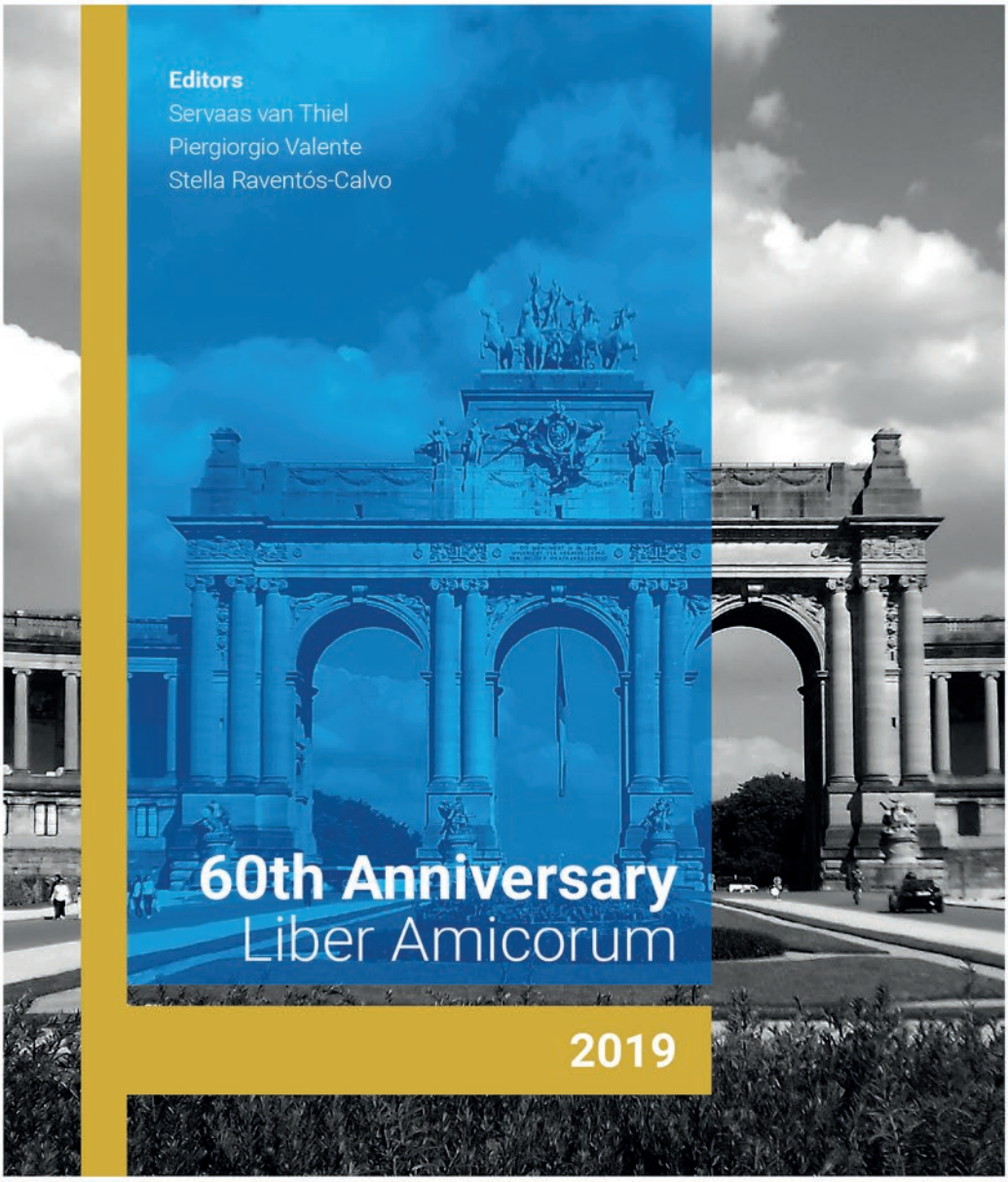
CFE tax advisers europe



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Servaas van Thiel
Piergiorgio Valente
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60th Anniversary
Liber Amicorum

2019

IBFD

CFE Tax Advisers Europe – 60th Anniversary Liber Amicorum

Why this book?
In this Liber Amicorum, compiled in honour of the 60th anniversary of CFE Tax Advisers Europe, renowned tax experts discuss key tax issues that challenge tax advisers, tax academics and tax officials on a daily basis.

