V.
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
E-mail: international-sales@wolterskluwer.com
Website: lrus.wolterskluwer.com

Sold and distributed in North, Central and South America by:

Wolters Kluwer Legal & Regulatory U.S.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@wolterskluwer.com

Sold and distributed in all other countries by:

Air Business Subscriptions
Rockwood House
Haywards Heath
West Sussex
RH16 3DH
United Kingdom
Email: international-customerservice@wolterskluwer.com

Printed on acid-free paper.

ISBN 978-94-035-0354-7

e-Book: ISBN 978-94-035-0164-2
web-PDF: ISBN 978-94-035-0343-1

© 2019 Werner Haslehner, Georg Kofler & Alexander Rust

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. More information can be found at: lrus.wolterskluwer.com/policies/permissions-reprints-and-licensing

Printed in the United Kingdom.

Editors

Werner Haslehner, Professor of Law at the Faculty of Law, Economics and Finance at the University of Luxembourg, holds the ATOZ Chair for European and International Taxation and is Director of its LL.M. Programme in EU and International Tax Law. He joined the Faculty as Associate Professor in 2013 and was appointed Full Professor in 2015. He previously held full-time academic positions in Austria at JKU Linz and in the UK at the London School of Economics and Political Sciences (LSE). His research interests cover all aspects of international taxation, including the impact of EU law and tax policy.

Georg Kofler, Professor of Law and Head of the Institute for Fiscal Law, Tax Law and Tax Policy at Johannes Kepler University of Linz Law School. He previously worked with the International Department of the Austrian Federal Ministry of Finance, as Acting Assistant Professor at New York University, and as Assistant Professor at the University of Linz. His research focuses on international and European direct tax law and all aspects of Austrian tax law.

Alexander Rust, Professor of Tax Law at the Institute for Austrian and International Tax Law of WU (Vienna University of Economics and Business). He previously worked as Professor of Tax Law and Director of the Master Programme in European and International Tax Law at the University of Luxembourg, as Acting Assistant Professor at New York University and as assistant at the University of Munich. He is a member of the editorial board of *Intertax* and *Internationale Steuer-Rundschau*, as well as Co-Editor of the Commentary *Klaus Vogel on Double Taxation Conventions*. His main research interests are tax treaty law, EU tax law and tax policy.

Contributors

Niels Bammens, Professor of Tax Law at KU Leuven (Belgium) and of counsel to EY Tax Consultants (FSO Tax, Brussels). His research interests mainly concern the principle of non-discrimination in international and European tax law, the interaction between international and European tax law, and the relevance of tax treaties for developing countries. He can be contacted at niels.bammens@kuleuven.be.

Frederik Boulogne is a tax lawyer at Lubbers, Boer & Douma (The Hague, The Netherlands). In 2016 he defended his PhD thesis, entitled *Shortcomings in the EU Merger Directive*, which contains an analysis of the tax obstacles to cross-border restructuring within the European Union and solutions to remove them. His thesis was awarded the prestigious European Academic Tax Thesis Award 2017 by the EATLP and the European Commission.

Ieva Freija-Peccati, *Référéndaire* at the Court of Justice of the European Union. She holds a DESS (Master) in European law (Université Paris I Panthéon-Sorbonne) and has been a Guest Lecturer at the University of Luxembourg (2011–2013) and at the Riga Graduate School of Law (2016). All views expressed in this volume are expressed in a solely personal capacity.

F. Alfredo García Prats, Jean Monnet Chair ‘EU Tax Law and Policy’ at the Universitat de València (Spain) and Of counsel at Montero Aramburu. He can be contacted at alfredo.garcia@uv.es.

Katerina Pantazatou, Associate Professor in Tax Law at the University of Luxembourg.

Alice Pirlot, Research Fellow at the Oxford University Centre for Business Taxation/ FNRS Postdoctoral Research Fellow at the Catholic University of Louvain (on leave).

Karoline Spies, Research Associate, Institute for Austrian and International Tax Law of WU (Vienna University of Economics and Business).

Contributors

Serge Schroeder, Judge, Administrative Court of Luxembourg and Guest Lecturer at the University of Luxembourg.

