

# EU Tax Law

Kokott

2022

ISBN 978-3-406-74395-5

C.H.BECK

# EU Tax Law

A Handbook

by

Juliane Kokott

**beck-shop.de**  
DIE FACHBUCHHANDLUNG

2022



*Published by*

Verlag C.H.Beck oHG, Wilhelmstraße 9, 80801 München, Germany,  
email: [bestellung@beck.de](mailto:bestellung@beck.de)

*Co-published by*

Hart Publishing, Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, United Kingdom,  
online at: [www.hartpub.co.uk](http://www.hartpub.co.uk)

and

Nomos Verlagsgesellschaft mbH & Co. KG, Waldseestraße 3–5, 76530 Baden-Baden, Germany,  
email: [nomos@nomos.de](mailto:nomos@nomos.de)

Published in North America by Hart Publishing

An Imprint of Bloomsbury Publishing 1385 Broadway, New York, NY 10018, USA  
email: [mail@hartpub.co.uk](mailto:mail@hartpub.co.uk)

Suggested citation:

Kokott, *EU Tax Law*, 2022, § [#] mn. [#]

**beck-shop.de**  
DIE FACHBUCHHANDLUNG  
[www.beck.de](http://www.beck.de)

ISBN 978 3 406 74395 5 (C.H.BECK)

ISBN 978 1 5099 6474 1 (HART)

ISBN 978 3 8487 8359 5 (NOMOS)

© 2022 Verlag C.H.Beck oHG

Wilhelmstr. 9, 80801 München

Printed in Germany by

Westermann Druck Zwickau GmbH  
Crimmitschauer Str. 43, 08058 Zwickau

Typeset by

Reemers Publishing Services GmbH, Krefeld

Cover: Druckerei C.H.Beck Nördlingen



[chbeck.de/nachhaltig](http://chbeck.de/nachhaltig)

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, without the prior permission of Verlag C.H.Beck, or as expressly permitted by law under the terms agreed with the appropriate reprographic rights organisation.

Enquiries concerning reproduction which may not be covered by the above should be addressed to C.H.Beck at the address above.

## Foreword

Though the terms are of a more modern vintage, tax law, policy and administration have been essential elements of public finance since the idea of government was born. After all, the costs of governance must be borne somehow. An almost infinite array of taxes long ago became increasingly important mechanisms for paying the bills of government.

The starting point in any tax analysis is normally found in legislation that reflects decisions of the government of the taxing authority. Over time, the objects of such analysis have become increasingly complex. The complexity derives from many well-recognized factors. While the tax systems of any country are created primarily to generate public revenues that will finance governmental operations, tax rules are regularly used to advance objectives that are antithetical to revenue production. For example, such provisions are often designed to stimulate economic development, reduce economic disparities among residents and support such public values as education and charitable giving. In most cases the objective is advanced by tax incentives in the form of exemptions, deductions and credits, all of which lose revenue.

The statutory and regulatory rules for implementing such conflicting objectives are necessarily complex. Moreover, the complexity is enlarged by enormous challenges of administration, including the need for judicial and regulatory interpretations and techniques of dispute resolution in which the legitimate rights of taxpayers are fully respected. But the ever expanding magnitude of domestic tax rules and procedures is only the beginning of complexity. The evolution of increasingly complex economic and social relationships in the past few centuries has produced an almost infinite array of transactions and arrangements that have required the development of a bewildering tapestry of tax jurisprudence. Those who toil in the vineyards of tax law well understand and have come to expect the challenges of complexity.

The challenges are ever expanding. The dramatic expansion of international trade, investment, finance and labor mobility during the past century has materially enlarged the complex topography of taxation. The focus on “international taxation” (a term that generally refers to the way in which nation-states tax or do not tax the consequences of international transactions) is about a century old. During the decade following the end of World War I, a series of reports were published by a Group of Tax Experts from different countries that had been organized under the auspices of the League of Nations. They noted that, while principles of customary international law imposed some limitations on the permissible jurisdiction of a country to tax, there were several connections that justified the exercise of taxing power. As a result, double taxation was not prohibited by customary international law. An important portion of the work of the Tax Experts was focused on the problem of double (or greater) taxation that occurs when different countries are empowered under customary international law to tax the same income or property to the same taxpayer.

The Tax Experts proposed a solution: The two interested and permissibly taxing countries should negotiate a treaty whose primary purposes would be to prescribe jurisdictional priority of taxation and commit the other country to take steps to avoid double taxation. Such treaties should also include commitments to cooperate in the administration of the taxing regimes of the two countries. The progeny of those recommendations is well known. It is reported that there are thousands of bilateral

income tax treaties in force among countries of the world. Other treaties address other forms of taxation. Still others are restricted to cooperation in the administration of taxes even though taxing priorities are not addressed. In addition, treaties designed to deal primarily with non-tax matters, such as trade and investment, may also have potential tax consequences.

