Corporate Income Tax Subjects

Why this book?
Tax harmonization or coordination of corporate taxation in the European Union is usually considered from two complementary points of view: tax base and tax rate. These two perspectives structure the debate on whether EU Member States, and more broadly states belonging to the same economic area, should harmonize or coordinate their policies on tax matters.

However, little attention has been paid so far to a more basic question which is at the core of tax theory: who are corporate taxpayers? Are they defined in the same way throughout Europe?

Comparative law shows that the conditions that must be met in order to be subject to corporate income tax are very different from one country to another. The way tax systems define foreign entities that fall under their corporate income tax may also vary significantly, which may in practice give rise to interesting tax planning opportunities.

Against this background, the 2013 EATLP Congress devoted to corporate income tax subjects was designed to enhance the main similarities and differences that exist between many countries (European countries and the United States). It is the first time that such joint research has been conducted on an international scale on this fundamental topic and it has given rise to an ambitious publication.

This book therefore provides a basis for tax policy decisions at a national and European level. It also constitutes a starting point for academic reflection on a core issue affecting the structure of corporate income taxation.

Title: Corporate Income Tax Subjects
Editor(s): Daniel Gutmann
Date of publication: 2016
Type of publication: Print book
Number of pages: 614
Terms: Shipping fees apply. Shipping information is available on our website
Price: EUR 80 / USD 95 (VAT excl.)

Order information
To order the book, please visit www.ibfd.org/IBFD-Products/shop. You can purchase a copy of the book by means of your credit card, or on the basis of an invoice. Our books encompass a wide variety of topics, and are available in one or more of the following formats:

- IBFD Print books
- IBFD eBooks – downloadable on a variety of electronic devices
- IBFD Online books – accessible online through the IBFD Tax Research Platform
## Table of Contents

**Preface** vi

**About the Authors** vii

**Chapter 1: General Report** 1

*Daniel Gutmann*

1.1. Introduction 1

1.2. Tax theory 2

1.2.1. Diversity of criteria of CIT liability 2

1.2.2. Relativity of criteria of CIT liability 4

1.2.3. Structural limits to general theory 5

1.3. Tax policy 6

1.3.1. Domestic tax policy 6

1.3.1.1. Clarity 7

1.3.1.2. Neutrality 7

1.3.2. Cross-border situations and tax policy 9

1.3.2.1. General reflections on EU harmonization 9

1.3.2.2. The personal scope of EU tax directives 11

**Part 1**

**Thematic Reports**

**Chapter 2: Legal Personality, Limited Liability and CIT Liability** 17

*Domingo Jesús Jiménez-Valladolid de L’Hotellerie-Fallois Félix Alberto Vega Borrego*

2.1. Introduction 17

2.1.1. Scope of the report 17

2.1.2. Definition of concepts 17

2.2. A reflection on the justification for CIT liability 19

2.3. Corporate income tax subjects: Current patterns 21

2.3.1. Countries which strictly adhere to the legal personality criterion 22

2.3.2. Countries which while adhering to the legal personality criterion deviate in practice 22
2.3.3. Countries that strictly adhere to the limited liability criterion  
2.3.3.1. Countries where this criterion excludes entities in which at least one of their members does not have limited liability 
2.3.3.2. Countries which base their definition of CIT subjects on the distinction between corporations and partnerships 
2.3.3.3. Countries where limited liability determines the possibility of being partially subject to CIT 
2.3.4. Countries where the application of the limited liability criterion shows relevant deviations 
2.3.5. Countries which follow different criteria for defining CIT subjects 
2.4. Should tax law rely on concepts from private law to determine which entities are subject to CIT? 

Chapter 3: Does Company Size Matter in Defining the Scope of a CIT? 
Jan van de Streek 

3.1. Introduction 
3.2. Preliminary remarks 
3.2.1. What is meant by company size? 
3.2.2. Why should company size be a relevant factor for determining the scope of a corporate income tax? 
3.3. Most important results of this comparative law study 
3.3.1. The overall line of reasoning 
3.3.2. SME carve-outs found 
3.4. A closer look at the carve-outs found for small and medium-sized companies in corporate income tax systems 
3.4.1. France 
3.4.2. Hungary (simplified tax regime) 
3.4.3. Italy 
3.4.4. United States 
3.4.5. Russia (simplified tax regime) 
3.4.6. Two other noteworthy country approaches with respect to company size 
3.4.6.1. Austria 
3.4.6.2. Luxembourg
### Table of Contents

3.5. Small and medium-sized companies in the CCCTB Proposal 50
   3.5.1. The Commission CCCTB Proposal and its relationship with Home State Taxation 50
   3.5.2. The carve-out for SMEs in the mandatory CCCTB advocated by the European Parliament 52
   3.5.3. The SME tax base carve-outs in the Compromise Proposal 53

3.6. State aid 54

3.7. Conclusions 56

### Chapter 4: Classification of Foreign Entities for Corporate Income Tax Purposes 59

*Bart Peeters*

4.1. Introduction 59
4.2. Which foreign entities need to be classified? 60
4.3. What is the classification of foreign legal entities? 62
4.4. How are foreign legal entities classified under a national tax regime? 63
4.5. EU compatibility of classification methods 66
4.6. Conclusions 68

### Chapter 5: Non-resident entities and CIT 71

*Stefan Olsson*

5.1. Unlimited or limited tax liability 71
5.2. Domestic legal entity 71
5.3. Foreign legal entity 72
5.4. Conclusions 74

### Chapter 6: Atypical Entities and the Personal Scope of the Corporate Income Tax 75

*Polina Kouraleva-Cazals*

6.1. Public (non-profit) purpose entities 76
   6.1.1. Issues of definition of this group of entities 76
   6.1.2. CIT scope issues raised by this group of entities 78
6.2. Private (for profit) purpose entities 81
6.3. Conclusion 83
# Table of Contents

**Chapter 7: Investment structures**  
*Hein Vermeulen*

7.1. Corporate taxpayers v. non-corporate taxpayers 87  
7.2. Collective investment v. individual investment 88  
7.3. Models for eliminating corporate income tax at the level of the CIV 90  
7.4. CIVS in a domestic context 95  
7.5. CIVs in a cross-border context 96  
7.5.1. State perspective 97  
7.5.2. Collective investment vehicle perspective 97  
7.6. OECD: Specific attention for collective investment 99  
7.7. Approaches of certain countries 101  
7.8. Collective real estate investments: REITs 105  
7.9. EU: No harmonization in the field of direct taxation 107  
7.10. Conclusions 108

**Chapter 8: Tax Neutrality between CIT and Non-CIT Subjects: Where Do We Stand?**  
*Giuseppe Marino*

8.1. Introduction 111  
8.2. The income 112  
8.3. The power 113  
8.4. The politics 114  
8.5. Partial conclusion and future investigations 115