Daniël S. Smit is a Professor in taxation at the Fiscal Institute Tilburg, Tilburg University, the Netherlands. He is the author of more than one hundred national and international publications in the field of European and international tax law and is a frequent speaker at seminars and conferences. He has also been employed at EY since 2002.

Mario Tenore is a senior associate at Maisto e Associati, with competence in corporate taxation and European and international tax law. Holding a PhD and an Advanced LL.M, he publishes extensively in the field of international and European tax law.

Edoardo Traversa, Professor of Tax Law, Catholic University of Louvain, guest professor at KU Leuven and Vienna University of Business and Economics; *Of Counsel*, Liedekerke Law Firm, Brussels.

Dennis Weber, Director of the Amsterdam Centre for Tax Law/Loyens & Loeff.

Joanna Wheeler, Senior Principal Research Associate at the IBFD, seconded to the University of Amsterdam for a substantial portion of her time. She is the Programme Director of the joint University of Amsterdam/IBFD advanced LL.M. programme 'International Tax Law: Principles, Policy and Practice'.

Summary of Contents

Editors	v
Contributors	vii
Preface	xix
CHAPTER 1	
Time and Distributive Rules in Tax Treaties	
<i>Georg Kofler & Alexander Rust</i>	1
CHAPTER 2	
Temporal Aspects of Passive Income under DTCs: Some Examples Based on Dutch Case Law	
<i>Daniël Smit</i>	13
CHAPTER 3	
Double Tax Relief and Time	
<i>Joanna Wheeler</i>	27
CHAPTER 4	
Timing Issues in the Application of Tax Treaties: Changes in the Applicable Treaty Law	
<i>Mario Tenore</i>	45
CHAPTER 5	
Timing Disadvantages and Tax Treaty Non-discrimination	
<i>Niels Bammens</i>	59
CHAPTER 6	
Value of Precedents in EU Direct Tax Law	
<i>Ieva Freija-Peccati</i>	77

Summary of Contents

CHAPTER 7		
Temporal Aspects of CJEU Judgments Related to Tax Matters		
<i>F. Alfredo García Prats</i>		107
CHAPTER 8		
Tax Deferral and Fundamental Freedoms: Exit Tax, Foreign Losses, and Withholding Tax		
<i>Karoline Spies</i>		145
CHAPTER 9		
Tax Rules with Retroactive Effect Versus Legal Certainty and Legitimate Expectations		
<i>Dennis Weber</i>		169
CHAPTER 10		
Tax, Time, and the Merger Directive		
<i>Frederik Boulogne</i>		183
CHAPTER 11		
The Temporal Application of State Aid Rules to Domestic Tax Measures: A Sensitive Matter		
<i>Alice Pirlot & Edoardo Traversa</i>		197
CHAPTER 12		
Effective Legal Remedies and Fair Trial in Tax and Time		
<i>Katerina Pantazatou</i>		213
CHAPTER 13		
The Constitutional Limits of Retroactivity in Tax Law		
<i>Serge Schroeder</i>		239
CHAPTER 14		
Time and Tax: Constitutional Versus Economic Perspectives		
<i>Werner Haslehner</i>		271

Table of Contents

Editors	v
Contributors	vii
Preface	xix
CHAPTER 1	
Time and Distributive Rules in Tax Treaties <i>Georg Kofler & Alexander Rust</i>	1
§1.01 Introduction	1
§1.02 Business Profits and Employment Income: Activities Versus Cash Flow (Articles 7 and 15 OECD Model)	2
[A] Bilateral Cases: Income from Employment (Article 15 OECD Model)	2
[B] Bilateral Cases: Business Profits (Article 7 OECD Model)	4
[C] Employment Income/Business Income and Changes of Residence	7
§1.03 Capital Gains: Accrual Versus Realization (Article 13 OECD Model)	8
§1.04 Conclusions	11
CHAPTER 2	
Temporal Aspects of Passive Income under DTCs: Some Examples Based on Dutch Case Law <i>Daniël Smit</i>	13
§2.01 Introduction	13
§2.02 The Dutch Compartmentalization Doctrine	14
§2.03 Temporal Aspects of Passive Income under DTCs	15
[A] The Dutch Compartmentalization Doctrine and DTCs	15
[B] Pension Income	16