Part I looks at EU decision-making in the tax area and some of the challenges of exercising tax jurisdiction in a digital world (taxing digital business models, robot taxes, etc.). Part II discusses the legal limits, particularly in Europe, to the traditional ways in which states exercise their tax jurisdiction (e.g. the need for equal treatment, the prohibition of discriminatory exit taxes and the ECJ Sofina decision) and the closely related issue of taxpayer rights (under EU law and the European Convention on Human Rights). Part III reports on recent developments in the fight against tax avoidance and tax evasion (e.g. the OECD BEPS Action Plan, the European Union's external "tax good governance" policy, international exchange of information, transfer pricing documentation requirements, the ECJ Denmark decisions and the Commission's Apple decision). Part IV presents an in-depth analysis of VAT (lessons learned) and suggests new ways forward, including in respect of dispute management (cross-border rulings). Finally, Part V reflects on non-tax issues that may have implications on international taxation and finance.

With its practical approach, the book provides an interesting and insightful read for all those involved in international taxation.

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Table of Contents

Part IV
Towards New Approaches in the VAT Area

Preface

This Liber Amicorum commemorates the 60th anniversary of CFE Tax Advisers Europe and was released on the occasion of the celebrations of this memorable event in Turin in October 2019. The book aims to be an insightful contribution to the ongoing discussions in the international tax world by offering high-level commentaries on a number of recent developments in taxation at the EU and worldwide levels.

Founded in 1959, CFE celebrates 60 years of presence in the European and international tax scene in 2019. During these 60 years, CFE has constantly sought, among others, to:

- safeguard tax advisers' professional interests;
- protect and enhance taxpayer rights;
- keep taxpayers informed about developments in the tax area;
- ensure effective cooperation among tax advisers;
- promote the exchange of information about national laws at the EU level;
- contribute to the coordination of national tax legislation at the EU level; and
- strengthen the relations between tax advisers and national/international authorities.

The efforts of CFE are inspired by the shared principle that effective cooperation between tax advisers implies a stronger impact on EU and international tax developments and, hence, a more robust protection of taxpayer rights.

In 2019, CFE is the most representative organization of tax advisers in Europe, comprising 30 member organizations from over 24 EU Member States, i.e. more than 200,000 tax advisers. Continuously expanding its reach and visibility, CFE remains committed to the above objectives and keeps promoting them the best it can.

CFE's 60th anniversary coincides with a critical turn in the history of international taxation. Under the dominance of new technologies, the digitalization of the economy is overhauling the coordinates of the existing framework. Business is increasingly run on the web, permitting economic reach everywhere with physical presence nowhere. Intangibles are valued more than tangibles, and data have gained unprecedented value creation potential.

Built for a tangible (brick-and-mortar) economy, international tax rules have proven inadequate for the new reality. New rules are needed that are more flexible, open and global. The change started with the BEPS Project, but the main challenge is still ahead: how should digital business income be taxed?

The digital economy, however, is not the sole game-changer, because political circumstances over the last decade have left their footprint as well. The financial crisis multiplied uncertainty and undermined trust in established institutions. Uncertainty can lead to non-compliance, further questioning the general framework of taxation. At the same time, new economic powers have emerged, changing established balances and asking for their own part of the global pie, creating the task for tax jurisdictions to find a new balance.

To respond to the new circumstances, CFE is targeting its efforts, on the one hand, on the tax regime for the digital economy, and on the other hand, on the effects of globalization and inclusiveness:

- Since 2018, the Tax Technology Committee has been monitoring the developments regarding taxation of the economy that is permeated by new technologies.

