

Legal Research in International and EU Tax Law

The authors, in this note, report on the proceedings of the symposium on Legal Research in International and EU Tax Law held on 16 May 2014 and hosted by the International Tax Center of Leiden University.

1. Introduction

This article reports on the proceedings of the symposium on Legal Research in International and EU Tax Law held on 16 May 2014 and hosted by the International Tax Center of Leiden University.¹ The symposium was divided into five parts: (1) the importance of legal research in the current tax climate (section 2.); (2) research methodologies (section 3.); (3) legal research from an interdisciplinary and intradisciplinary perspective (section 4.); (4) relevant research in international and EU tax law (section 5.); and (5) the importance of comparative tax law (section 6.).

The symposium was opened by Professor Alex Geert Castermans, Vice-Dean of the Law School of Leiden University and Director of Research. He commenced by calling the origin of Leiden University into memory. Leiden citizens cherish the story that the university was a direct gift from William of Orange to thank the city for its brave resistance during the Spanish "Siege of Leyden" from 1573 – 1574. William of Orange supposedly gave the city a choice: exemption from tax for a couple of years, or a university. It is clear what the city chose: no exemption from taxes, but a university instead. This, of course, gave the university the opportunity to perform legal research in the fascinating area of tax law. Such research is highly relevant and necessary in current times, in which acting in one's self-interest may not always be the right thing to do. It is the task of legal scholars to help formulate "right" and "wrong" behaviour, also in taxation.

2. The Importance of Legal Research in the Current Tax Climate

Stef van Weeghel² started off by quoting from the Report on Double Taxation submitted to the Financial Committee of the Economic and Financial Commission of the League of Nations by Professors Bruins, Einaudi, Seligman and Sir Josiah Stamp (1923).³ This report was the start of 90 years

of tax research commissioned by the League of Nations, the Organization of European Economic Cooperation and, finally, the OECD. Van Weeghel found it ironic that, at the beginning of this research, the focus was on how to remove "the evil consequence of double taxation", whereas, now, 90 years later, the OECD's Director of the Centre for Tax Policy and Administration has declared that "our system is broken".⁴ This latter statement refers to the "evil consequences of double non-taxation". Has the previous work been too successful? Whatever the answer to this question may be, it is clear that a system that is broken urgently needs research from a legal, economic and interdisciplinary perspective.

Van Weeghel suggested that an important role for legal and economic research would be to perform data and other analyses in order to establish the accuracy of statements made and the effects of measures proposed. He stressed that data and other analyses are important, particularly in today's world, an age of social media, where the threshold for dispersion of information is low and where opinions may easily be perceived as fact.

He then turned to explain the impact of the BEPS initiative on legal research.⁵ He noted that BEPS and the ensuing Action Plan⁶ justify specific and thorough legal and interdisciplinary research. For instance, the consistency of proposed measures with EU law is a case in point. Moreover, the BEPS agenda also calls for more emphasis on dispute resolution mechanisms. As is well known, currently, an international court for the resolution of tax treaty issues does not exist and dispute resolution through arbitration is still in its infancy.

Next, Van Weeghel raised a big question: who should undertake the research? Should it be universities, independent organizations such as IFA and the IBFD, government organizations, such as the OECD, United Nations, World Bank, IMF and certain smaller initiatives, or NGOs? He believed that independence of the research institute will increasingly be an issue.

Finally, Van Weeghel noted that even though none of the questions raised herein can be solved in the short term, legal and interdisciplinary research in the current tax climate is the key to restoring society's trust in the international tax order.

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1. The symposium took place before Sjoerd Douma's inaugural lecture later that day in the Great Auditorium of Leiden University. The symposium was kindly sponsored by PwC.
2. Stef van Weeghel is a Professor of International Tax Law at the University of Amsterdam, chairman of the Permanent Scientific Committee of IFA, chairman of the Board of Trustees at the IBFD and tax partner at PwC.
3. Geneva, 5 April 1923.

4. Interview with Pascal Saint-Amans, p. 8 (see http://www.pwc.com/en_GX/gx/tax/tax-policy-administration/beps/assets/pwc-tax-interview-transcript.pdf).