The topography of international taxation is also affected by other international sources. The treaties and procedures that together constitute the European Union importantly affect the taxing authority of Member States. Sometimes taxing power is limited or prohibited. Sometimes it must be exercised to advance identified EU objectives. In any event, procedures must satisfy certain standards of fairness and equality. Dockets of the judicial organs of the EU, including the Court of Justice of the European Union, reflect the extensive resort to dispute resolution with respect to EU requirements in tax substance and procedures.

The challenges of international tax complexity are further magnified because the international sources impacting on tax law are in a state of constant review and possible modification. Model income tax treaties established under the auspices of the OECD and the United Nations are discussed and debated frequently. The results include changes in the model treaties that are often cited as direct or secondary authority by the courts of many countries.

It seems to be the proverbial “never ending story.” A decision of the G20 at a meeting in Mexico about a decade ago resulted in the widely discussed and debated BEPS projects famously intended to provide more uniformity in international taxation among all countries and to mitigate against facile avenues for tax avoidance, particularly by multinational corporations.

While complexity is seldom a revered quality in the creation and administration of legal systems, successful simplification is rare. The extraordinary degree of unavoidable complexity in dealing with international taxation that derives from the extensive and diverse sources of legal authority cannot be materially minimized. It is fortunate for tax practitioners, government officials and other tax experts, particularly in Europe, that Dr. Juliane Kokott has been able to find the time and energy to bring her extraordinary knowledge, great skill and peculiarly relevant and important experience to produce this volume. The book confronts and explains without minimizing or simplifying the vast complexity in ways that are thorough, accessible and extremely incisive. The net result is a virtual GPS presentation of virtually all of the most important elements of tax law and practice as affected by international law and the extensive jurisprudence of the EU. Dr. Kokott modestly entitles her work a “Handbook.” It might more accurately be considered an encyclopedia or even a library.

The work is presented in a particularly logical and useful way. There are eleven specific sections organized in four parts. The different parts and sections are identified in very specific terms that facilitate references to particular groups of problems and issues. There follows a very brief summary of the basic structure of the book that identifies major elements of each part and cites a representative sample of issues that are treated with great clarity and great detail in the various portions of the book.

It is always useful to assure that there is an understanding of the jurisprudential sources relevant and determinative of substance. The first portion of the book (Part 1) describes, analyses and discusses a number of foundational topics. They include the role of customary international law, treaty law and the existence and limits on the power to make and implement treaties. The effect of EU Regulations and Directives respecting direct and indirect taxes is explored. The important distinction between the “international application” of customary international law and treaty law and “intranational

application” of EU law is noted and explained. Different sources of “soft law” are identified and explained, including model treaties and international financial standards. Their impact on customs duties and VAT’s is also reviewed.

The discussion of sources of EU tax law is followed in Section 2 by the identification of important “general principles.” This portion of the analysis includes an exploration of very important principles that underlie and define the way in which EU law affects tax regimes. The key focus of the discussion includes principles of legality, legal certainty and proportionality. The importance of effectiveness and equivalent treatment is analyzed and explained. The effects of violations of EU restrictions by national taxing authorities and their consequences for taxpayers are addressed.

Tax administrators everywhere are concerned with the manipulation of transactional arrangements to avoid and/or evade taxes. The distinctions among these related terms describing forms of tax abuse, along with outright tax fraud, are explained. Various techniques for combatting such actions and preserving legally imposed taxes are described.

As noted previously, double taxation is possible even though both countries are in compliance with jurisdictional prescriptions of international law. Section 3 of the book explores the devices evolved within the framework EU law for addressing the potential for double taxation.

The principle of equality, characterized as a foundational element of EU jurisprudence, is explored in great detail in Section 3. The analysis addresses the notion of equal protection, the importance of neutrality, the requirement of consistency, identification of unacceptable discrimination and concerns with respect to the ability of taxpayers to pay.

No comprehensive examination of EU law in any respect would be complete without regarding the relevance and application of the fundamental freedoms of taxpayers. This portion of the book includes a particularly thoughtful explanation of their application in the context of tax law and practice.

The possibility that the provision of tax benefits can be regarded as prohibited forms of State Aid has been a particularly heated issue on the agenda of EU law for the past decade. The book includes a detailed summary of the controversy and the way that the issue has been raised by national tax laws, regulations and rulings. It continues with an exploration of the legal consequences when tax practices have been challenged as forms of prohibited State Aid. Section 3 concludes with the somewhat related question arising when prohibited forms of discrimination are alleged.