**Chapter 9: Searching for Neutrality of Corporate Income Tax in the EU Member States**  
*Pietro Selicato*

9.1. Premise 117  
9.2. A short overview of relationships between CIT and non-CIT subjects 118  
9.3. Relevant issues in the national legislation of the EU Member States 120  
9.3.1. Partnerships 121  
9.3.2. Corporations 122  
9.3.3. Dividends paid to non-CIT subjects 123  
9.3.4. Transparency of corporate companies 124  
9.4. Economic double taxation: To what extent is it an issue to be dealt with in the individual Member States? 126
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>9.5.</td>
<td>... and in the European Union?</td>
<td>128</td>
</tr>
<tr>
<td>9.6.</td>
<td>Large vs. small businesses: Looking at CIT neutrality in accordance with the ability to pay principle</td>
<td>129</td>
</tr>
<tr>
<td>Chapter 10:</td>
<td>Tax Neutrality between CIT and Non-CIT Subjects: How To Improve Our Systems?</td>
<td>133</td>
</tr>
<tr>
<td>10.1.</td>
<td>Introduction</td>
<td>133</td>
</tr>
<tr>
<td>10.2.</td>
<td>Trends in corporate income taxation since 1945</td>
<td>134</td>
</tr>
<tr>
<td>10.3.</td>
<td>Trends in the use of legal forms for running a business which provide for limited liability</td>
<td>135</td>
</tr>
<tr>
<td>10.4.</td>
<td>System of a uniform business tax (UBT)</td>
<td>136</td>
</tr>
<tr>
<td>10.4.1.</td>
<td>Definition</td>
<td>136</td>
</tr>
<tr>
<td>10.4.2.</td>
<td>History</td>
<td>137</td>
</tr>
<tr>
<td>10.5.</td>
<td>Proposal for a uniform business tax (UBT)</td>
<td>137</td>
</tr>
<tr>
<td>10.5.1.</td>
<td>Basic features of a proposal for a uniform business tax system</td>
<td>137</td>
</tr>
<tr>
<td>10.5.2.</td>
<td>Explanations and reasons</td>
<td>138</td>
</tr>
<tr>
<td>10.5.2.1.</td>
<td>Tax neutrality with regard to the legal nature of the person who is running the business</td>
<td>138</td>
</tr>
<tr>
<td>10.5.2.2.</td>
<td>Double entry bookkeeping</td>
<td>139</td>
</tr>
<tr>
<td>10.5.2.3.</td>
<td>Flat rate tax</td>
<td>139</td>
</tr>
<tr>
<td>10.5.2.4.</td>
<td>Losses</td>
<td>139</td>
</tr>
<tr>
<td>10.5.2.5.</td>
<td>Withholding tax on profit distributions and profit withdrawals</td>
<td>140</td>
</tr>
<tr>
<td>10.5.2.6.</td>
<td>Economic double taxation</td>
<td>140</td>
</tr>
<tr>
<td>10.5.2.7.</td>
<td>Cross-border cases</td>
<td>141</td>
</tr>
<tr>
<td>10.5.3.</td>
<td>Directors’ fees and other remuneration (interest, rent) paid to owners</td>
<td>144</td>
</tr>
<tr>
<td>10.6.</td>
<td>Conclusions</td>
<td>146</td>
</tr>
<tr>
<td>Chapter 11:</td>
<td>Tax Neutrality between CIT and Non-CIT Subjects: How To Improve Our Systems?</td>
<td>147</td>
</tr>
<tr>
<td>11.1.</td>
<td>Introduction</td>
<td>147</td>
</tr>
<tr>
<td>11.2.</td>
<td>Some history</td>
<td>148</td>
</tr>
<tr>
<td>11.3.</td>
<td>Towards corporate-shareholder tax integration</td>
<td>150</td>
</tr>
<tr>
<td>11.3.1.</td>
<td>Dividend deduction</td>
<td>151</td>
</tr>
<tr>
<td>11.3.2.</td>
<td>Imputation systems</td>
<td>151</td>
</tr>
</tbody>
</table>
11.3.3. Reduced rates for two level taxes
11.3.4. Tax transparency
11.4. Recommendation
11.5. Continuing Capital Flight

Chapter 12: Corporate Income Tax Subjects and EU Harmonization
Ruben Martini & Ekkehart Reimer

12.1. Introduction
12.2. The EU Directives in the field of direct taxation
12.3. Negative integration: Corporate income tax subjects and fundamental freedoms
  12.3.1. Discrimination
    12.3.1.1. Resident entities governed by local law vs. non-resident entities governed by foreign law
    12.3.1.2. Resident entities established under local vs. foreign law
    12.3.1.3. Non-resident entities established under different foreign laws
    12.3.1.4. Resident vs. non-resident entities, both established under domestic law
    12.3.1.5. Resident vs. non-resident entities, both established under different foreign laws
  12.3.2. Restriction
  12.3.3. Fundamental freedoms and harmonization
12.4. Positive harmonization?
12.5. Outlook

Part 2
National Reports

Chapter 13: Questionnaire on Corporate Income Tax Subjects

13.1. Background
13.2. Questions
  13.2.1. General presentation of CIT in your country
    13.2.1.1. Quick overview of the system of CIT in your country
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>13.2.1.2</td>
<td>Presentation of the historical evolution of CIT in your country (to the extent relevant)</td>
<td>178</td>
</tr>
<tr>
<td>13.2.2.</td>
<td>Legislative technique</td>
<td>179</td>
</tr>
<tr>
<td>13.2.2.1</td>
<td>Sources</td>
<td>179</td>
</tr>
<tr>
<td>13.2.2.2</td>
<td>Legal drafting</td>
<td>179</td>
</tr>
<tr>
<td>13.2.3.</td>
<td>Domestic entities</td>
<td>179</td>
</tr>
<tr>
<td>13.2.3.1</td>
<td>First approach</td>
<td>179</td>
</tr>
<tr>
<td>13.2.3.2</td>
<td>More details</td>
<td>180</td>
</tr>
<tr>
<td>13.2.3.2.1</td>
<td>Link between company law and tax law</td>
<td>180</td>
</tr>
<tr>
<td>13.2.3.2.2</td>
<td>Charitable organizations and associations</td>
<td>180</td>
</tr>
<tr>
<td>13.2.3.2.3</td>
<td>Miscellaneous on CIT subjects</td>
<td>180</td>
</tr>
<tr>
<td>13.2.3.2.4</td>
<td>Partial implementation of CIT</td>
<td>181</td>
</tr>
<tr>
<td>13.2.3.2.5</td>
<td>Tax planning</td>
<td>181</td>
</tr>
<tr>
<td>13.2.3.2.6</td>
<td>Others</td>
<td>181</td>
</tr>
<tr>
<td>13.2.4.</td>
<td>Cross-border situations</td>
<td>182</td>
</tr>
</tbody>
</table>

**Chapter 14: Austria**

*Johannes Heinrich and Claudia Slawitsch*

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>14.1.</td>
<td>General presentation of CIT in Austria</td>
<td>183</td>
</tr>
<tr>
<td>14.1.1.</td>
<td>Overview of the system of CIT</td>
<td>183</td>
</tr>
<tr>
<td>14.1.2.</td>
<td>Historical evolution</td>
<td>186</td>
</tr>
<tr>
<td>14.1.2.1</td>
<td>Elimination of economic double taxation with regard to natural persons</td>
<td>186</td>
</tr>
<tr>
<td>14.1.2.2</td>
<td>Elimination of economic double taxation: National and international affiliation privilege</td>
<td>187</td>
</tr>
<tr>
<td>14.1.2.3</td>
<td>Group taxation</td>
<td>189</td>
</tr>
<tr>
<td>14.1.2.4</td>
<td>Changes in the personal scope of CIT</td>
<td>189</td>
</tr>
<tr>
<td>14.2.</td>
<td>Legislative technique</td>
<td>191</td>
</tr>
<tr>
<td>14.3.</td>
<td>Domestic entities</td>
<td>192</td>
</tr>
<tr>
<td>14.3.1.</td>
<td>First approach</td>
<td>192</td>
</tr>
<tr>
<td>14.3.2.</td>
<td>More details</td>
<td>195</td>
</tr>
<tr>
<td>14.3.2.1</td>
<td>Link between company law and tax law</td>
<td>195</td>
</tr>
<tr>
<td>14.3.2.2</td>
<td>Charitable organizations and associations</td>
<td>196</td>
</tr>
<tr>
<td>14.3.2.3</td>
<td>Miscellaneous on CIT subjects</td>
<td>197</td>
</tr>
<tr>
<td>14.3.2.4</td>
<td>Partial implementation of CIT</td>
<td>198</td>
</tr>
<tr>
<td>14.3.2.5</td>
<td>Tax planning</td>
<td>198</td>
</tr>
<tr>
<td>14.4.</td>
<td>Cross-border situations</td>
<td>200</td>
</tr>
</tbody>
</table>
## Chapter 15: Belgium