5. The project known as BEPS (Base Erosion and Profit Shifting) looks at whether or not the current rules allow for the allocation of taxable profits to locations different from those where the actual business activity takes place and what can be done to change this if they do (see <http://www.oecd.org/tax/beps-about.htm>).

6. OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD 2013), International Organizations' Documentation IBFD.

3. Research Methodologies

Diane Ring delivered the second presentation on research methodologies.⁷ She commenced by introducing contemporary questions and concerns regarding methodology in legal scholarship: What is the unique contribution of legal scholars? What is the foundation of their research? She suggested that these questions have become particularly prominent in recent years, as legal scholars, including those focused on tax, have turned to other disciplines, especially the social sciences, for insight, ideas and research.

Ring illustrated this development by discussing three stages of legal research: (1) traditional legal research, (2) the increased criticism of this type of research and (3) legal research in the current tax climate. The traditional view of legal scholarship can be described in terms of role, audience and format. Legal scholarship, at least in the United States for many years, was focused on interpretation of judgments and statutes, and was directed at legislators, judges and lawyers. Thus, many major articles in the past were more practice-oriented as compared to the more academic approach today. Ring then explained the role of economics in earlier tax law scholarship: economic principles were integrated into legal rules, questions and, ultimately, legislative policy.

Ring further spoke about changes to the traditional view in legal scholarship. Over time, the traditional status quo of research was disturbed and unsettled by a number of forces, including the rise of optimal tax theory and modelling, the rise of critical legal studies, the declining significance of the comprehensive tax base discussion and the broader rise of law and economics. She particularly stressed that the application of law and economics, using assumptions and modelling, was appealing in its apparent ability to deliver precise conclusions in respect of analyses (more recently, though, recognition of the limits of research grounded in “unrealistic” assumptions has tempered enthusiasm for law and economics). Another change took place in the teaching profession. Ring elaborated on the change of requirements in the selection and hiring of academics at top law schools and its impact on research. In the past, Supreme Court law clerks would readily be considered for positions as professors upon completing their clerkships. Now, candidates for a law school professorship need to have an excellent publication record and, increasingly, a PhD or Master’s degree (in a non-law field).

In the third part, Ring explained three important trends in the current environment of legal scholarship. First, she described the shifting and expanding intellectual influences on legal scholarship: law and economics has become less exclusively prominent; other fields of science, in particular the social sciences, are more integrated into legal research; and international and comparative research has gained in importance. Second, Ring raised concerns regarding the assessment of scholarship including: (1) how scholarship should be evaluated. The broader the range of methodologies and fields upon which legal scholars draw,

the more difficult it can be for peers in a law faculty to evaluate scholarship; and (2) how law schools “measure” law faculty members. Today getting a position as a member of a law faculty and being promoted for tenure is more competitive than in years past. US law schools use various metrics to measure faculty members, including compiling outside written reviews, having internal reviews by those in the field and ranking the placement of articles. Often, the journal in which an article is published is a significant factor in evaluating a faculty member’s (or candidate’s) scholarship. What kinds of articles can or will get published in a top law journal? There are no clear answers, but when selecting a topic for research and when crafting an article for publication, academics look for: issues that are interesting to law school students who run the major law reviews; topics that are accessible and current; arguments that have a very clear structure/framework/methodology and a conclusion that follows from that framework; the opportunity to make bold pronouncements, even if a more nuanced conclusion and policy recommendation would be more appropriate. The contemporary process of evaluating legal scholars also impacts the format of scholarship. Rather than writing a book, which requires a longer time-frame (and may not produce anything tangible in the short run), scholars often prefer to produce a number of law review articles during the period they are seeking tenure and promotion. Although the preference for articles does not explicitly influence scholars in their methodological choices, it can influence their willingness to undertake complex empirical projects that may be time consuming and delay production of a finished work.

Finally, Ring identified some promising signs in legal scholarship: (1) varied questions, projects and issues are being tackled by contemporary legal scholarship; (2) legal academics are drawing on a wide range of resources, partners and fields; (3) recognition by the legal academy that other disciplines and explicit methodologies are not free of debate, uncertainty and conflict; and (4) vibrant discussion of legal work outside one’s field (which allows the author to hear the perspectives of a broad array of legal experts and ensures that the author fully appreciates the scope of the issues and their connection to other areas of law).