- On 12 September 2018, the Ulaanbaatar Declaration was signed by CFE, AOTCA (Asia-Oceania Tax Consultants' Association) and WAUTI (West Africa Union of Tax Institutes) to mark the relaunch of the GTAP (Global Tax Advisers Platform), reaffirming ten key priorities for the GTAP in pursuing international cooperation among tax advisers and optimization of the national and international taxation framework.

The GTAP was established by CFE, AOTCA and WAUTI, which collectively represent more than 600,000 tax advisers in Europe, Asia and Africa. The GTAP is an international platform that seeks to bring together national and international organizations of tax professionals from all around the world. The GTAP's fundamental principle is that the interests of taxpayers and tax advisers are better pursued and served within a fair and efficient global tax framework. It is CFE's commitment to continue contributing to the shaping and optimization of the international tax framework by monitoring, alerting, commenting, uniting and suggesting, and this book is an affirmation of such ongoing engagement.

This Liber Amicorum comprises contributions by eminent tax professionals of this era. It is a Liber Amicorum because the choice of the topic of each contribution was left to the discretion of the author. The authors were

selected for their expertise, experience and high-level contributions to the tax area. An effort was made for the authors to represent different backgrounds so that varying viewpoints are reflected in the book. As a result, the authors might, for example, have an academic or institutional background or be leading tax professionals, while they also come from different nations.

Most importantly, the CFE Liber Amicorum is the outcome of cooperation on a pro bono basis, with the common goal to serve the EU and international tax frameworks, making use of the broad experience of tax advisers worldwide.

Piergiorgio Valente

President, CFE Tax Advisers Europe

Chapter 1

Introduction to the Liber Amicorum

Servaas van Thiel*

1.1. A collective effort

It has been a great pleasure to be allowed to help edit the Liber Amicorum for the 60th anniversary of CFE Tax Advisers Europe, and I would like to take the opportunity in this introductory chapter to thank all the authors for their insightful contributions and the excellent cooperation we had during the preparatory process. I also want to thank my co-editors for their wisdom and concrete help in organizing the work and arriving at the result that is before you today. Finally, great gratitude is due to the efficient work of the CFE office in Brussels and the staff of IBFD in Amsterdam. This is a truly collective effort and we hope it will be interesting and useful for all readers.

Interestingly, the authors of the different chapters in this Liber Amicorum discuss many of the key tax issues that are on our table on a daily basis, and they do so with different approaches and in a clear and concise way that is likely to be informative and helpful for the readers, whether they are tax advisers, academics or tax officials. The chapters are grouped around different topics, including the key question of who decides on tax issues and how tax jurisdiction may have to be redefined in a digital world (*see* section 1.2.), the legal limits on the traditional ways in which states, in particular, in Europe, exercise their tax jurisdiction and the closely related issue of taxpayer rights (*see* section 1.3.), recent developments in the fight against tax avoidance and evasion (*see* section 1.4.), ideas for new approaches in

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the area of VAT (*see* section 1.5.) and, finally, reflections of some non-tax issues that may have tax implications (*see* section 1.6.).

1.2. Tax decisions and jurisdiction

A key question in international and European tax law is who can take decisions on tax issues and which countries can actually claim the jurisdiction to tax, and different aspects of this question are the subject of the first group of chapters. In chapter 2, Pasquale Pistone addresses the question of tax-related decision-making in the European Union. He notes that taxation has truly globalized and that the EU Council should be able to adopt secondary EU law to the extent needed for the internal market without being hindered by the unanimity requirement that has been written in the European Treaties since the 1957 Treaty of Rome. He notes that case law cannot substitute a sound common regulatory framework, and he therefore strongly agrees with the 2019 Commission suggestion to change the dynamics of EU Council decision-making on taxation to qualified majority voting and co-decision by the European Parliament. He agrees to the use of the *passerelle* clauses, but nuances the proposal of the Commission to use these initially for administrative cooperation and supporting tax measures (e.g. climate change) and, by 2025, for harmonized areas (e.g. VAT) and other initiatives (e.g. the Common Corporate Tax Base). He concludes that using the ordinary legislative procedure would fit with a modern concept of tax sovereignty and allow European institutions to develop a tax policy consistent with the internal market and with full accountability to the European Parliament.