*Marc Bourgeois, Bart Peeters and Xavier Pace*

15.1. General presentation of corporate income tax (CIT) in Belgium

15.1.1. A synthetic corporate income tax

15.1.2. Historical evolution of CIT in Belgium

15.2. Legislative technique

15.3. Domestic entities

15.3.1. General overview

15.3.2. More details

15.3.2.1. Link between company law and tax law

15.3.2.2. Legal personality

15.3.2.3. Tax residence

15.3.2.4. Charitable organizations and associations

15.3.2.5. Miscellaneous on CIT subjects

15.3.2.5.1. Special tax regimes

15.3.2.5.2. Public undertakings

15.3.2.5.3. Lack of tax consolidation regime

15.3.2.6. Partial implementation of CIT

15.3.2.7. Tax planning

15.3.2.8. Others

15.4. Cross-border situations

## Chapter 16: Denmark

*Søren Friis Hansen and Jacob Graff Nielsen*

16.1. Background – corporate income taxation in Denmark

16.1.1. Historical evolution of CIT in Denmark

16.2. Legislative technique concerning CIT subjects

16.2.1. Sources and legal drafting

16.2.2. Foreign companies etc.

16.2.3. Requalification for tax purposes

16.3. Domestic entities

16.3.1. The Danish approach to legal entities and CIT

16.3.2. Public and private limited companies

16.3.3. Other companies with limited liability

16.3.4. Partnerships

16.3.5. Limited partnerships

16.3.6. Silent partnerships

16.3.7. Cooperatives
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>16.4. The link between company law and tax law</td>
<td>236</td>
</tr>
<tr>
<td>16.5. Trusts</td>
<td>237</td>
</tr>
<tr>
<td>16.6. Public entities</td>
<td>238</td>
</tr>
<tr>
<td>16.7. Group taxation</td>
<td>238</td>
</tr>
<tr>
<td>16.7.1. Mandatory national group taxation</td>
<td>238</td>
</tr>
<tr>
<td>16.7.2. Optional international group taxation (“all-in” or “all-out”)</td>
<td>239</td>
</tr>
<tr>
<td>16.8. Certain procedural remarks concerning Danish CIT</td>
<td>240</td>
</tr>
<tr>
<td>16.8.1. On-account CIT payment</td>
<td>240</td>
</tr>
<tr>
<td>16.8.2. Open list policy on CIT payments</td>
<td>240</td>
</tr>
<tr>
<td><strong>Chapter 17: Finland</strong></td>
<td>243</td>
</tr>
<tr>
<td><strong>Raimo Immonen and Jaakko Ossa</strong></td>
<td></td>
</tr>
<tr>
<td>17.1. General presentation of CIT in Finland</td>
<td>243</td>
</tr>
<tr>
<td>17.1.1. Overview</td>
<td>243</td>
</tr>
<tr>
<td>17.1.2. Historical evolution of CIT</td>
<td>244</td>
</tr>
<tr>
<td>17.2. Legislative technique</td>
<td>245</td>
</tr>
<tr>
<td>17.2.1. Sources</td>
<td>245</td>
</tr>
<tr>
<td>17.2.2. Legal drafting</td>
<td>245</td>
</tr>
<tr>
<td>17.3. Domestic entities</td>
<td>247</td>
</tr>
<tr>
<td>17.3.1. First approach</td>
<td>247</td>
</tr>
<tr>
<td>17.3.2. More details</td>
<td>248</td>
</tr>
<tr>
<td>17.3.2.1. Link between company law and tax law</td>
<td>248</td>
</tr>
<tr>
<td>17.3.2.2. Charitable organizations and associations</td>
<td>249</td>
</tr>
<tr>
<td>17.3.2.3. Miscellaneous on CIT subjects</td>
<td>250</td>
</tr>
<tr>
<td>17.3.2.4. Partial implementation of CIT</td>
<td>251</td>
</tr>
<tr>
<td>17.3.2.5. Tax planning</td>
<td>251</td>
</tr>
<tr>
<td>17.3.2.6. Others</td>
<td>252</td>
</tr>
<tr>
<td>17.4. Cross-border situations</td>
<td>253</td>
</tr>
<tr>
<td><strong>Chapter 18: France</strong></td>
<td>255</td>
</tr>
<tr>
<td><strong>Polina Kouraleva-Cazals</strong></td>
<td></td>
</tr>
<tr>
<td>18.1. General presentation of corporate income tax</td>
<td>255</td>
</tr>
<tr>
<td>18.1.1. CIT in the context of French income tax regimes</td>
<td>255</td>
</tr>
<tr>
<td>18.1.2. General presentation of CIT</td>
<td>256</td>
</tr>
<tr>
<td>18.1.3. General presentation of the personal scope of CIT</td>
<td>258</td>
</tr>
<tr>
<td>18.2. Domestic entities</td>
<td>259</td>
</tr>
<tr>
<td>18.2.1. For-profit organizations</td>
<td>260</td>
</tr>
<tr>
<td>18.2.1.1. Companies with limited liability of their members or the form criteria</td>
<td>260</td>
</tr>
<tr>
<td>Section</td>
<td>Page</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>18.2.1.2. Companies with unlimited liability of their members</td>
<td>262</td>
</tr>
<tr>
<td>18.2.1.3. Civil companies or nature of transactions criteria</td>
<td>263</td>
</tr>
<tr>
<td>18.2.2. Non-profit organizations</td>
<td>265</td>
</tr>
<tr>
<td>18.2.2.1. Total CIT liability criteria of for-profit transactions</td>
<td>265</td>
</tr>
<tr>
<td>18.2.2.1.1. CIT liability criteria for private non-profit organizations</td>
<td>265</td>
</tr>
<tr>
<td>18.2.2.1.2. CIT liability criteria for public non-profit organizations</td>
<td>267</td>
</tr>
<tr>
<td>18.2.2.2. Partial CIT liability criteria for financial and other passive income</td>
<td>268</td>
</tr>
<tr>
<td>18.2.3. Domestic entities covered by European directives</td>
<td>269</td>
</tr>
<tr>
<td>18.3. Cross-border issues</td>
<td>271</td>
</tr>
<tr>
<td>18.3.1. Confusion between the resemblance test and CIT personal scope criteria</td>
<td>272</td>
</tr>
<tr>
<td>18.3.2. Confusion between limited liability and commercial form criteria</td>
<td>273</td>
</tr>
<tr>
<td>18.3.3. Confusion between commercial transaction and for-profit transaction criteria</td>
<td>275</td>
</tr>
<tr>
<td>18.3.4. Differences in the assessment of the personal scope of CIT depending on the tax issue</td>
<td>276</td>
</tr>
</tbody>
</table>