4. Interdisciplinary and Intradisciplinary Perspective

Ekkehart Reimer delivered a presentation on interdisciplinary and intradisciplinary perspectives of legal research in international and EU tax law.⁸ He began the presentation by putting forward a question: what are the dimensions of legal research in international and EU tax law? To illustrate this, he divided his presentation into observations from four perspectives: (1) the tax researcher as inventor; (2) the tax researcher as collector; (3) the evaluation of tax rules and decisions; and (4) pure theoretical legal research.

7. Diane M. Ring is a Professor of Law at Boston College Law School.

8. Ekkehart Reimer is a Professor at the Faculty of Law of the University of Heidelberg, where he holds the Chair for Public Law and Principles of European and International Tax Law.

Reimer explained and compared the first two perspectives through the lens of interdisciplinary and intradisciplinary research. Tax researchers, as inventors, are generally associated with new rules, concepts and legal instruments, paving the way for tax legislators. In contrast, tax researchers, as collectors, normally collect rules and surprise others with what they have found before the court or tax administration. In spite of these differences, both inventors and collectors are linked to the government: inventors are related to tax law-making branches, while collectors are related to second/third branches, i.e. tax administrations and courts. These branches of the government are accompanied by tax researchers and, in turn, tax researchers are accompanied by researchers from other legal disciplines and sciences. Indeed, assisting legislators requires interdisciplinary help, such as assessing the impact of a new tax rule by also involving economists and psychologists to predict people's response to the new rule.

Reimer then discussed a real life example, provided to him by a colleague who is an anthropologist doing research into the economic behaviour of the inhabitants of a village in Laos. The anthropologist found out that a considerable part of the economic life of the villagers was not expressed by formal bilateral contracts between private parties, but through a huge circle of gifts. Reimer highlighted that the gift circle was very similar to a tax system, whereby a taxpayer paid tax to a tax authority without the right to claim direct benefits therefrom. Therefore, the gift system can provide valuable guidance for tax researchers in respect of many issues such as the composition and delineation of communities of mutual solidarity, compliance with such communities and self-stabilization of the system. This example shows that true interdisciplinary research may be of great value in the design and implementation of tax legislation.

Apart from interdisciplinary research, there remains a need for intradisciplinary legal research. Tax law research benefits from analyses in constitutional law. Likewise, the particularities of tax law obtain sharp contours when tax rules are compared to social security law, private contract law and redistribution mechanisms in other areas of law (for example, energy law, banking and financial regulation, or environmental law).

In summary, assisting law making in parliament or ministries is the responsibility of tax researchers, including both inventors and collectors, who, in turn, benefit from intradisciplinary and interdisciplinary expertise. Tax researchers as inventors and collectors, when assisting the branches of government, aim at bringing the right law to a case. This is an activity that is mainly forward-oriented. At the same time, however, collecting – i.e. finding and excavating rules and decisions – is a retrospective activity. Likewise, the third type of tax research – the evaluation of rules or decisions – is also retrospective.

To explain the evaluation of rules or decisions, Reimer posed two questions: (1) are tax researchers the right evaluators; and (2) how do tax researchers evaluate rules or decisions? According to Reimer, the answer to the first question should, in principle, be positive. That is to say, tax researchers are entitled to evaluate rules, although

other disciplines are also involved in this work. As to the second question, the answer differs from continent to continent, and even from country to country. With respect to the European continental tradition, legal evaluation will typically be made in light of a constitution, the Treaty on the Functioning of the European Union (TFEU) (2007),⁹ the European Convention on Human Rights, a tax treaty, or any other source of public international law. Likewise, legal research relies on intradisciplinary standards of clarity, consistency and operability. In all, evaluation by tax law researchers takes place within the legal discipline, using legal research methods. An antipode can be found in the United States, where many researchers tend to evaluate rules with the help of non-legal standards, such as economic standards through empirical research methods, as Diane Ring showed in her presentation.