Section 4 deals with the fundamental rights with which taxpayers are imbued by EU law and practice. The most extensive portion of the analysis, unsurprisingly, deals with the ever enlarging concern with the protection of personal data. The risks to personal privacy arising in the context of tax administration have been an increasing concern among taxpayers and tax administrations around the world for more than half a century. The discussion here effectively describes the sources of such privacy rights and the circumstances in which such rights can permissibly be infringed.

Other forms of taxpayer rights explored in this portion of the book include the freedom to choose an occupation and/or conduct a business, to own and use property and to enjoy the benefits of good administration that includes access to relevant documents.

The section includes an enumeration and description of basic rights within the justice system. The discussion includes the right to a fair trial before an independent tribunal, access to mutual assistance procedures and the availability of generally available rights

such as the presumption of innocence and respect for proportionality in criminal prosecutions.

The final portion of Part 1 (Section 5) examines permissible infringements of basic rights and the justifications for them. The allocation of taxing rights between the EU and Member States and among the Member States is described. Particular attention is paid to justifications based upon the importance of revenue collection to free governments, which is a continuing conflict in the establishment of tax policy. They include effective procedures of tax assessment and collection and, in particular, the justifications for defense mechanisms to protect against forms of tax abuse, including evasion, avoidance and outright fraud.

The discussion concludes with a review and analysis of the justifications based upon the importance of coherence, reciprocity and balance in tax treaties, certain flat-tax rules, and various economic and social objectives

As indicated previously, Part 1 of the book is designed to describe and analyze overarching principles of general application in the tax jurisprudence of the EU. Part 2 turns to the applications of those provisions and related issues in the context of specific areas of taxation. The literature of tax policy generally distinguishes between arrangements effecting what are termed direct and indirect taxation. The analysis in Part 2 of the book applies this distinction in the analysis of particular provisions.

Issues of direct taxation are addressed in Section 6. Primary law requirements are first examined as they apply to different tax payer categories and the “blurring” of the boundary between unlimited and limited taxation. While income taxes are the major focus of analysis, the primary law requirements applicable to inheritance and gift taxes are explored in some detail.

After dealing with the requirements of primary law sources, the focus pivots to “secondary legal requirements”, which are characterized as of particular importance. The principle portion of the analysis is directed to corporate income taxes, including the effect of parent/subsidiary rules, the impact of the merger directive and examples of non-taxable events. The Interest and Royalties Directive, which is of critical importance in the context of corporate finance and tax planning is analyzed in particular detail.

The second portion of Part 2 (Section 7) addresses issues arising from forms of indirect taxation. Unsurprisingly, the primary focus is turned to the VAT because of its enormous importance in the public financing of European governments. The section begins with an interesting reflection of the historical background of the VAT, the general principles applicable to its implementation and the interaction of the EU and national VATs.

Particular topics in this section include the identity and status of taxpayers, forms of economic activity to which the VAT attaches, the chargeable event and the extent of compliance obligations (including, but not limited to, paying any applicable tax). A long series of exemptions and other relief provisions are examined in detail.

The remainder of the section on indirect taxation is devoted to general EU and Member State excise duties. It includes discussions of particular excise taxes on alcohol, tobacco and energy products and indirect taxes on raising capital.

Section 8, the final section of Part 2, deals with EU taxes. Observing that the EU is a special international organization with many attributes of a nation-state, Dr. Kokott examines its competence to tax and provides a detailed discussion of the tax status of EU employees and other EU workers.

Tax practitioners know well that understanding the rules for determining tax liability and the impact of international and EU law is only the beginning of understanding the practical realities of the taxing regimes in place throughout Europe. Part 3 of this book

## Foreword

deals with the implementation of EU tax law, which is obviously the other part of the story. This portion of the book is divided into two distinct segments: administrative implementation (Section 9) and judicial implementation (Section 10).

Discussion of administrative implementation is focused primarily on two factors: the application of EU law in the administration of domestic procedures and its application in transnational procedures involving cooperation with the taxing authorities of other countries. The analysis begins with an examination of the principles of equivalence and effectiveness in the context of domestic procedures. The ensuing discussion addresses both taxpayer rights and techniques for combatting unacceptable tax avoidance and evasion.

Examples of administrative cooperation between Member States are described and analyzed. The important role of information exchange in the context of EU tax administration is underscored. The discussion includes a focus on some of the consequences of the BEPS process, such as the idea of country-by-country reporting and the requirements imposed on intermediaries.

Techniques for enhanced enforcement through international cooperation are described and evaluated. At the same time, administrative responsibilities and procedures for respecting the rights of taxpayers are identified and explained.

The section dealing with judicial implementation, including judicial protections of important interests, is somewhat less complex. The discussion includes identification of courts or tribunals of Member States affected by the EU rules, the right to request preliminary rulings on issues of EU law and the scope of temporal effects of judgments in tax proceedings.