Chapter 19: Germany

Ruben Martini

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>19.1. General presentation of corporate income tax in Germany</td>
<td>279</td>
</tr>
<tr>
<td>19.1.1. The relevance of corporate income tax in Germany</td>
<td>279</td>
</tr>
<tr>
<td>19.1.2. Historical evolution</td>
<td>281</td>
</tr>
<tr>
<td>19.1.2.1. German states (1891-1918)</td>
<td>281</td>
</tr>
<tr>
<td>19.1.2.2. Weimar Republic (KStG 1920 and KStG 1925)</td>
<td>283</td>
</tr>
<tr>
<td>19.2. Legislative technique</td>
<td>284</td>
</tr>
<tr>
<td>19.3. Domestic entities</td>
<td>286</td>
</tr>
<tr>
<td>19.3.1. Private law tax subjects</td>
<td>287</td>
</tr>
<tr>
<td>19.3.1.1. Explicitly listed tax subjects</td>
<td>288</td>
</tr>
<tr>
<td>(§ 1 paragraph 1 nos. 1 to 3 of the KStG)</td>
<td>288</td>
</tr>
<tr>
<td>19.3.1.2. Tax subjects with legal personality</td>
<td>289</td>
</tr>
<tr>
<td>(§ 1 paragraph 1 no. 4 of the KStG)</td>
<td>289</td>
</tr>
<tr>
<td>Section</td>
<td>Page</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>19.3.1.3. Unincorporated associations and other tax subjects without</td>
<td>290</td>
</tr>
<tr>
<td>legal personality (§ 1 paragraph 1 no. 5 of the KStG)</td>
<td></td>
</tr>
<tr>
<td>19.3.2. Public law tax subjects (§ 1 paragraph 1 no. 6 of the KStG)</td>
<td>293</td>
</tr>
<tr>
<td>19.3.3. Non-profit organizations and associations</td>
<td>293</td>
</tr>
<tr>
<td>19.4. Cross-border situations</td>
<td>295</td>
</tr>
<tr>
<td>19.4.1. The irrelevance of legal personality granted by foreign law</td>
<td>295</td>
</tr>
<tr>
<td>19.4.2. The resemblance test</td>
<td>298</td>
</tr>
<tr>
<td>19.4.2.1. Comparison to legal persons in general</td>
<td>299</td>
</tr>
<tr>
<td>19.4.2.1.1. Centralized management and representation</td>
<td>299</td>
</tr>
<tr>
<td>19.4.2.1.2. Liability</td>
<td>299</td>
</tr>
<tr>
<td>19.4.2.1.3. Duration</td>
<td>300</td>
</tr>
<tr>
<td>19.4.2.1.4. Formal requirements of incorporation</td>
<td>300</td>
</tr>
<tr>
<td>19.4.2.2. Comparison to business corporations</td>
<td>300</td>
</tr>
<tr>
<td>19.4.3. Extraterritorial public bodies</td>
<td>301</td>
</tr>
<tr>
<td>Chapter 20: Greece</td>
<td>303</td>
</tr>
<tr>
<td>Theodoré Fortsakis and Andreas Tsourouflis</td>
<td></td>
</tr>
<tr>
<td>20.1. General presentation of CIT in Greece</td>
<td>303</td>
</tr>
<tr>
<td>20.1.1. Presentation of the historical evolution of CIT in Greece (to</td>
<td>305</td>
</tr>
<tr>
<td>the extent relevant)</td>
<td></td>
</tr>
<tr>
<td>20.2. Legislative technique</td>
<td>306</td>
</tr>
<tr>
<td>20.3. Domestic entities</td>
<td>306</td>
</tr>
<tr>
<td>20.3.1. First approach</td>
<td>306</td>
</tr>
<tr>
<td>20.3.2. More details</td>
<td>308</td>
</tr>
<tr>
<td>20.3.2.1. Link between company law and tax law</td>
<td>308</td>
</tr>
<tr>
<td>20.3.2.2. Charitable organizations and associations</td>
<td>308</td>
</tr>
<tr>
<td>20.3.2.3. Miscellaneous on CIT subjects</td>
<td>309</td>
</tr>
<tr>
<td>20.3.2.4. Partial implementation of CIT</td>
<td>309</td>
</tr>
<tr>
<td>20.3.2.5. Tax planning</td>
<td>310</td>
</tr>
<tr>
<td>20.3.2.6. Others</td>
<td>311</td>
</tr>
<tr>
<td>20.4. Cross-border situations</td>
<td>311</td>
</tr>
</tbody>
</table>
Table of Contents

Chapter 21: Hungary

Éva Erdős, Petra Mihályi and Máté Lakatos

21.1. General presentation of CIT in Hungary
21.2. Legislative technique
21.3. Domestic entities
   21.3.1. More details
      21.3.1.1. Link between company law and tax law
      21.3.1.2. Charitable organizations and associations
      21.3.1.3. Miscellaneous on CIT subjects
      21.3.1.4. Partial implementation of CIT
      21.3.1.5. Tax planning
      21.3.1.6. Others
21.4. Cross-border situations
21.5. Final thoughts

Chapter 22: Italy

Luca Di Nunzio, Mario Grandinetti, Marco Muratore and Pietro Selicato

22.1. General presentation of CIT in Italy
   22.1.1. Taxation of dividends
   22.1.2. Taxation of groups
   22.1.3. Legal forms of CIT subjects in Italy
      22.1.3.1. Companies
      22.1.3.2. Public and private entities other than companies
      22.1.3.3. Trusts
      22.1.3.4. Undertakings for collective investment
   22.1.4. Historical evolution of CIT in Italy
22.2. Legislative technique
22.3. Domestic entities
   22.3.1. First approach
   22.3.2. More details
      22.3.2.1. The relationship between company law and tax law
      22.3.2.2. Charitable organizations and associations
      22.3.2.3. Miscellaneous on CIT subjects
      22.3.2.4. CIT and partnerships
      22.3.2.5. Tax planning
22.4. Cross-border situations
# Table of Contents

## Chapter 23: Luxembourg

*Alain Steichen*

23.1. General presentation of CIT in Luxembourg 351  
23.1.1. Overview of the system of CIT in Luxembourg 351  
23.1.2. Presentation of the historical evolution of CIT in Luxembourg 353  

23.2. Legislative technique 353  
23.2.1. Sources 353  
23.2.2. Logic behind the legislative technique 354  

23.3. Domestic entities 355  
23.3.1. Generalities 355  
23.3.2. Specificities 357  
23.3.2.1. Link between company law and tax law 357  
23.3.2.2. Charitable organizations and associations 359  
23.3.2.3. Miscellaneous on CIT subjects 359  
23.3.2.4. Partial implementation of CIT 360  
23.3.2.5. Tax planning 361  
23.3.2.6. Others 361  

23.4. Cross-border situations 362  

23.5. The “subject to CIT” condition under article 2 (a)(iii) of the Parent-Subsidiary Directive (and the other tax directives) 363

## Chapter 24: Netherlands

*Hans Arts*

24.1. General presentation of CIT in the Netherlands 365  
24.1.1. A brief history of the taxation of corporate income in the Netherlands 365  
24.1.2. The subjects of the corporate income tax in the Netherlands 367  
24.1.2.1. General 367  
24.1.2.2. Taxation of partnerships 368  
24.1.3. The relevance of CIT in the Netherlands 369  
24.1.3.1. Some figures regarding CIT in the Netherlands 369  
24.1.3.2. Taxes comparable with CIT in the Netherlands 370  

24.2. Legislative technique 370  

24.3. Domestic entities 372  
24.3.1. Survey of domestic entities subject to CIT 372  
24.3.2. CIT liability of partnerships 374
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>24.3.2.1. Liability to CIT in general</td>
<td>374</td>
</tr>
<tr>
<td>24.3.2.2. Partial liability to CIT and the link with private law</td>
<td>375</td>
</tr>
<tr>
<td>24.3.3. One-person companies</td>
<td>376</td>
</tr>
<tr>
<td>24.3.4. Options for taxation or transparency</td>
<td>376</td>
</tr>
<tr>
<td>24.3.6. Charitable organizations and associations</td>
<td>378</td>
</tr>
<tr>
<td>24.3.7. Trusts, state-owned entities and group taxation</td>
<td>379</td>
</tr>
<tr>
<td>24.3.8. Tax planning</td>
<td>380</td>
</tr>
<tr>
<td>24.3.9. Final remarks on the liability to CIT of domestic entities</td>
<td>381</td>
</tr>
<tr>
<td>24.4. Cross-border situations</td>
<td>382</td>
</tr>
<tr>
<td>24.4.1. Liability to CIT of foreign entities</td>
<td>382</td>
</tr>
<tr>
<td>24.4.2. The subject to CIT condition in the Parent-Subsidiary Directive and other EU directives</td>
<td>383</td>
</tr>
</tbody>
</table>

**Chapter 25: Norway**

* Benn Folkvord

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>25.1. General presentation of company income taxation (CIT)</td>
<td>385</td>
</tr>
<tr>
<td>25.1.1. Overview</td>
<td>385</td>
</tr>
<tr>
<td>25.1.2. Historical evolution of CIT</td>
<td>387</td>
</tr>
<tr>
<td>25.2. Legislative technique</td>
<td>387</td>
</tr>
<tr>
<td>25.2.1. Sources</td>
<td>387</td>
</tr>
<tr>
<td>25.2.2. Legal drafting</td>
<td>388</td>
</tr>
<tr>
<td>25.3. Domestic entities</td>
<td>388</td>
</tr>
<tr>
<td>25.3.1. Taxable entities</td>
<td>388</td>
</tr>
<tr>
<td>25.3.2. More details</td>
<td>392</td>
</tr>
<tr>
<td>25.3.2.1. Link between company law and tax law</td>
<td>392</td>
</tr>
<tr>
<td>25.3.2.2. Charitable organizations and associations</td>
<td>394</td>
</tr>
<tr>
<td>25.3.2.3. Miscellaneous on CIT subjects</td>
<td>394</td>
</tr>
<tr>
<td>25.3.2.4. Partial implementation of CIT</td>
<td>395</td>
</tr>
<tr>
<td>25.3.2.5. Tax planning</td>
<td>395</td>
</tr>
<tr>
<td>25.3.2.6. Other</td>
<td>396</td>
</tr>
<tr>
<td>25.4. Cross-border situations</td>
<td>396</td>
</tr>
</tbody>
</table>
Chapter 26: Poland