Table of Contents

	[1]	Introduction	16
	[2]	Emigration	16
	[3]	Privatization	17
	[C]	Dividend Income	18
	[1]	Introduction	18
	[2]	Treaty Shopping	18
	[3]	Emigration	19
	[4]	Loss of Tax-Treaty Residence Status	20
§2.04		Capital Gains	21
§2.05		Interest and Royalty Income	21
§2.06		Business Profits	23
	[A]	Introduction	23
	[B]	Emigration	23
§2.07		Relief from Double Taxation	24
§2.08		Final Remarks	26
CHAPTER 3			
Double Tax Relief and Time			
		<i>Joanna Wheeler</i>	27
§3.01		Introduction	27
	[A]	Scope of This Chapter	27
	[B]	Income Taxation	27
§3.02		Double Tax Relief for Income	28
§3.03		Taxable Events	29
	[A]	Mismatches of Taxable Events	29
	[B]	Consequential Mismatches	30
§3.04		Tax on Profit	31
	[A]	Division of Profit into Annual Amounts	31
	[B]	Losses	31
§3.05		Timing of Receipts and Expenses	33
	[A]	Allocation of Profit over Time	33
	[B]	Timing Differences and Withholding Taxes	33
§3.06		Inflation Gains	34
§3.07		Currency Exchange Issues	35
	[A]	Payments Subject to Withholding Tax	35
	[B]	PE Profit and Currency Issues	36
	[C]	Geographical Source of Exchange Rate Gains and Losses	36
§3.08		Tax Treaties	37
	[A]	Treaty Obligation to Grant DTR	37
	[B]	Timing of the Tax Charge under Treaties	39
	[C]	Assigning a Time to Income for Treaty Purposes	39
	[1]	Active Income	40
	[2]	Passive Income	40
	[D]	Start and End of Treaty	41

Table of Contents

	[1]	Different Starting and Ending Dates	42
	[2]	Replacement of a Treaty	42
§3.09		Conclusion	43
 CHAPTER 4			
Timing Issues in the Application of Tax Treaties: Changes in the Applicable Treaty Law			
		<i>Mario Tenore</i>	45
§4.01		Introductory Remarks	45
§4.02		Rules Addressing Entry Into Force and Termination in the OECD Model	46
	[A]	General Remarks	46
		[1] Article 31 OECD Model	47
		[2] Article 32 OECD Model	49
		[3] Rules Addressing the Succession of Tax Treaties	49
	[B]	Selected Issues Related to the Interpretation of Temporal Rules in the OECD Model	51
		[1] Timing Issues Arising from Differences in Domestic Laws of the Contracting States	51
		[2] Timing Issues Arising from Distributive Rules	53
		[3] Timing Issues Arising from Procedural Rules	56
 CHAPTER 5			
Timing Disadvantages and Tax Treaty Non-discrimination			
		<i>Niels Bammens</i>	59
§5.01		Introduction	59
§5.02		Reported Case Law	60
	[A]	Early Burdens	60
		[1] Taxation at Source	60
		[2] Prepayment of Tax	62
		[3] Procedural Early Burdens	64
	[B]	Late Benefits	65
		[1] Deductibility of Expenses	65
		[2] Timing Issues in Relation to Loss Set-Off	67
§5.03		The Scope of Application of the Different Paragraphs of OECD Model Article 24	70
§5.04		Conclusions and Remedies	72
 CHAPTER 6			
Value of Precedents in EU Direct Tax Law			
		<i>Ieva Freija-Peccati</i>	77
§6.01		The Role of the CJEU in Shaping EU Direct Tax Law	77
	[A]	CJEU Action in Direct Tax Law	77