A portion of the section is devoted to a further exploration of legal protections arising in connection with respect to disputes about Fiscal State Aid. Finally, the implementation of EU tax law procedures for dispute resolution, including possible arbitration, is explored. Like many portions of this book, this is another hot topic on the BEPS agenda.

This important book will be used for different reasons. Some readers will use it as an important summary of the impact of international and EU law on tax jurisprudence in Europe. Others will use it as a kind of library providing highly useful and specific material in dealing with particular issues and problems. For either group, the same admonition applies: Do not fail to read Part 4, which is modestly labeled as “Concluding Remarks.” The observations and predictions proffered here are important because they are relevant and because all tax professionals know that tax law never rests in one place. Moreover, the observations and the predictions are proffered by a thoughtful and incisive expert who has served importantly at the challenging cross section of national laws, international law and EU law. It is very valuable reading.

This is a book that squarely addresses, explains and analyzes the infinitely complex tapestry of the jurisprudence of international taxation in the context of the always evolving EU. It is intended to and will serve as an important and highly usable resource for any tax professional needing or wishing to learn about and confront issues of tax law, policy and administration in and about the EU.

Charles H. Gustafson  
Professor of Law (Emeritus)  
Georgetown University Law Center  
Washington, D.C.



## Preface

This book is the revised and updated edition of “*Das Steuerrecht der Europäischen Union*”, published in German in 2018. It aims to contribute to a better understanding and a coherent development of the tax law of the European Union. In the tradition of my academic mentor Karl Doehring, I have chosen the form of the monograph. This is better suited for systematisation than the collective editions commonly used today. However, systematising EU tax law is a challenge as the body of tax law flows from various sources and lacks a codified system. In addition, international influences from diffuse sources, in particular the OECD’s “soft law”, are becoming ever more important. My contribution to the order and systematisation of both direct and indirect tax law follows in accordance with the German legal tradition. It is difficult to find such work up to now,<sup>1</sup> though there have been collections<sup>2</sup> and books that discuss case law and secondary law according to the common law method,<sup>3</sup> usually related either to direct tax law<sup>4</sup> or to EU VAT law.<sup>5</sup> European tax law operates at these two levels, namely of largely harmonised indirect taxes and of nationally regulated direct taxes. This book presents both areas of law, the law of indirect taxation and the requirements for direct taxation resulting from EU legislation and the ECJ case law. Despite this dualism, EU law contains overarching general principles and concepts common to both areas of tax law.

The EU legislator and the national legislators implementing EU law are involved in the development of EU tax law, as are the Court of Justice of the European Union and the national courts. At both EU and national levels, courts sometimes become substitute legislators. The ECJ plays this role in particular in the area of direct taxation, where there is a lack of EU legislation, which requires unanimity for adoption. The ECJ urges national courts to assume the role of substitute legislators when national transposition legislation is absent or inadequate. This has occurred in the area of VAT when enforcement at national level is insufficient. Here, the impact on national prescription periods regarding VAT fraud has led to controversy and challenges for national courts. By instrumentalising the individual and the national courts, which thus functionally become Union courts, the ECJ has always contributed to the *effet utile* of EU law, both within and outside tax law. This is the basis of the concept of integration by law, which is laid down in the Treaties.

The ECJ derives requirements for national tax systems from the fundamental freedoms and, increasingly, from fundamental rights, and has as such already been referred

---

<sup>1</sup> But see in French, Maitrot de la Motte, *Droit fiscal de l’ Union européenne* (2nd. edn., Bruylant 2016); Boria, *Taxation in the European Union* (2nd edn., Springer 2017).

<sup>2</sup> Including both, direct and indirect tax law: Schaumburg/Englisch (eds.), *Europäisches Steuerrecht* (2nd edn., Otto Schmidt 2020); Musil/Weber-Grellet (eds.), *Europäisches Steuerrecht, Kommentar* (C.H. Beck 2019); Panayi/Haslehner/Traversa (eds.), *Research Handbook on European Union Taxation Law* (Elgar 2020). Without indirect tax law, Weber-Grellet, *Europäisches Steuerrecht*, (2nd edn., C.H. Beck 2016).

<sup>3</sup> Essentially, Terra/Wattel, *European Tax Law* (Wolters Kluwer 2012).

<sup>4</sup> Weber-Grellet, *Europäisches Steuerrecht*, (2nd edn., C.H. Beck 2016); Pistone, *Diritto Tributario Europeo* (2nd edn., Giappichelli 2020).