Hanna Litwińczuk and Karolina Tetłak

26.1. General presentation of CIT in Poland
26.1.1. A quick overview of the system of CIT in Poland
26.1.2. Presentation of the historical evolution of CIT in Poland (to the extent relevant)

26.2. Legislative technique
26.2.1. Sources
26.2.2. Legal drafting

26.3. Domestic entities
26.3.1. First approach
26.3.2. More details
26.3.2.1. Link between company law and tax law
26.3.2.2. Charitable organizations and associations
26.3.2.3. Miscellaneous on CIT subjects
26.3.2.4. Partial implementation of CIT
26.3.2.5. Tax planning
26.3.2.6. Others

26.4. Cross-border situations

Chapter 27: Portugal

Francisco de Sousa da Câmara, Nuno de Oliveira Garcia and José Almeida Fernandes

27.1. General presentation of CIT in Portugal
27.1.1. CIT Code and brief historical evolution
27.1.2. Similar taxes and CIT revenue

27.2. Legislative technique and domestic entities
27.2.1. First approach
27.2.2. More details

27.3. Miscellaneous on CIT subjects
27.3.1. Trusts in Madeira International Business Centre
27.3.2. Special Tax Regime for Groups of Companies
27.3.3. Tax planning

27.4. Cross-border situations
27.4.1. Non-resident entities as CIT subjects
27.4.2. Subject to CIT condition
## Chapter 28: Russia

*Danil V. Vinnitskiy*

28.1. General presentation

28.1.1. Overview of the system

28.1.1.1. Tax on profit of organizations vs. corporate income tax

28.1.1.2. Tax on profit of organizations as a universal tax

28.1.2. Historical evolution

28.2. Legislative technique

28.2.1. Sources

28.2.2. Legal drafting

28.3. Domestic entities

28.3.1. First approach

28.3.2. More details

28.3.2.1. Link between company law and tax law

28.3.2.2. Charitable organizations and associations

28.3.2.3. Miscellaneous on CIT subjects

28.3.2.4. Partial implementation

28.3.2.5. Tax planning

28.3.2.6. Others

28.4. Cross-border situations

28.4.1. Foreign taxpayers and rules of private international law

28.4.2. Branches and representative offices of international and of foreign organizations

## Chapter 29: Spain

*Domingo Jiménez-Valladolid de L’Hotellerie-Fallois and Félix Alberto Vega Borrego*

29.1. General presentation of corporate income tax in Spain

29.2. Legislative technique

29.3. Domestic entities

29.3.1. Entities subject (and not subject) to CIT

29.3.2. Rationale for the inclusion and exclusion of entities within the CIT scope: link between company law and tax law

29.3.3. Other issues raised by CIT subjects: Charitable organizations, silent partnerships, irregular companies, state-owned entities and group taxation
29.3.4. Consistency between domestic classification of CIT subjects and EU directives 452  
29.3.5. Partial implementation of CIT 454  
29.3.6. Tax planning 456  
29.3.7. Others 457  

29.4. Cross-border situations 458  
29.4.1. Legal background 458  
29.4.2. The current Spanish method for classifying foreign entities: a resemblance test or a tax-oriented approach? 460  
29.4.3. The “subject to CIT” condition under the Parent-Subsidiary Directive 464

**Chapter 30: Sweden** 467  
*Stefan Olsson*

30.1. General presentation of Swedish company income tax 467  
30.1.1. Overview of the system of the Swedish company income tax 467  
30.1.2. The historical evolution of the Swedish company income tax 469  

30.2. Legislative technique 471  
30.2.1. Sources 471  
30.2.2. Legal drafting 472  

30.3. Domestic entities 473  
30.3.1. Domestic entities which are subject to CIT in Sweden 473  
30.3.2. Domestic entities which are not subject to CIT in Sweden 477  
30.3.3. More details 478  
30.3.3.1. Link between company law and tax law 478  
30.3.3.2. Charitable organizations and associations 479  
30.3.3.3. Miscellaneous on CIT subjects 480  
30.3.3.4. Partial implementation of CIT 481  
30.3.3.5. Tax planning 481  

30.4. Cross-border situations 481

**Chapter 31: Switzerland** 487  
*Pierre-Marie Glauser*

31.1. General presentation of CIT in Switzerland 487  
31.1.1. Switzerland as a federal state 487
Table of Contents

31.1.2. Taxes levied on business profit 488
31.1.3. Importance of corporations and of corporate income tax 489

31.2. Legislative techniques 490
31.2.1. Sources 490
31.2.2. Legal drafting 490

31.3. Domestic entities 491
31.3.1. Overview 491
31.3.2. Corporate tax subjects in Switzerland (more detailed approach) 493
    31.3.2.1. Link with company law 493
    31.3.2.2. Charitable organizations and associations 494
    31.3.2.3. Specific structures 495
        31.3.2.3.1. Investment funds and SICAVs 495
        31.3.2.3.2. Investment funds with direct ownership in real estate 497
        31.3.2.3.3. SICAF 499
        31.3.2.3.4. Transparency of corporations 500
    31.3.2.4. Partial implementation of CIT 500
    31.3.2.5. Tax planning 501

31.4. Cross-border situations 501
31.4.1. Foreign entities in Switzerland 501
    31.4.1.1. Foreign corporations with limited tax liability in Switzerland 503
    31.4.1.2. Foreign business entities and communities of persons with limited tax liability in Switzerland 504
    31.4.1.3. Foreign entities with unlimited tax liability 506
31.4.2. Foreign entities without business in Switzerland 507

Chapter 32: Turkey 509

Funda Başaran Yavaşlar

32.1. General Presentation of CIT in Turkey 509
    32.1.1. Overview of the System of CIT 509
    32.1.2. Historical evolution of CIT 512
32.2. Legislative technique 515
    32.2.1. Sources 515
    32.2.2. Legal drafting 516
32.3. Domestic entities 518
    32.3.1. First approach 518
32.3.2. Special Issues 519
   32.3.2.1. Link between company law and tax law 519
   32.3.2.2. Charitable organizations and associations 521
   32.3.2.3. Miscellaneous on CIT subjects 523
   32.3.2.4. Partial implementation of CIT 527
   32.3.2.5. Tax planning 529
   32.3.2.6. Others 530

32.4. Cross-border situations 531

Chapter 33: Corporate Income Tax Subjects in the United Kingdom 535
   John Snape

33.1. General presentation of corporation tax 535
   33.1.1. A quick overview of corporation tax 536
   33.1.2. Relevant aspects of the historical evolution of corporation tax 538

33.2. Legislative technique 540
   33.2.1. Sources 540
   33.2.2. Legal drafting 540

33.3. Domestic entities 541
   33.3.1. First approach 541
   33.3.2. More details 543
      33.3.2.1. Link between company law and tax law 543
      33.3.2.2. Charitable organizations and associations 546
      33.3.2.3. Miscellaneous corporation tax subjects 547
      33.3.2.4. Partial implementation of corporation tax 551
      33.3.2.5. Tax planning 554
      33.3.2.6. Others 555

33.4. Cross-border situations 556

33.5. Conclusions 561

Chapter 34: United States 563
   Henry Ordower

34.1. General presentation of the CIT in the United States 563
   34.1.1. Overview 563
   34.1.2. Evolution of the CIT 566