The three subsequent chapters look at the question of tax jurisdiction in light of technical developments, such as the digitalization of the economy, and the possible need to redefine or modernize tax systems accordingly. In chapter 3, Piergiorgio Valente looks at the inconsistency between traditional tax systems and changing business models in the digital economy (participative networked platforms, the sharing economy, online booking and payment services, 3D printing, etc.), in which intangibles are prevalent over tangibles. Searching for appropriate responses, he surveys actions taken by legislators worldwide (e.g. the extension of VAT to e-commerce, taxing income from e-services without a physical presence and diverted profits tax) and within the OECD (e.g. BEPS Action 1, revisiting the nexus approach, the concept of a digital permanent establishment (PE), a withholding tax on online transactions and an equalization levy) and the European Union (the 2018 Digital Tax Package). He argues passionately in favour of moving forward through international cooperation in order to collectively

better understand the digital revolution and be able to define a totally new approach to taxation.

In chapter 4, Christina Dimitropoulou looks at robot taxes as a possible reply to adverse robotization impacts (e.g. unemployment, inequality and lower revenue). She notes that robots cannot legitimately be considered persons for income tax purposes (given that they have no ability to pay and no right to vote and are a part of corporate capital assets) and discusses whether robot taxes on production or products could be useful (e.g. a deemed payroll tax, reduced depreciation allowances, capital income tax increases and excise duties). She recognizes that this could possibly be a short-term fiscal policy response to cushion the economic and revenue impacts of robotization and to prevent the exacerbation of already existing income and wealth inequalities, but also recognizes the downsides of the proposals presently on the table. She sees a challenging task ahead for the European Union to find coordinated solutions.

In chapter 5, Krister Andersson wonders where corporations should be taxed in light of major tax changes in Europe and touches on recent tax policy issues, such as digitalization, changes in EU VAT, qualified majority voting in the Council, changes in tax revenue allocation and the adverse effects for net exporters of a shift towards destination-based income taxes. He urges governments to listen to tax advisers and to limit uncertainty.

1.3. Limits to tax jurisdiction and taxpayer rights

The second group of chapters concerns the limits that flow from EU law and human rights law on the way in which states exercise their tax jurisdiction. In chapter 6, Tom O'Shea looks at the principles of neutrality and equal treatment and disagrees with Wolfgang Schön, who had noted that neutrality is a general principle of European law. O'Shea provides a detailed and exhaustive analysis of the Court's case law in different areas of law (e.g. VAT, the Parent-Subsidiary Directive, the Mergers Directive, the prohibition of indirect tax discrimination, the fundamental freedoms, copyright law and international agreements) and concludes that the principle of equal treatment is the defining principle in direct tax case law of the Court of Justice of the European Union (ECJ), while neutrality, as a principle, applies only if explicitly provided for, such as in the VAT Directive.

In chapter 7, Servaas van Thiel traces the remarkable EU journey regarding exit taxation of unrealized capital gains. He notes that the Court initially

protected the exiting taxpayer by disallowing the exit state to (i) determine the taxable amount on exit; (ii) collect tax on exit; and (iii) require a bank guarantee, interest or a fiscal representative to ensure payment of the tax due upon the realization of the capital gains. When the European Commission transposed this case law into its 2006 Recommendation, the Council adopted its 2008 Resolution, which allowed for the taxation of unrealized capital gains of exiting companies or business assets. In 2011, the Court agreed that exit states may tax unrealized gains and either collect the tax in yearly installments or grant a collection deferral (accompanied by interest, bank guarantee and administrative tracing requirements). In 2016, the Anti-Tax Avoidance Directive obliged exit states to tax unrealized gains and host states to provide a step-up. It remains to be seen how these developments will affect other areas of ECJ case law in the future.