<sup>5</sup> For example, van Doesum et al., *Fundamentals of EU VAT Law* (2nd edn., Wolters Kluwer 2020); Terra/Kajus, *A Guide to the European VAT Directives 2021* (IBFD 2021); Centore, *IVA* (Wolters Kluwer 2020).

to as the “second tax legislator”.<sup>6</sup> This points to the constitutional dimension of EU tax law. The separation of powers is at stake, both horizontally in the relationship between the judiciary and the legislature and vertically in the relationship between the EU and its Member States. It is remarkable in this context that the first idea for this book was not developed by a tax lawyer, but by an expert of comparative constitutional law and public international law, Prof. Dr. iur. Dr. h.c. mult. Karl Doehring.<sup>7</sup> European tax law raises fundamental questions with a constitutional dimension because it touches on the core of state sovereignty and parliamentary supremacy: the oldest and most important prerogative of parliaments is the power of the purse. It includes the right to levy taxes and duties. In exercising this core competence, national parliaments are increasingly bound by EU law. Respecting the fiscal sovereignty of the EU Member States does not exempt their tax measures from those legal commitments.<sup>8</sup> However, there can be no automatic priority for the realisation of the internal market over national fiscal sovereignty; on the contrary, in a non-harmonised area the internal market necessarily remains incomplete. In the tension between national fiscal sovereignty and EU law, the principle of mutual respect and consideration applies.<sup>9</sup> For the EU this means, in particular, that tax disadvantages resulting from the mere coexistence of separate national tax systems and the differences between these systems are not subject to correction by the ECJ but can only be eliminated through harmonisation.<sup>10</sup> This follows from the principle of the separation of powers. In its case law, this idea is reflected in the noticeable effort of the ECJ to preserve the balanced allocation of the power to impose taxes between Member States, in particular from 2005 onwards. That’s the way it has to be. States depend on taxes. “Taxes are the lifeblood of government.”<sup>11</sup> States must therefore be able to protect their tax revenue. This idea currently dominates international tax law and experiences forceful promotion by the representatives of the States meeting in the framework of the OECD. The ECJ and courts in general are called upon to strike a fair balance between this legitimate concern of the States and the protection of taxpayers’ rights.

Another challenge is the very rapid internationalisation of tax law, which brings me back to one of my original areas of expertise, public international law. However, the traditional “genuine link” or nexus requirement for the exercise of tax jurisdiction, in particular residence or source, must be reinterpreted in the digitalised and data-driven economy.<sup>12</sup> Here, concepts of VAT or turnover tax law are also gaining ground in the

---

<sup>6</sup> Stewen, “Der EuGH und die nationale Steuerhoheit” (2008) 4 *EuR* 445.

<sup>7</sup> Prof. Dr. iur. Dr. h.c. mult. Karl Doehring (1919–2011) was the author’s academic mentor.

<sup>8</sup> See already ECJ judgment of 2.7.1973 – C-173/73, para. 12 – *Commission/Italy*.

<sup>9</sup> See also the Opinion of AG Maduro of 7.4.2005 to judgment of 16.7.2003 – C-446/03, para. 67 – *Marks & Spencer*. AG Maduro refers to the rule of “double neutrality”. On the one hand, national tax rules must be neutral in relation to the exercise of fundamental freedoms. On the other hand, the interpretation of EU law must be as neutral as possible for the Member States’ tax systems. See also Stewen, “Der EuGH und die nationale Steuerhoheit” (2008) 4 *EuR* 445 at 467.

<sup>10</sup> AG Geelhoed coined the term of “quasi restrictions” for such disadvantages which could not be remedied by the Court of Justice, Opinion AG Geelhoed of 29.6.2006 to judgment of 13.3.2007 – C-524/04, para. 40 – *Test Claimants in the Thin Cap Group Litigation*. See also ECJ judgment of 14.11.2006 – C-513/04, paras. 20 et seq. – *Kerckhaert Morres*.

<sup>11</sup> US Supreme Court, 295 U.S. 247 (259) (1935) – *Bull v United States*.

<sup>12</sup> For the controversial approaches of the Commission, cf. “Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services” COM(2018)148 final and “Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence” COM(2018) 147 final. See also Kokott, “The ‘Genuine Link’ Requirement for Source Taxation in Public International Law” in Haslehner/Kofler/Pantazatou (eds.), *Tax and the Digital Economy* (Wolters Kluwer 2019), p. 9; Kokott, “Herausforderungen einer

area of direct taxation, e.g. the country of destination principle;<sup>13</sup> sometimes profit taxation is even linked to turnover.<sup>14</sup> It is therefore important to treat direct and indirect taxes in context. Also, a public international law perspective is indispensable.<sup>15</sup> In a world in which tax substrates can circulate and be allocated relatively freely and in which companies are largely free to choose their investment locations, it is becoming increasingly difficult for individual States to protect their tax base. Other, more generous States can easily undermine this legitimate concern by harmful tax competition for investments. “Abuse” is the almost unavoidable consequence of lacking tax harmonisation, which is not easily compatible with tax sovereignty, however.<sup>16</sup> The most pertinent way to achieve single effective taxation of globally operating taxpayers therefore lies in a more principled, transparent and internationally more closely coordinated design of national tax laws.<sup>17</sup> The concepts developed and experience gained within the EU could thus be helpful.<sup>18</sup> Similarly, the international transfer of tax data calls for an international protection regime for taxpayers, especially when one considers that in some countries the death penalty was imposed on tax offences until the beginning of the millennium.<sup>19</sup>