34.2. Legislative technique. 568
   34.2.1. Sources 568
   34.2.2. Legal drafting 569

34.3. Domestic entities 570
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>34.3.1. Entity list</td>
<td>570</td>
</tr>
<tr>
<td>34.3.2. Link between company law and tax law</td>
<td>571</td>
</tr>
<tr>
<td>34.3.2.1. Charitable and other tax exempt organizations</td>
<td>572</td>
</tr>
<tr>
<td>34.3.3. Miscellaneous: Double taxation and the dividends</td>
<td>574</td>
</tr>
<tr>
<td>received deduction</td>
<td></td>
</tr>
<tr>
<td>34.3.4. Partial implementation of the CIT:</td>
<td></td>
</tr>
<tr>
<td>Tax transparency models</td>
<td>575</td>
</tr>
<tr>
<td>34.3.4.1. De facto transparency</td>
<td>576</td>
</tr>
<tr>
<td>34.3.4.2. S corporations and transparency</td>
<td>576</td>
</tr>
<tr>
<td>34.3.4.3. Partial tax transparency and pooled investment entities</td>
<td>578</td>
</tr>
<tr>
<td>34.3.5. Tax Planning: Why choose opacity when transparency is possible?</td>
<td>578</td>
</tr>
<tr>
<td>34.3.5.1. Electing the double taxation model to capture corporate tax</td>
<td>579</td>
</tr>
<tr>
<td>benefits</td>
<td></td>
</tr>
<tr>
<td>34.3.5.2. Exit strategies: Tax-deferred reorganizations</td>
<td>580</td>
</tr>
<tr>
<td>34.3.5.3. Tax exempt and corporate investors</td>
<td>581</td>
</tr>
<tr>
<td>34.4. Cross-border situations</td>
<td>581</td>
</tr>
<tr>
<td>34.4.1. Classification of foreign entities</td>
<td>581</td>
</tr>
<tr>
<td>34.4.2. Active conduct of US trade or business</td>
<td>582</td>
</tr>
<tr>
<td>34.4.3. Investment income</td>
<td>582</td>
</tr>
<tr>
<td>34.4.4. Inversions</td>
<td>583</td>
</tr>
<tr>
<td>34.4.5. Elective classification and hybridization</td>
<td>584</td>
</tr>
</tbody>
</table>
1.1. Introduction

In terms of tax policy, tax harmonization or coordination of corporate taxation in the European Union is usually considered from two complementary points of view: tax base and tax rate. These two perspectives structure the debate on whether EU Member States, and more broadly states belonging to the same economic area, should harmonize or coordinate their policies on tax matters.

However, little attention has been paid so far to a more basic question which is at the core of tax theory: who are corporate taxpayers? Are they defined in the same way throughout Europe?

This may be explained by the fact that the vast majority of tax systems accept the same fundamental idea: while companies limited by shares and limited liability companies should be subject to corporate income tax (CIT), partnerships should be considered fully or partly transparent for tax purposes.

This general statement is nevertheless an oversimplification of reality. Comparative law indeed shows that the conditions which must be met in order to be subject to CIT are very different from one country to another. The way tax systems define foreign entities which fall under their CIT may also vary in a significant way, which may in practice give rise to interesting tax planning opportunities.

Against this background, the 2013 EATLP Congress devoted to CIT subjects was designed to highlight the main similarities and differences which exist between many countries (European countries and the United States). To the best of my knowledge, it is the first time that such joint research has been conducted on this fundamental topic.

The outcome of this collective research is very interesting in many respects, all of which cannot be tackled in this brief general report. I would however
like to thank all the national and thematic reporters whose accurate and insightful reflections have truly helped us to reach a better understanding of the historical background to and the current state of the law in many different countries.

That said, it seems that the comparative research underlying the question “why do some entities fall within the scope of CIT whereas others do not?” leads to mixed results both in terms of tax theory and in terms of tax policy. While no general theory seems to explain why and to what extent some entities are actually subject to CIT, little justification exists for an ambitious process of harmonization at a European level in this field.

1.2. Tax theory

Those who believe in the existence of a rational explanation for the personal scope of corporate income tax should not read the output of this conference. Comparative law indeed shows that it is extremely difficult, if not impossible, to build a systematic theory in this respect. The criteria for CIT liability differ from one country to another; even within one legal system, several criteria may coexist and not be consistent with each other; finally, structural reasons may explain why theory cannot account for positive law in this field.

1.2.1. Diversity of criteria of CIT liability

National and thematic reports display a wide variety of criteria for CIT liability.¹ These criteria fall under two basic categories: abstract criteria (which are drawn from general legal principles or concepts) and concrete criteria (which rely on individual characteristics of entities).

Abstract criteria seem to be far more important than concrete ones. In several countries, legal personality is presented as a condition of CIT liability.² In other countries (which are less numerous), limited liability is considered to

---

¹ Please see national reports in this book for accurate information on each legal system examined. Please note that in order to avoid overlap with the thematic reports, this general report does not always refer to individual national reports when it deals with topics already tackled by thematic reports. Neither does this general report quote exhaustive lists of countries as examples of the statements which it contains.

² For details, see the thematic report written by D. J. Jiménez-Valladolid de l’Hotellerie-Fallois and F. A. Vega Borrego.
be the prevailing criterion. Sometimes also (albeit very rarely) the dividing line between CIT subjects and other entities builds upon existing distinctions of company law, such as the distinction between capital companies and partnerships.

Concrete criteria stem from a more fact-sensitive approach. The Luxembourg report provides an example of a system where the guiding criterion for determining CIT liability relies on the entrepreneurial risk of the partner combined with the collegial running of the undertaking. This combination may rely on abstract distinctions imported from company law but it also serves as an *in-concreto* tool to recharacterize entities whose legal form would normally exclude them from its scope. It is therefore interesting to see how the actual features of the entity’s organization may impact its tax status.

Another example of a concrete criterion may be found in the French legislation where the nature of the activity performed by the entity is closely connected to the CIT liability. A civil partnership which should normally be subject to personal income tax becomes a CIT subject if it performs a commercial activity. Non-resident companies may also be subject to CIT where they perform a for-profit activity.

Lastly, it is worth noting that a limited number of countries give some leeway to taxpayers by offering them a choice between CIT and personal income tax under generally narrow conditions. This is the case for domestic entities as well as for non-resident entities in very limited cases. Individual will therefore becomes a material criterion for determining CIT liability – which does not go without saying from the constitutional perspective of the ability-to-pay principle.

At first glance, it therefore appears that many different criteria exist in comparative law for determining CIT liability. This is a major hurdle for the building of a general theory … but it is certainly less important than the obstacle which the internal inconsistency of most tax systems presents.

3. For details, see the thematic report written by D. J. Jiménez-Valladolid de l’Hotellerie-Fallois and F. A. Vega Borrego.
4. See for instance the Greek national report.
5. See also case law in the national report on Spain.
6. See the French national report. See also the Belgian national report which describes such a system which is however no longer in force.
7. See for instance the check-the-box rules in the United States.
1.2.2. Relativity of criteria of CIT liability

It is striking to note that domestic tax systems almost never rely on a single criterion of CIT liability for domestic entities. In systems where legal personality is the prevailing driver for CIT liability, some entities deprived of legal personality are nevertheless obliged to pay CIT. Even pools of assets can be recognized as CIT “subjects” for practical reasons relating mainly to the need to prevent tax avoidance. The same kind of observation can be made for other systems which favour other abstract or concrete criteria in principle. This conclusion, drawn from comparative research, teaches that CIT liability is certainly not connected to one general criterion but rather to several criteria which coexist in domestic law in order to reach the different kinds of entities which the legislator has decided to include in the scope of CIT for budgetary and economic purposes.

Whether the addition of unrelated criteria relating to CIT liability should be considered as a sign of inconsistency of tax systems is a matter for discussion. The fact remains that this juxtaposition of criteria makes it nearly impossible to identify a theoretical rationale for most domestic systems.

The same may be said about the criteria for determining CIT liability of non-resident entities. Here again, comparative law shows a great diversity of criteria but also and more importantly, a possibly different approach regarding the criteria for CIT liability within the same tax system, depending on whether the entity in question is a resident or a non-resident one. Horizontal comparison of tax systems moreover shows that systems which are greatly comparable when it comes to defining CIT liability for domestic entities (relying for instance on legal personality) may diverge significantly when it comes to defining the CIT liability of non-resident entities: while some systems extend the domestic criterion to cross-border situations, others prefer a “resemblance test” which departs from the domestic criterion (although some discussion remains open as to whether the adoption of a resemblance test is or is not a way to extend the domestic approach in a cross-border context).