Table of Contents

	[B]	Challenges in the Field of Direct Taxation	79
§6.02		Reasoning Using Prior Decisions	81
	[A]	Reliance on Prior Decisions	81
		[1] Legitimation	81
		[2] Techniques	82
		[3] Following Schumacker’s Tracks	84
		[a] <i>Schumacker</i> Itself	84
		[b] <i>Wielockx</i> and <i>Asscher</i>	86
		[c] <i>Wallentin</i> , <i>Commission v Estonia</i> , <i>Kieback</i> and <i>X</i>	88
		[d] <i>D</i> , <i>Turpeinen</i> , <i>Lakebrink</i> , and Others	90
		[e] Other Lines of Case Law Arising out of <i>Schumacker: Manninen</i> and <i>ACT GL</i>	91
	[B]	Departures from Prior Judgments	92
		[1] Reasons for Departing from Prior Decisions	93
		[2] Techniques for Moving Away from Existing Case Law	95
		[a] Express Overruling	95
		[b] Soft Overrulings	95
		[c] Distinguishing Cases	101
§6.03		Conclusion	104
CHAPTER 7			
Temporal Aspects of CJEU Judgments Related to Tax Matters			
		<i>F. Alfredo García Prats</i>	107
§7.01		Introduction	107
§7.02		Effects of the Interpretation Role of the CJEU and Consequences in Tax Matters	110
	[A]	<i>Ex Tunc</i> Effects: Implications	113
		[1] The Moment the EU Law Came into Force	113
		[2] <i>Ex Tunc</i> Effects and Changes in Interpretation	113
		[3] <i>Ex Tunc</i> Interpretation of Charges and Benefits	114
		[4] <i>Ex Tunc</i> Interpretation of EU Principles of Law	115
	[B]	Legal Consequences for Domestic Courts: Applying Preliminary Rulings <i>Ex Tunc</i>	117
§7.03		The Exception Rule	120
	[A]	The Starting Point: The TFEU’s Lack of Recognition Versus the CJEU’s Expansion	120
	[B]	Consolidating the Exception Rule: Applying It to Tax Matters	122
		[1] Elements of the Exception Rule	123
		[a] Exclusive Competence	123

Table of Contents

		[b] Single Declaration of the Limitation: Identifying the First Case	125
		[c] Consideration <i>Ex Petitum</i> : Not <i>Ex Officio</i>	127
		[d] Good Faith of Those Concerned and Risk of Serious Difficulties	130
	[2]	The Exception Rule: Application in Tax and Other Matters	136
§7.04		Consequences of a Temporal-Effects Limitation	141
CHAPTER 8			
Tax Deferral and Fundamental Freedoms: Exit Tax, Foreign Losses, and Withholding Tax			
		<i>Karoline Spies</i>	145
§8.01		About This Chapter	145
§8.02		Tax Deferral and the Non-discrimination Test	145
	[A]	Evaluation	145
	[B]	The Approach by the CJEU	148
§8.03		Exit Taxes	149
	[A]	The Two Potential Discriminations and Their Justifications	149
	[B]	CJEU Case Law: From Tax Deferral Until Realization to Staggered Payments	151
		[1] First Phase: Strict Proportionality Test	151
		[2] Second Phase: Lenient Proportionality Test	151
		[3] Third Phase: Overruling the First Line of Cases	153
	[C]	Reasons for Accepting the Cash-Flow Disadvantage	154
§8.04		Foreign Losses	155
	[A]	The Two Discrimination Issues and Their Justifications	155
	[B]	CJEU Case Law: No Need for a Deduction-Recapture Rule	157
	[C]	Reasons for Accepting the Cash-Flow Disadvantage	159
§8.05		Withholding Tax	161
	[A]	The Two Types of Discrimination and Their Justifications	161
	[B]	CJEU Case Law: No Tax Deferral	162
	[C]	Reasons for Accepting the Cash-Flow Disadvantage	163
§8.06		Conclusion	165
CHAPTER 9			
Tax Rules with Retroactive Effect Versus Legal Certainty and Legitimate Expectations			
		<i>Dennis Weber</i>	169
§9.01		Introduction	169
§9.02		Principle of the Protection of Legitimate Expectations	169
	[A]	General	169