The idea for this book originally goes back, as already mentioned, to my late academic mentor Professor Dr. Dr. h. c. mult. Karl Doehring; Professor Dr. Dr. h.c. Antonio Tizzano, former Vice-President of the European Court of Justice, encouraged me to turn the idea into reality. I thank Professor Dr. David Hummel for critically reading the VAT section of the manuscript and Friedrich Wöhlecke, Johanna Wernthaler and Patrik Deutsch for their critical review of other parts; I enjoyed the excellent cooperation with Thomas Klich and Dr. Thomas Schäfer of Verlag C.H. Beck.

beck-shop.de

DIE FACHBUCHHANDLUNG

---

Digitalsteuer “(2019) 4 *IStr* 123; Avi-Yonah, “Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State” (2000) 7 *Harvard Law Review* 1573 at 1589 et seq., 1670 et seq.

<sup>13</sup> Auerbach et al., “Destination-Based Cash Flow Taxation” (2017) *Oxford University Centre for Business Taxation WP 17/07*. Critical on the US plan for a destination-based corporate tax, Avi-Yonah/Clausing, “Problems with Destination-Based Corporate Taxes and the Ryan Blueprint” (2017) 2 *Columbia Journal of Tax Law* 229: falsely declared turnover tax and export subsidy contrary to WTO rules.

<sup>14</sup> On the Polish retail tax, which is progressive in relation to turnover and which the Commission considers to be aid to smaller enterprises, European Commission, “Commission Decision of 30.6.2017 on the state aid SA. 44351 (2016/C)(ex2016/NN) implemented by Poland for the tax on the retail sector” C (2017) 4449 final. But see European Commission, “Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services” COM (2018) 148 final; Kokott, “Herausforderungen einer Digitalsteuer “(2019) 4 *IStr* 123; critically Hufbauer/Zhiyao, “The European Union’s Proposed Digital Services Tax: A De Facto Tariff” (PIIE Policy Brief 18–15 June 2018).

<sup>15</sup> Likewise, Biebinger, *Treaty- and Directive-Shopping in den Quellenbesteuerungssystemen europäischer Staaten* (Lohmar 2016), p. 105; Cockfield, “Protecting Taxpayer Privacy Rights Under Enhanced Cross-Border Tax Information Exchange: Toward a Multilateral Taxpayer Bill of Rights” (2010) 2 *U.B.C. Law Review* 419 at 461 et seq.

<sup>16</sup> See also Avi-Yonah, “Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State” (2000) 7 *Harvard Law Review* 1573 at 1675 et seq.

<sup>17</sup> Biebinger, *Treaty- and Directive-Shopping in den Quellenbesteuerungssystemen europäischer Staaten* (Lohmar 2016), p. 148.

<sup>18</sup> As far as VAT is concerned, that is obvious. With regard to the controversial project of an international financial transaction tax van Vooren, “The EU’s financial transaction tax” in Kochenov/Antenbrink (eds.), *The European Union’s Shaping of the International Legal Order* (Cambridge University Press 2014), p. 328 at p. 341 et seq. and p. 347.

<sup>19</sup> Such as in China on tax fraud and tax evasion, [www.todesstrafe.de](http://www.todesstrafe.de) (retrieved on 1.1.2017).

*Preface*

The book is structured as follows: General Part 1 on the sources and principles of EU tax law is followed by Special Part 2 on EU secondary legislation in the field of direct taxation, but in particular indirect taxation with a special focus on VAT law. Part 3 on tax procedures is divided into a subsection on administrative and a subsection on judicial proceedings. Part 4 contains concluding remarks.

Luxembourg, April 2022

Juliane Kokott

  
**beck-shop.de**  
DIE FACHBUCHHANDLUNG

## Table of Contents

List of Abbreviations.....	XVII
About the Author .....	XXI

### PART 1 GENERAL PART

§ 1. Overview of the Sources of EU Tax Law.....	1
§ 2. General Principles of EU Tax Law.....	18
§ 3. The Principle of Equality as Foundation of Tax Law.....	109
§ 4. Taxpayers' Fundamental Rights.....	229
§ 5. Justification of Infringements.....	297

### PART 2 SPECIAL PART

§ 6. Direct Taxation.....	357
§ 7. Indirect Taxation.....	410
§ 8. EU Taxes.....	726

### PART 3 THE IMPLEMENTATION OF EU TAX LAW

§ 9. Administrative Implementation.....	729
§ 10. Judicial Implementation and Legal Protection.....	766