Reimer listed the merits of non-legal approaches to evaluating tax rules from an interdisciplinary perspective: (1) non-legal standards can play a function in identifying niches for policy strategies, which can be perfectly illustrated by tax competition between countries, for example, the Netherlands, Spain and Ireland; (2) tax researchers can benefit from learning vocabulary, i.e. concepts in other disciplines, as well as exporting their own vocabulary; (3) tax researchers can acquire new forms to present their intradisciplinary research result in a smart way, such as drawing maps. He then underlined the need to balance interdisciplinary and intradisciplinary excellence, emphasizing that interdisciplinary work is of little value if tax researchers in this context perform worse than they could among the colleagues in their own discipline.

Reimer labelled the fourth dimension of tax research as “pure” legal research, which generally covers both the level of law making and law application and theory of interpretation. Due to its disconnection from any factual problems or cases, it is not surprising that “pure” legal research focuses on intradisciplinary legal research, for example, legal history, legal theory, comparative research and so on. But even in this area, it calls for interdisciplinary work. Cooperation with other disciplines in respect of “pure” legal research is mainly aimed at identifying concepts and conceptualizing legal methods and operations.

5. The International and EU Tax Law Perspective

Martha O'Brien delivered the presentation on international and EU tax law aspects of legal research.¹⁰ She illustrated dogmatic research methods in this area by examining the potential adoption of a single general anti-avoidance rule (GAAR) for preventing abuse of treaties under three types of corporate tax systems: (1) an incompletely harmonized federal system (Canada); (2) a highly economically, legally and even politically (but not fiscally) integrated single market (European Union); and (3) the international system created through membership in the OECD and the network of bilateral tax treaties.

9. Treaty on the Functioning of the European Union of 13 December 2007, OJ C115 (2008), EU Law IBFD.

10. Martha O'Brien is a Professor at the Faculty of Law of the University of Victoria; her research interests combine Canadian and international taxation with EU law, as well as international investment law.

O'Brien began her presentation by comparing two approaches to the adoption of a single GAAR derived from the BEPS: (1) a new provision of the OECD Model or new Commentary on the OECD Model, along with new domestic provisions used to prevent abuse of treaties through treaty shopping and hybrid mismatch arrangements, as proposed by Action 6; (2) the adoption of a harmonized GAAR in a multilateral treaty, envisaged in Action 15. O'Brien concluded that the development of a multilateral treaty with a harmonized GAAR would be more efficient and would also be the most likely option to be effective in combating new multi-jurisdiction avoidance schemes compared to domestic and bilateral measures. Regarding the possibility of adoption of such a harmonized GAAR, O'Brien's position is that such a project cannot be successful without a sufficient degree of fiscal cohesion and solidarity, as well as legal and cultural consistency.

To further explain her thesis, O'Brien provided an overview of the current degree of harmonization of GAAR in the three corporate tax systems mentioned herein to illustrate the obstacles and opportunities of each system:

(1) Canadian tax jurisdictions (federal government and provinces) established a highly harmonized tax base, but not a harmonized tax rate, through identical bilateral agreements between provinces and the federal government, with the exception of three provinces. The provinces also enacted GAARs modelled closely on the federal GAAR, but the harmonized GAAR under both federal and provincial tax law has not prevented double non-taxation resulting from tax avoidance techniques exploiting gaps in the imperfectly harmonized tax base.

(2) The EU's single market was established through both positive harmonization measures, for example, directives and negative harmonization through the four freedoms. Anti-avoidance is currently governed primarily by domestic tax law and tax treaties between Member States, subject to the prohibition of discrimination in respect of taxation articulated by the Court of Justice of the European Union (ECJ). The ECJ's primary intention is not preventing undue tax avoidance or double non-taxation, but ensuring free movement of persons, establishment and capital. Free movement must not be inhibited by national tax law and the ECJ applies a stringent test of tax avoidance in *Cadbury Schweppes* (C-196/04)¹¹ and *SGI* (C-311/08).¹² Currently, there are proposals regarding GAARs in the EU Parent-Subsidiary Directive (2011/96)¹³ and EU Interest and Royalties Directive (2003/49),¹⁴ and these supranational mechanisms can be considered as EU harmonized GAARs.