---

8. See for instance the Dutch national report.
9. See for instance the Portuguese, Swedish and Norwegian national reports.
10. See for instance the French and Greek national reports.
11. For instance, the German and Polish systems consider legal personality as the key condition for CIT liability of domestic entities. However, while Poland extends this criterion to foreign entities, Germany rather relies on a resemblance test. For a synthesis of legislations on this matter, see Stefan Olsson’s thematic report.
situation). Whether this difference is legitimate from an EU point of view is an interesting question which is tackled in several reports.\textsuperscript{12}

1.2.3. Structural limits to general theory

This great diversity and inconsistency of domestic systems is certainly not surprising. Economic actors perform their activities through many different legal forms: traditional forms prescribed in company law, non-profit entities such as associations, charities or foundations, investment structures etc. This diversity of legal forms mirrors the variety of needs and goals which are intrinsically connected to the complexity of contemporary societies.\textsuperscript{13}

Moreover, the personal scope of CIT is closely dependent upon domestic policy considerations, some of which are of a budgetary nature. Not only does the legislator wish to include as many entities as possible in the scope of CIT in order to make sure that every economic actor contributes its share to the global tax burden, it also pursues specific anti-avoidance goals. Several reports illustrate that general rules regarding CIT liability may actually be inspired by the need to fight tax planning schemes: in some countries, CIT is more advantageous for taxpayers than personal income tax, which explains why partnerships, albeit outside the scope of CIT, are nevertheless subject to a level of taxation which mirrors CIT, or why some companies which would normally be subject to CIT are subject to personal income tax to prevent tax planning behaviour (in order to avoid shelter companies, closely held passive companies, transformation of labour income into corporate income etc.);\textsuperscript{14} conversely, several countries wish to prevent abuse of facilities offered by personal income tax (in particular by way of loss imputation) and have designed or drafted CIT liability rules to prevent this from occurring.\textsuperscript{15}

Other aspects relating to policy considerations may be illustrated by the existence of regimes providing exceptions to CIT liability as a way to offer tax facilities to specific taxpayers: in some countries, family units may either opt out of CIT or be excluded from its scope;\textsuperscript{16} start-up companies

\textsuperscript{12} See the German national report as well as Bart Peeter’s thematic report on the classification of foreign entities for CIT purposes and Ruben Martini and Ekkehart Reimer’s report on CIT subjects and EU harmonization.
\textsuperscript{13} See in this respect Hein Vermeulen’s thematic report on investment structures and P. Kouraleva-Cazals’ thematic report on atypical entities and the personal scope of CIT.
\textsuperscript{14} See for instance the Danish, Portuguese and Belgian national reports.
\textsuperscript{15} See for instance the Polish national report.
\textsuperscript{16} See the French and Portuguese national reports.
may enjoy a personal income tax treatment for a limited duration,\textsuperscript{17} small and medium-sized companies are subject to special carve-out measures\textsuperscript{18} etc. Needless to say, when anti-avoidance or expediency considerations impact the design of general rules of CIT liability, pure theory becomes even more complex.

Against this background, the easiest way to define the scope of CIT is certainly to give up the ideal of an overreaching theory of CIT liability and to establish lists of CIT subjects. In most countries, legal drafting techniques are therefore analogous: the scope of CIT is not defined by way of general principles, but rather by way of enumeration of specific types of entities. Whenever a general principle does exist (such as “persons enjoying legal personality are subject to CIT”), it frequently appears as one of the items in the list of entities falling within the scope of CIT and serves as a tool to close potential tax gaps rather than as a principle statement intended to reflect the real nature of CIT subjects. Consequently, the natural inclination of academics to build theory on the basis of positive law should be analysed as an ex post rationalization of reality but in most cases does not reflect an intentional will of the legislator to derive the scope of CIT from general principles.

This somewhat pessimistic theoretical conclusion should not hide the important fact that comparable economic entities are generally subject to comparable kinds of taxes within Europe and the United States. However, as comparative law often shows, comparable results may rely on very different theoretical grounds.

\textbf{1.3. Tax policy}

Facing such a diverse and somewhat chaotic environment, is there room for any tax policy recommendations in this area?

\textbf{1.3.1. Domestic tax policy}

It is certainly not the goal of this general report to advise individual states on what they should do in the future. However, one might wish to pay attention to two fundamental policy issues.

\textsuperscript{17} See the French national report.

\textsuperscript{18} See the Hungarian, Russian, Italian, US and French national reports. See also the thematic report by J. van de Streek, \textit{Does Company Size Matter in Defining the Scope of a CIT?}
1.3.1.1. Clarity

The need for clarity in tax legislation is not specific to the topic of this report but it nevertheless deserves some attention. While tax systems generally establish clearly which domestic entities fall within the scope of CIT, the same is not true for non-resident entities. In some countries, tax statutes and administrative statements of practice are either silent or vague on this matter. Case law is ambiguous. This situation may be inspired by a reluctance to provide classifications which would in the end prove to be too rigid.\(^\text{19}\) However, it is well-known that legal certainty is demanded by taxpayers generally, and perhaps even more of foreign investors who need to know in advance the tax framework which applies to them.

1.3.1.2. Neutrality

Another important policy issue which has been widely discussed during the conference is neutrality. Although this concept still possesses its dark side of uncertainty, there seems to be a wide agreement among scholars and even in the current legislation of some states regarding the need to ensure that CIT subjects and non-CIT subjects should bear a comparable – if not identical – tax burden, account taken of the sum of CIT and personal income tax. It is however striking to observe that the tools used to reach the goal of neutrality are significantly different from one country to another. Some States have established specific rules of taxation of partnerships in order to approximate their taxation to that of CIT,\(^\text{20}\) some have enacted opt-in and/or opt-out rules while others have reformed dividend taxation.\(^\text{21}\) Scholars also disagree on the best possible ways to achieve neutrality: in this book, some advocate a strong move towards full transparency\(^\text{22}\) while others urge countries to adopt a uniform business tax.\(^\text{23}\)

Several observations may be made in this respect. First of all, it is questionable whether the same ready-made solution can be proposed for all countries. The debate on neutrality varies widely depending on the features of each tax system insofar as the respective rules governing CIT and personal income tax are different in every system. Within a single system,

\(^{19}\) See the UK national report, however quoting detailed HRMC guidance on this topic.

\(^{20}\) See for instance the Greek national report.

\(^{21}\) See the thematic reports written by G. Marino and P. Selicato.

\(^{22}\) See Henry Ordower’s thematic report.

\(^{23}\) See Johannes Heinrich’s thematic report.
the respective advantages of CIT and personal income may also vary over
time. It is therefore up to each country to decide whether neutrality can
be achieved in a satisfactory way through specific anti-abuse rules or if it
requires a structural reconstruction of the system itself.

Secondly, the ultimate legal status of neutrality still seems to be very ambigu-
ous. Is neutrality a mere policy goal or is it a consequence of the constitu-
tional principle of equality? If neutrality is a policy goal, it is desirable. If it
stems from the equality principle, it is compulsory, in which case it entails
that comparable situations should legally be treated equally. Here again,
though, the question of whether neutrality is a policy or a legal issue may
receive very different answers from one country to another!

Assuming however that neutrality is a constitutional constraint on the leg-
islator, it remains to be seen what comparable situations consist of. Are
partnerships (and their partners) and corporations (and their shareholders)
intrinsically comparable? To what extent should this comparison take into
account the size of the entity, its governance, etc.? Should the comparison
factors include other economic factors such as the identity of the sharehold-
ers and their activity in the company? One may for instance take the view
that an individual owning a substantial interest in a company where he or
she performs his or her activity is comparable to an individual entrepreneur
and should be taxed accordingly. By contrast, another shareholder in the
same company may legitimately not enjoy the same tax treatment because
he or she merely acts as an investor. Along this line, several ways to achieve
neutrality could be conceived: one could consist in not applying CIT up to
the portion of the company’s profits corresponding to the interest owned
by the “entrepreneur-shareholder”; another one could consist in keeping
CIT liability at the level of the company and in reintroducing the currently
obsolete imputation system for this category of shareholders (i.e. in granting
shareholders a tax credit corresponding to the upstream CIT) and making it
EU-compliant by extending it to foreign-source dividends.

Once again, the latter proposal should not be taken as a ready-made tool to
achieve tax neutrality. It nevertheless shows that many possible understand-
ings of this concept may exist in academic literature.