### PART 4 CONCLUDING REMARKS

§ 11. Summary.....	789
Index.....	801

## List of Abbreviations

ABV .....	Alcohol by volume
AG .....	Advocate General
Alcohol Excise Duty Directive .....	Council Directive 92/83/EEC of 19 October 1992 on the harmonization of the structures of excise duties on alcohol and alcoholic beverages
ALP .....	Arm's-length principle
ALS .....	Arm's-length standard
Alt. ....	Alternative
Alts. ....	Alternatives
AO .....	Abgabenordnung (Fiscal Code, Germany)
AöR .....	Archiv des öffentlichen Rechts (journal)
APA .....	Advance Pricing Agreement
Art. ....	Article
Arts. ....	Articles
ASTG .....	Außensteuergesetz (External Tax Relations Act, Germany)
ATAD .....	Anti-Tax Avoidance Directive
BAPA .....	Bilateral Advance Pricing Agreement
BEPS .....	Base Erosion and Profit Shifting
BFH .....	Bundesfinanzhof (Federal Fiscal Court, Germany)
BGH .....	Bundesgerichtshof (Federal Court of Justice, Germany)
BIT .....	Bilateral Investment Treaty; Bulletin for International Taxation
BMF .....	Bundesministerium der Finanzen (Federal Ministry of Finance, Germany)
BVerfG .....	Bundesverfassungsgericht (Federal Constitutional Court, Germany)
BVerwG .....	Bundesverwaltungsgericht (Federal Administrative Court, Germany)
BYIL .....	British Yearbook of International Law
Capital Duty Directive .....	Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital
CCCTB .....	Common Consolidated Corporate Tax Base
cf. ....	compare (from Latin: conferatur)
CFC .....	Controlled Foreign Company
Charter .....	Charter of Fundamental Rights of the European Union
CJEL .....	Columbia Journal of European Law
CJEU .....	Court of Justice of the European Union
CMLR .....	Common Market Law Review
CRS .....	Common Reporting Standard
DAC .....	Directive on Administrative Cooperation
Data Protection Directive .....	Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data
DBA .....	Doppelbesteuerungsabkommen (Double Taxation Agreement)
Directive on Administrative Cooperation .....	Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC
DStR .....	Deutsches Steuerrecht (journal)
DStRK .....	Deutsches Steuerrecht kurzgefasst (journal)
DTA .....	Double Taxation Agreement
DTC .....	Double Taxation Convention
DTT .....	Double Taxation Treaty
e.g. ....	for example (from Latin: <i>exempli gratia</i> )

## *List of Abbreviations*

EATLP .....	European Association of Tax Law Professors
ECHR .....	European Convention on Human Rights
ECJ .....	European Court of Justice
ECtHR .....	European Court of Human Rights
ed. ....	editor
edn. ....	edition
eds. ....	editors
EEA .....	European Economic Area
EFTA .....	European Free Trade Association
EJIL .....	European Journal of International Law
Energy Tax Directive .....	Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity
Equal Treatment Framework Directive .....	Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation
EStAL .....	European State Aid Law Quarterly
EStG .....	Einkommensteuergesetz (Income Tax Act; Austria, Germany)
et al. ....	and others (from Latin: et alii)
et seq. ....	and following (from Latin: et sequens)
EU Arbitration Convention .....	Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (90/436/EEC)
EuCLR .....	European Criminal Law Review
EuGRZ .....	Europäische Grundrechte Zeitschrift (journal)
EuR .....	Europarecht (journal)
EuZW .....	Europäische Zeitschrift für Wirtschaftsrecht (journal)
EWS .....	Europäisches Wirtschaftsrecht (European Business and Tax Law) (journal)
FATCA .....	Foreign Account Tax Compliance Act
FR .....	FinanzRundschau (journal)
FS .....	Festschrift (liber amicorum)
FTT .....	Financial Transaction Tax
GC .....	General Court (European Union)
GDP .....	Gross Domestic Product
GDPR .....	General Data Protection Regulation
General Data Protection Regulation .....	Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC
General Excise Duty Directive .....	Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC
GNI .....	Gross National Income
HRRS .....	Höchstrichterliche Rechtsprechung zum Strafrecht (online journal)
IATJ .....	International Association of Tax Judges
IBFD .....	International Bureau of Fiscal Documentation
ibid. ....	in the same place (from Latin: ibidem)
ICLQ .....	International and Comparative Law Quarterly (journal)
IDPL .....	International Data Privacy Law (journal)
IGP .....	Independent Group of Persons
Implementing Regulation 282/2011 .....	Council Implementing Regulation (EU) No. 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax
Interest and Royalties Directive .....	Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States