(3) The international tax system is a form of consensual and partial harmonization through a bilateral treaty network combined with domestic rules regulating cross-border transactions. The beneficial ownership limitation can be viewed as an international harmonized anti-avoidance measure to combat treaty shopping.

Subsequently, O'Brien examined the interpretation and application of harmonized GAARs at each of the levels mentioned above:

(1) Based on the analysis of current Canadian tax law and court cases of different provincial jurisdictions, O'Brien listed three main findings: (a) a different legal culture, and understanding of the Canadian federation, and the perception of what constitutes abuse, cause a different interpretation and application of almost identical GAARs, even within a single country; (b) a GAAR aimed at preventing abusive avoidance in one jurisdiction is difficult to apply effectively and consistently across jurisdictions; (c) in a federal state with extensive economic integration and fiscal interdependency, the subnational governments will move quickly to close the gaps, even doing so retroactively. Québec's civil law tradition has approached the provincial GAAR differently from Alberta's common law legal system. Canada has a "supreme tax court", the Supreme Court of Canada, but it has, so far, not accepted an interjurisdictional GAAR case.

(2) The proposed GAARs in the EU Parent-Subsidiary Directive (2011/96) and EU Interest and Royalties Directive (2003/49) represent a positive harmonization of Member State tax law, but whether national courts will interpret and apply the GAARs in the same way in similar situations needs further examination given the different interpretive cultures that prevail in different Member States. In O'Brien's view, since the proposed GAARs are sufficiently clear and are only aimed at certain avoidance circumstances, the ECJ would probably be willing to directly apply these rules.

(3) The beneficial ownership limitation in tax treaties faces significant variability of interpretation from country to country, demonstrated by a series of cases, for example, *Indofood* (2006),¹⁵ *Prévost Car* (2009)¹⁶ and *Bank of Scotland* (2006).¹⁷ This implies that a GAAR in either a network of bilateral tax treaties or the Commentary on the OECD Model, or in a multilateral treaty, might be interpreted quite differently by different national courts.

O'Brien ended her presentation by suggesting that it is essential to either have a "Supreme International Tax Court" to create a unified interpretation or there must be a sufficient degree of fiscal integration or solidarity such that the jurisdictions involved are willing to protect each

11. UK: ECJ, 12 Sept. 2006, Case C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, ECJ Case Law IBFD.

12. BE: ECJ, 21 Jan. 2010, Case C-311/08, *Société de Gestion Industrielle SA (SGI) v. Belgian State*, ECJ Case Law IBFD.

13. EU Parent-Subsidiary Directive – recast (2011): Council Directive of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (recast), OJ L 345/8, (2011), EU Law IBFD.

14. EU Interest and Royalties Directive (2003): Council Directive 2003/49/EC of 3 June 2003 on a Common System of Taxation Applicable to Interest and Royalty Payments Made Between Companies of Different Member States, OJ L157 (2003), EU Law IBFD.

15. UK: CA, 2 Mar. 2006, *Indofood International Finance Ltd. v. JP Morgan Chase Bank NA* (2006) 8 ITLR 653, STC 1 195, Tax Treaty Case Law IBFD.

16. CA: TC, 22 Apr. 2008, *Prévost Car Inc. v. Her Majesty the Queen* 2008 TCJ 231, Tax Treaty Case Law IBFD, affirmed in CA: FCA, 26 Feb. 2009, *Her Majesty the Queen v. Prévost Car* [2009] FCA 57, Tax Treaty Case Law IBFD.

17. FR: CE, 29 Dec. 2006, Case 283314, *Bank of Scotland*, Tax Treaty Case Law IBFD.

other's tax base to make such a harmonized international GAAR effective.

6. The Comparative Tax Law Perspective

The last presentation on comparative tax law methodology was delivered by Bertil Wiman.¹⁸ He commenced by sharing his research experience concerning how difficult it was to conduct comparative research in the field of tax law. This is because tax laws in different jurisdictions are changing all the time. Then, he provided some good examples of comparative tax law research done by other scholars, including Hugh Ault's book, *Comparative Income Taxation*.