24. See for instance the interesting evolution described in the Austrian national report.
1.3.2. Cross-border situations and tax policy

Policy issues related to cross-border situations may arise to the extent that differences in tax systems create undesirable effects for taxpayers and/or tax administrations. Some of these effects are well-known: where a state considers that an entity is a CIT subject while another state takes the opposite approach, double taxation or double non-taxation may occur. This problem arises notably in connection with hybrid entities, which are subject to close scrutiny both at the OECD level and at the EU level and do not require particular comment in this general report. Other issues may also arise in cross-border situations in the event that some countries consider that specific entities such as investment structures may claim the protection of tax treaties while other countries take a different view. These practical problems call for coordination between EU and OECD states in order to avoid mismatches between domestic tax systems.

The reports prepared for the EATLP conference on CIT subjects shed a more original light on other aspects of interest, in particular with respect to EU law. In particular, they allow some reflections on the opportunity for harmonizing tax systems regarding the personal scope of CIT as well as on the way tax directives deal with CIT liability.

1.3.2.1. General reflections on EU harmonization

As Ruben Martini and Ekkehart Reimer point out in their report (see section 12.3.3.), “diversity does not affect the fundamental freedoms (...). As a result, the fundamental freedoms do not promote a harmonization of the personal scope of corporate income taxes within the EU”. This statement seems to be perfectly correct insofar as no legal obligation exists for EU Member States to harmonize their legislation in this field.

Let us add that in any event, harmonization of domestic legislation in this respect appears to be nearly impossible. Even if EU Member States agreed on the need for such harmonization, they would have difficulty finding appropriate criteria in this respect. This may be explained by the fact that abstract criteria do not provide an adequate basis for harmonization while concrete criteria are too imperfect by nature.

For instance, “legal personality” cannot be used for harmonization purposes because its connection to CIT liability is too deeply anchored in the specific legal culture of each country to allow any generalization. Indeed, the link
between legal personality and CIT liability relies on a strong relationship between private law and tax law, which is far from being accepted by all EU Member States where the never-ending debate on the autonomy of tax law is often not closed.

Moreover, the very concept of “legal personality” does not have the same meaning throughout the world: in some countries, legal personality means that a person enjoys rights and obligations under civil law; in others, a person may enjoy rights and obligations without being a “legal person”. This is the mechanical outcome of the absence of harmonization of civil and company legislations.

To complicate the whole issue further, let us underline that any reference to civil law to decide whether a non-resident entity enjoys legal personality would lead to even more diversity, since the rules governing conflicts of laws differ in every state: the \textit{lex societatis} may either be the law of the state where the company is incorporated or the law of the state where it has its effective place of management.\footnote{See for instance the contrast between the Swiss and Belgian systems in this respect: while both systems consider that the \textit{lex societatis} should provide an answer to the question of whether an entity enjoys legal personality, they do not retain the same connecting factor to determine which is the \textit{lex societatis}. Belgian law refers to the law of the principal establishment, Swiss law refers to the incorporation theory.}

In the end, the generalization of legal personality as a criterion of CIT liability would produce undesirable effects insofar as it would make tax systems even more different from one another than they are today! Let us indeed recall that private law varies substantially in this respect: while partnerships enjoy legal personality in some countries, they do not in others. Incidentally, this difference in the private law status of partnerships explains why article 3 of the OECD Model on Income and Capital defines the term “company” as “any body corporate or any entity that is treated as a body corporate for tax purposes”.\footnote{As the preparatory work of the Model recalls, “in most Member countries of the O.E.E.C. differences exist between the provisions of civil law and those of tax laws as to the treatment of different kinds of entities. Thus, e.g., a partnership is frequently treated for tax purposes as a body corporate whereas this form of business undertaking has no legal personality under civil law. The term “company” has been defined with a view to eliminate difficulties originating from such differences between the national tax laws and the civil law” (FC/WP14(61)1).}

At present, the different civil law approach of partnerships among countries does not produce wide-scale problems since most Member States end up with comparable tax systems through different means: while countries which accept the connection to legal personality and believe that
partnerships do not enjoy such a personality logically exclude partnerships from the scope of CIT, other countries which attribute legal personality to partnerships reach the same conclusion spontaneously by introducing exceptions to the personal scope of CIT in order to exclude partnerships. In other words, most tax systems are globally convergent despite their different civil or company law culture; harmonization by means of referral to civil or company law would therefore lead to the paradoxical outcome of making systems less aligned than they are today.

Could these problems be overcome by using concrete criteria of CIT liability such as the nature of the activity conducted by an entity or the way its governance is organized? One may have doubts in this respect, since these criteria are not only shared by a minority of EU Member States; they also contain a great deal of semantic uncertainty, which explains why they always play a marginal role in the tax systems where they exist.

These general considerations on EU harmonization do not mean, however, that no reflection deserves to be conducted when it comes to assessing the personal scope of EU tax directives.

1.3.2.2. The personal scope of EU tax directives

EU directives in direct tax matters (the Parent-Subsidiary Directive, the Interest and Royalties Directive and the Merger Directive) as well as the Draft CCCTB Directive do not pursue the same goals. This is the reason why the personal scope of these directives should be dealt with in separate ways.

The Parent-Subsidiary Directive and the Interest and Royalties Directive mainly aim at eliminating juridical double taxation on specific cross-border financial payments. This is the reason why Ruben Martini and Ekkehart Reimer rightly observe that the different methods which are used in the annex to these Directives in order to determine whether an entity is eligible for their benefits are not satisfactory insofar as they leave some domestic CIT subjects outside their scope although these entities are exposed to the same risk of double juridical taxation as other entities falling within the scope of the Directive (see section 12.2 of their thematic report). National reports also reveal cases of inconsistency between the list of entities covered by the Parent-Subsidiary Directive and other directives: these differences are hardly understandable from a theoretical and practical standpoint.27

27. See for instance France, the Netherlands and Spain.
Chapter 1 - General Report

An extension and a harmonization of the personal scope of these directives therefore seems to deserve a new discussion at a European level. Let us recall in this respect that the Ruding Report\(^{28}\) had already called for an evolution of the current situation through an extension of the scope of both the Parent-Subsidiary Directive and the Merger Directive in order to include any undertaking subject to CIT irrespective of its legal form. This proposal had even been endorsed by a European Commission Proposal in 1993\(^{29}\) and later been approved by the European Parliament,\(^ {30}\) but was withdrawn in 2003, with the regrettable effect that the Directives still do not apply to certain entities which are subject to CIT in their country of residence.

The case of the Draft CCCTB Directive\(^ {31}\) is slightly different as its objective is not to prevent double juridical taxation but rather to define new tax rules applying on a harmonized basis to groups of companies operating across the European Union. It is however interesting to see that the legal drafting technique used by the Draft Directive does not innovate when it comes to defining personal scope and merely duplicates the listing system which exists in current directives. Thus, it does not have as an ambition to create entirely new criteria for CIT liability: those continue to derive from national tax law.

This approach is certainly pragmatic, since I have already explained above why a substantive harmonization of the criteria for defining CIT liability appears not only unnecessary but also very difficult. However, one may wonder whether the reflection on the CCCTB draft does not provide for an opportunity to re-think the somewhat chaotic methodology reflected in the existing directives on direct tax matters and to resist the temptation to duplicate a tool which is not entirely satisfactory in substance. Moreover, the question of whether the scope of the CCCTB Directive should be identical to that of other tax directives must remain open. The European Commission was aware of this issue, as is demonstrated by a working document which suggests that more detailed reflection should still be conducted on this matter. This document states the following: “as the main goal of the CCCTB is to remove obstacles created by existence of 25 different corporate tax systems, it would probably make sense to cover in CCCTB only entities doing business, whereas some corporate tax systems cover a wider group

---

29. COM (93) 293 final.
of entities”. The Commission therefore seems to have plead in favour of a restriction of the scope of the CCCTB by taking into account concrete criteria in addition to a mere referral to domestic tax legislations. Whether such a restriction based on “business or profit making activities” is the proper way to approach this topic may be discussed, but it has the merit of opening a debate which does not yet seem to have taken place.

33. Ibid, § 16.
Contact

IBFD Head Office
Rietlandpark 301
1019 DW Amsterdam
P.O. Box 20237
1000 HE Amsterdam, The Netherlands
Tel.: +31-20-554 0100 (GMT+1)
Email: info@ibfd.org
Web: www.ibfd.org