Table of Contents

	[B]	Only ‘A Prudent and Circumspect Trader’ May Invoke the Principle of the Protection of Legitimate Expectations	170
§9.03		EU and National Legislation with Retroactive Effect	172
	[A]	Substantive EU Rules with Retroactive Effect	172
	[B]	Procedural EU Rules with Retroactive Effect	173
	[C]	EU Case Law Concerning National Legislation with Retroactive Effect	173
	[D]	Legislation Immediately Entering into Force; Transitional Provisions on the Basis of the Principle of the Protection of Legitimate Expectations	176
§9.04		Conclusion	181
CHAPTER 10			
Tax, Time, and the Merger Directive			
		<i>Frederik Boulogne</i>	183
§10.01		Introduction	183
§10.02		Qualification under Article 2 MD: <i>Kofoed</i>	184
§10.03		Tax Avoidance: Minimum Holding Period	186
§10.04		Double Taxation: <i>3D I Srl</i>	189
§10.05		Safeguarding the Financial Interests of the Member States and Taxation of Gains: <i>Marc Lassus</i>	190
§10.06		Conclusion	195
CHAPTER 11			
The Temporal Application of State Aid Rules to Domestic Tax Measures: A Sensitive Matter			
		<i>Alice Pirlot & Edoardo Traversa</i>	197
§11.01		Introduction	197
§11.02		The Time Frame of EU State Aid Review	198
	[A]	General Overview	198
	[B]	Conflicts and Tensions with National Procedural Tax Rules	199
§11.03		Temporal Issues Raised by the Recovery of Aid	202
	[A]	The Consequences of the Passage of Time on the Calculation of the Aid to Be Recovered	202
	[B]	Legal Uncertainty and Recovery of Unlawful Aid	205
§11.04		The Objective of the Commission: Pursuing a New Tax Agenda?	209
§11.05		Conclusion	211
CHAPTER 12			
Effective Legal Remedies and Fair Trial in Tax and Time			
		<i>Katerina Pantazatou</i>	213
§12.01		Introduction	213

Table of Contents

§12.02	Timely Justice	214
	[A] The European Convention of Human Rights	215
	[1] The Right to a Fair Trial	215
	[2] The Right to an Effective Remedy	219
	[B] The Charter of Fundamental Rights	220
	[1] General Principles, the Charter, and the ECHR: The Right of the Defence	222
§12.03	Limitation Periods	225
	[A] Safeguards: Procedural Autonomy	227
	[1] Claims Based on Improper or Non-timely Implementation of a Directive	228
	[2] Principle of Equivalence	229
	[3] Res Judicata	230
	[4] Principle of Effectiveness	232
	[5] ‘Reasonable Time’: An Unambiguous Concept?	235
	[6] Commencement	237
§12.04	Conclusion	238
 CHAPTER 13		
The Constitutional Limits of Retroactivity in Tax Law		
	<i>Serge Schroeder</i>	239
§13.01	The Classic Distinction at the Heart of Retroactivity	239
§13.02	Juridical Retroactivity	241
	[A] The Value of the Principle of Non-retroactivity in Luxembourg	241
	[1] The Relevant Texts	241
	[2] Other Sources of Law	242
	[3] Sanction Mechanisms	246
	[B] Looking Outside Luxembourg’s Borders	249
	[1] The Situation in Belgium	249
	[2] The Situation in Germany	254
	[C] Conclusions for Luxembourg	258
§13.03	Economic Retroactivity	260
	[A] An Iterative Look Beyond Luxembourg’s Borders	260
	[1] Legislative Freedom in Belgium	260
	[2] A Restricted Framework in Germany	262
	[3] Conclusions on Economic Retroactivity for Luxembourg	264
§13.04	Retrospectivity of Tax Law	266
§13.05	Conclusion	269