Next, Wiman discussed how one should conduct comparative research. He pointed out that the research starts with the identification of potential problems and hypotheses, followed by a description of the content of the jurisdictions compared and an analysis of the rules compared. From this, the research should draw conclusions as appropriate. In this process, one should always focus on the purpose of the comparative research in the concrete study at hand. After all, comparing rules is not the purpose, but a methodology.

When it comes to the description of foreign law, in making a comparison, it is important and helpful to communicate with colleagues from those foreign jurisdictions. In this way, the researcher not only can gain insight into the foreign law but also avoid pitfalls. Wiman emphasized that a scholar should be aware of the legal environment and national context in the specific jurisdiction, for instance its legal system (common law or civil law) and its legal tradition (rule-oriented or principle-oriented).

Wiman stressed that another important element for comparative tax research is the number of countries and factors to be compared. Choosing too many countries and factors might make it too difficult to reach a meaningful conclusion. In many cases "less is more", because the more countries and issues involved – like in the general report of IFA – the harder it becomes to draw precise conclusions.

Subsequently, Wiman discussed the cases in which comparative tax law research may be useful. He pointed out that the BEPS project is a good example. Some of the BEPS Actions are not aimed at developing specific rules. Rather, they are looking for measures that may be seen as appropriate to combat aggressive tax planning. This approach may be somewhat problematic – the mere identification of different types of measures that can be used to prevent aggressive tax planning without putting them into national context can lead to the implementation of ineffective measures – comparative research may indeed be useful in the BEPS context. Wiman specifically mentioned four potential opportunities.

- (1) To provide comparable solutions for legislators to make new rules. Wiman mentioned that, in Sweden, it is quite common for a government committee to conduct

18. Bertil Wiman is a Professor at Uppsala University, Sweden and chairman of the European Association of Tax Law Professors.

comparative research before proposing a new rule. For instance, the new Swedish proposal for a limitation on interest deduction contains hundreds of pages of comparative research to find out how other countries deal with this issue.

- (2) To interpret existing rules. Comparative tax research is beneficial to the interpretation of EU law and tax treaty law, i.e. the interpretation of certain directives and tax treaties by courts in other countries.
- (3) To harmonize tax law. Comparative tax research can also serve to harmonize and unify tax law. The BEPS and CCCTB projects are good examples of this.
- (4) To enrich legal education. Wiman emphasized that legal education institutions should provide more comparative tax courses. As is well known, rules change all the time, but the principles behind them and the way or approach to solving those issues will remain the same. Therefore, to be more principle based, tax education should be more comparative and discuss how different countries solve different issues.

7. Group Discussion and Closing Remarks

The final part of the symposium involved a lively group discussion, chaired by Kees van Raad.¹⁹ Participants came to the consensus that tax lawyers and economists should have more interaction with each other. Also, they agreed that the most direct and useful way to acquire knowledge of foreign laws is to have a dialogue with local scholars.

The closing remarks were made by Sjoerd Douma.²⁰ He discussed three perspectives to conducting legal research. The first one is an internal perspective, which is a purely legal one. It is a doctrinal approach that concerns, for instance, the validity and interpretation of rules, the optimization of competing principles, the systemization of legislative acts and judgments in a legal system and the mutual influence of legal norms in a multilevel legal order. The second perspective is external. Here, the process of law making or the effects of the law are analysed from, for instance, an economic, social, historic or philosophical angle. The third perspective of legal research is the normative perspective, which is a combination of the internal and external perspectives: the study of the law as it ought to be and the ways in which the desired legal reality can be achieved in a legal system. Douma further elaborated on these three perspectives in his inaugural lecture, which took place immediately after the symposium.²¹

19. Kees van Raad is a Professor at Leiden University, Chairman of the International Tax Center Leiden, Director of the Leiden Adv. LLM Programme in International Tax Law and Of Counsel to Loyens & Loeff.

20. Sjoerd Douma is a Professor at Leiden University, Deputy Director of the International Tax Center Leiden, Director of the Leiden Adv. LLM Programme in European Tax Law and a director at PwC.

21. The lecture was published as S. Douma, *Legal Research in International and EU Tax Law* (Kluwer 2014).