## List of Abbreviations

Intertax .....	International Tax Review (journal)
IRS .....	Internal Revenue Service
ISR .....	Internationale SteuerRundschau (journal)
IStR .....	Internationales Steuerrecht (journal)
JICT .....	Journal of Industry, Competition and Trade
KStG .....	Körperschaftsteuergesetz (Corporation Tax Act, Germany)
LG .....	Landgericht (Regional Court, Germany)
LIIEI .....	Legal Issues of Economic Integration
LJIL .....	Leiden Journal of International Law
MAPA .....	Multilateral Advance Pricing Agreement
Merger Directive .....	Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States.
MJ .....	Maastricht Journal of European and Comparative Law
MLI .....	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS/Multilateral Instrument
mn. ....	margin number
MwStR .....	MehrwertSteuerrecht (journal)
N.Y.L. Sch. L. Rev. ....	New York Law School Law Review (journal)
NJW .....	Neue Juristische Wochenschrift (journal)
No. ....	number
Nos. ....	numbers
NVwZ .....	Neue Zeitschrift für Verwaltungsrecht (journal)
NZWSt .....	Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht (journal)
OECD .....	Organisation for Economic Cooperation and Development
OECD Model Convention .....	OECD Model Convention with respect to taxes on income and on capital
p. ....	page(s)
para. ....	paragraph
paras. ....	paragraphs
Parent-Subsidiary Directive .....	Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States
PE .....	Permanent Establishment
PIF Directive .....	Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law
Recovery Directive .....	Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures
Savings Directive .....	Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (repealed)
SCE .....	European Cooperative Society (from Latin: Societas Cooperativa Europaea)
SE .....	European Society (from Latin: Societas Europaea)
sent. ....	sentence
Sixth VAT Directive .....	Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment
SME .....	Small and Medium-sized Enterprise
StuW .....	Steuer und Wirtschaft (journal)
subpara. ....	subparagraph
subparas. ....	subparagraphs



## List of Abbreviations

Tax Dispute Resolution Directive .....	Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union
taxlex .....	taxlex (journal)
TEU .....	Treaty on European Union
TFEU .....	Treaty on the Functioning of the European Union
Thirteenth VAT Directive .....	Thirteenth Council Directive 86/560/EEC of 17 November 1986 on the harmonization of the laws of the Member States relating to turnover taxes – Arrangements for the refund of value added tax to taxable persons not established in Community territory
Tobacco Excise Duty Directive .....	Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco
TPG .....	OECD Transfer Pricing Guidelines
U.B.C. Law Review .....	University of British Columbia Law Review
UCITS Directive .....	Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)
UR .....	Umsatzsteuer-Rundschau (journal)
US .....	United States
UStG .....	Umsatzsteuergesetz (VAT Act, Germany)
VAT Directive .....	Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax
VAT Refund Directive ...	Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State
VEG .....	VAT Expert Group
vol. ....	volume
v. ....	versus
VVDStRL .....	Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (series)
WTJ .....	World Tax Journal
WTO .....	World Trade Organisation
ZaöRV .....	Zeitschrift für deutsches und ausländisches öffentliches Recht und Völkerrecht
ZfZ .....	Zeitschrift für Zölle und Verbrauchsteuern (journal)
ZGR .....	Zeitschrift für Unternehmens- und Gesellschaftsrecht (journal)
ZIP .....	Zeitschrift für Wirtschaftsrecht (journal)
ZRP .....	Zeitschrift für Rechtspolitik (journal)
ZVglRWiss .....	Zeitschrift für Vergleichende Rechtswissenschaft (journal)

## About the Author

**Juliane Kokott** holds the office of Advocate General at the Court of Justice of the European Union, Luxembourg. Since October 2003, she has been responsible for over 1400 cases and has delivered more than 570 Opinions, including some 160 on taxation. The latter cases concerned issues of direct and indirect taxation, in particular VAT, as well as State aid and internal market issues. Prior to joining the Court of Justice, Ms Kokott was Professor at the Universities of Augsburg, Heidelberg, Düsseldorf, and St Gallen. She was also Visiting Professor at the University of California, Berkeley, USA. Ms Kokott is a graduate of the University of Bonn, Germany, the American University, Washington DC, USA, the University of Heidelberg, Germany, Harvard Law School, USA and holds an honorary doctoral degree of the Université of Liège/Belgium. She is the author and co-author of a number of publications in European law, public international law, and international and European tax law (e.g. *Taxpayers in International Law – International Minimum Standards for the Protection of Taxpayers Rights*, together with Pasquale Pistone, 2022). In addition, Ms Kokott has actively initiated and organised several high-level conferences and symposia. She is also Founder and Co-Chair of the Committee of International Tax Law (Taxpayers' Rights; Nexus; Enforcement of International Tax Law) of the International Law Association.

**beck-shop.de**  
DIE FACHBUCHHANDLUNG