Table of Contents

CHAPTER 14	
Time and Tax: Constitutional Versus Economic Perspectives	
<i>Werner Haslechner</i>	271
§14.01 Introduction	271
§14.02 Elements of Taxation Timing	272
[A] Substantive Rules: When to Impose Tax	272
[B] Procedural Rules: When to Collect Tax	273
[C] Transition Rules: The Effect of Rule Changes	273
§14.03 The Constitutional Perspective(s) on Taxation Timing	274
[A] Equal Treatment and the Ability-to-Pay Principle	274
[B] The Rule of Law and Right to Property: Limits on Retroactive Taxation	278
[C] Legal Certainty, Reliance, and Protection of Legitimate Expectations: Limits to Retrospective Taxation and the Need for Transition Relief	283
§14.04 Law and Economics Perspective(s) and Tools	284
[A] Societal Welfare Versus Public Choice Theory	284
[B] Efficiency Versus Equity	286
[C] Incentives, Indirect Effects, and Incidence	287
§14.05 Economics Perspectives on Taxation Timing	288
[A] When to Impose Tax: The ‘Right’ Tax Base and Timing of ‘Realization’	288
[B] When to Collect Tax: A Proposal for Retrospective Taxation	290
[C] Transition Rules: The Case Against Relief	292
§14.06 Conclusion	293

Preface

This book constitutes the latest volume in a series of publications by the University of Luxembourg's ATOZ Chair for European and International Taxation, which series is based on annual conferences on current international and European tax-law issues and which was previously published in a separate series called 'International Tax Conferences of the University of Luxembourg'. The ATOZ Chair's conferences bring together leading tax experts from various areas of tax practice, academia, and governmental entities to facilitate high-level and timely topical discussions that foster dialogue among the different actors. This volume is the result of just such a conference, organized by the ATOZ Chair in collaboration with the University of Linz, the Vienna University of Economics and Business, and an expert group on EU Tax Law from CFE Tax Advisers Europe, to which the editors are grateful.

Time is a crucial dimension in the application of any law, especially tax law, yet, too often, it is underappreciated in academic analysis of virtually any tax issue. Nevertheless, the timing of taxation is becoming ever-more important when attempting to provide accurate legal advice in an environment characterized by rapid change on the national, European, and international levels.

Among the numerous timing issues arising out of applying tax treaties, this book addresses: the time limits within which relief must be requested for 'taxation not in accordance with a Convention'; the relevance of national statutes of limitation for claiming a tax refund; the question of when income arises under a tax treaty; the transitional issues relating to changes in tax treaties, including tax rules applied to on-going business operations that overlap periods of 'different' treaties; and the attribution of profits and expenses to a moving or closed-down business.

With respect to EU tax law, the volume discusses a similar number of questions that arise from the application of primary and secondary EU law to national taxation. Such questions concern, among other things, the retroactivity of judicial decisions of the Court of Justice of the European Union (CJEU) and its approach to changing circumstances and developing case law. Moreover, several key EU tax doctrines developed by the CJEU – such as the concept of 'final losses', the compliance of exit tax regimes with free movement, and the related issue of cash-flow disadvantages – all

Preface

relate to the timing of taxation from an EU-law perspective and ought to be analysed from that angle. In addition, the book also deals with timing issues arising under EU tax directives.

Thirdly, the book explores the important constitutional and policy aspects that arise in the context of taxation timing. In particular, it addresses the limits of retroactivity for tax rules under constitutional principles, which are not only protected by the Treaty on the European Union (TEU), the Treaty on the Functioning of the European Union (TFEU), and the Charter of Fundamental Rights of the European Union (Charter), but also by the European Convention on Human Rights (ECHR), such as the principle of legal certainty, as well as the right to a fair trial and to effective legal remedies. These principles, of course, contrast with policy recommendations that often suggest a different approach, one that aims to prioritize efficiency of taxation over individual rights; this volume analyses the conflict between these two sets of principles and approaches.

We would like to express our sincere gratitude to all the contributors for their commitment to the publication of this volume and for their diligent adherence to the guidelines set for the chapters by the editors. We also especially thank the ATOZ Foundation for its generous sponsorship of the research coordinated by the ATOZ Chair and the conferences organised under its aegis, which made the publication of this book possible.

We further owe thanks to our publisher Kluwer and, especially, Simon Bellamy, for their professional and kind assistance through the publication process. The timely publication of this book in its current form would not have been possible without the dedicated copy-editing work of Suzanne M. Larsen, with additional assistance from Roman Ursu and Jessica Cafferkey.

*Werner Haslehner
Georg Kofler
Alexander Rust*