In chapter 8, Georg Kofler analyses the *Sofina* decision, in which the ECJ took account of the non-dividend income of a non-resident recipient when comparing the tax treatment of domestic and outbound dividends and concluded that the tax on outbound dividends constituted EU-law-incompatible discrimination. He fears that this retreat from the territoriality principle (because the source state must take account of losses of the non-resident in the residence state) could herald a broader "no loss" condition for all source-state taxing rights, which would be unconventional and difficult to administer and could, in the end, even bar a PE state from taxing the profits attributable to the PE if the foreign head office is loss-making.

In chapter 9, Dick Barmentlo and Paul Kraan look at taxpayer rights. They express doubts about the 2018 EU Directive on automatic exchange of information, which they believe may violate the fundamental rights to remain silent and not incriminate oneself, as well as the right to privacy. They also question the retroactive effects of that Directive and see a danger in the digital sharing of confidential information between tax authorities. Recalling the relevant fundamental rights provided in existing instruments (the 1953 European Convention on Human Rights, the 2000 Charter, the EU non-discrimination provisions and bilateral tax treaties), they call for a legally binding EU Charter of Taxpayer Rights (in the form of an EU directive or regulation).

In chapter 10, Jeremy Woolf focuses in particular on the human rights of taxpayers under the European Convention on Human Rights and its protocol, including the right to a fair hearing, the prohibition of double penalization and the right to property, which also prohibits tax discrimination, as well as some protection against retroactive changes in the law. He regrets

that the right to a fair hearing does not extend to tax proceedings unless they relate to penalties and that the principle of legality does not limit a state's ability to introduce retroactive legislation. On those issues, EU law may actually provide better protection than the European Convention.

1.4. Combating tax avoidance and evasion

The third group of chapters deals with measures to combat tax avoidance and evasion. In chapter 11, Howard Liebman takes stock, in broad terms, of the 15-point BEPS Action Plan as adopted by the OECD in October 2015. He briefly summarizes the follow-up to the 15 Actions and further developments, as well as the additional reports and documents produced by the OECD, under each of these 15 actions. He concludes that the implementation of the 15-point Action Plan by every OECD member country (and by key non-OECD member countries signing on to the Inclusive Framework) is crucial, and even though he recognizes that the report card of the BEPS initiative is not yet final, he gives top marks for the achievements so far.

In chapter 12, Claudia Barsotti and Franco Roccatagliata trace the history of the European Union's external strategy on good governance in taxation, including standards on transparency and exchange of information and the fight against harmful tax competition. They discuss the external dimension of the work of the Code of Conduct Group on harmful tax competition and the follow-up to the 2009 and 2012 Commission Communications on promoting good governance in tax matters, both within the European Union and in third countries, also including the common blacklist of non-cooperative tax jurisdictions. They conclude that much will depend on how third countries implement their commitments and note that engagement on the issue of substance requirements at the international level would be a major achievement.

In chapter 13, Ana Paula Dourado explores the condition, contained in the international standard on exchange of information, that the requested state is bound to provide information when it is "foreseeably relevant" (i.e. no fishing expeditions). She looks at different legal texts, case law and the EU Assistance Directive (which provides for automatic exchange of information) and comes to the conclusion that the condition has, to a large extent, lost its role of protecting taxpayers against speculative requests and that the defence of taxpayer rights is basically left to the recipient state, with some EU constitutional limits being applicable when exchange of information takes place in the European Union.

In chapter 14, Steef Huibregtse, Marina Menezes da Silva and Kartika Sukmatullahi recall that the BEPS transfer pricing documentation requirements, designed to help align the taxation of multinational enterprises (MNEs) with economic reality and value creation, require MNEs to disclose how value is generated in the group as a whole, the interdependencies of the functions performed by the related enterprises and the contribution that each associated entity makes to that value creation. They note that this gives rise to the need for taxpayers to assess their business operations from a holistic perspective and explain, with concrete examples, how a value chain analysis approach aligns business models, finance and tax positions and the governance of MNEs with best practice under the OECD/G20 BEPS initiative.

In chapter 15, Stella Raventos-Calvo discusses the recent anti-abuse case law (Danish cases), in which the ECJ essentially held that Member States must uphold the European prohibition of abuse of law (no transposition in national law needed), and therefore must deny the advantages of the direct tax directives if interest and dividends are paid by a European company to a European intermediate holding that transfers them, almost immediately, to a third-country parent investment company. She discusses the Court's indicators for "abuse of law" (e.g. a conduit without economic activity that receives income and passes it on), contrasts the outcome of the decision with previous case law (*Eqiom*) and wonders how the decision may affect the many dividend-receiving holding companies in Europe, as well as third-country investors.

In chapter 16, Alexander van Thiel discusses Apple's arguments against the Commission decision that qualified Ireland's Apple ruling as illegal State aid. He notes that the ruling did not apply normal tax base and rate rules, but allowed Apple to be taxed on income from global sales at 0.05% rather than at 12.5%, which is an advantage that was selectively granted and resulted from profit allocation and transfer pricing rules that had already been subject to negative decisions by the Code of Conduct Group, the Commission and the Court. He argues that, at least since the 2007 Advance Pricing Agreement Recommendation, taxpayers should have known that EU Member States must deal with the private sector at arm's length (i.e. according to the "market investor principle") and not waive tax normally due. He notes that the ruling allowed Apple to use Irish shell companies to achieve double non-taxation and that its renewal in 2007 was problematic, because every tax adviser should have known that this was "too good to be true".

1.5. Towards new approaches in the VAT area

The fourth group of chapters concerns VAT. In chapter 17, Christian Amand makes an admirable analysis of VAT, starting from its origins in the 1950s via the 1977 Sixth VAT Directive to the 1993 transitional regime, along with its strengths (no borders and no pre-financing of import VAT) and weaknesses ("missing trader" fraud, compliance costs for businesses and the non-traceability of goods). He surveys the many improvement proposals that are on the table and critically evaluates the Commission's 2014 VAT action plan. He sums up the lessons learned from the past (e.g. that revenue is the key driver for Member States, physical movements of goods are no longer traceable, missing trader fraud is a major weakness, the VAT-taxable person is already an unpaid tax collector and should not become the taxpayer and both the unanimity requirement and the Commission's exclusive right of initiative are problematic) and suggests reconsidering the 1995 proposal of Frans Vanistendael that cross-border suppliers pay VAT directly to the destination country at the destination country's rates. He ends on the philosophical note that, as in 1954, a major system change may be required.

In chapter 18, Paolo Centore and Matteo Dellapina focus on cross-border advance rulings in the VAT area. They summarize the rulings adopted during a pilot project phase and identify other cases in which a ruling would have been helpful. Looking at experience from the direct tax area, they ask the question of which tool to use in the VAT area in the future in order to address disputes regarding the facts and the interpretation of the rules. While recognizing the role of the VAT Committee (guidelines), the Commission (explanatory notes), the VAT Expert Group (opinions) and the courts (decisions), they argue strongly in favour of a definitive scheme of cross-border advance rulings under which the VAT Committee could play a role without substituting the courts.

1.6. Reflections on non-tax issues

Chapters 19 and 20 briefly touch on issues that will increasingly be related to international taxation and finance. In chapter 19, Alessandro Valente and Marco Nicoli correctly identify taxation as an essential element to help countries realize the 2030 Agenda and its 17 sustainable development goals and 169 targets. They suggest that tax policy should be closely aligned with broader policy objectives, such as economic growth, jobs and the reduction of inequalities. In chapter 20, Andrea Borroni discusses the relationship

between virtual currencies, such as Bitcoin, with the principles of Islamic law and banking.

Finally, I would like to personally congratulate CFE Tax Advisers Europe on their 60th anniversary, and I hope that this Liber Amicorum will provide tax practitioners, officials and academics who follow international and European tax developments on a daily basis with many hours of good reading and lots of useful, practical information.

Notes

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