

# **Fiscal Sovereignty of the Member States in an Internal Market**

**Past and Future**

*Edited by  
Sjaak J. J. M. Jansen*



**Wolters Kluwer**  
Law & Business

EUCOTAX Series on European Taxation

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## Preface

Recent decades have seen an increasingly rapid pace of globalization, with the economies in the various countries becoming ever more closely entwined. This has created worldwide markets on which individual countries have little, if any, influence. That in turn is resulting in their sovereignty becoming eroded. Meanwhile the sovereignty of individual countries is also coming under pressure because of the establishment of international organizations such as the World Trade Organization (WTO), which have restricted countries' sovereignty in specific policy areas. So, too, has the creation of the European Union gone hand in hand with the transfer of some of the sovereignty of the Member States. The introduction of the Economic and Monetary Union, for example, resulted in Member States transferring their powers to determine their own monetary policies to the European Central Bank. Now the only areas in which European Community (EC) Member States can still determine how to structure their economies for themselves are their spending and labour market policies and taxation. This may be one of the reasons why Member States are so attached to the principle of fiscal sovereignty and why the requirement for unanimity in this policy area is so cherished. With twenty-seven Member States, however, it is becoming increasingly difficult, if not impossible, to achieve unanimity in the field of fiscal policy.

Although the EC countries have retained national sovereignty in tax matters, a consistent line of decisions by the European Court of Justice (ECJ) requires them to exercise these powers consistently with the higher Community law. In other words, the Member States are not wholly autonomous. This in turn creates tensions. In its decisions the ECJ has sometimes made it painfully clear to Member States that certain tax regulations are not consistent with Community law. Member States also have to deal with the issue of the prohibition on state aid. According to ECJ case law, fiscal measures can certainly be regarded as state aid. Legislators introducing fiscal stimulation measures benefiting domestic or foreign investors consequently

also have to consider whether the specific measures are in compliance with the state aid provisions in the Treaty on the Functioning of the European Union (TFEU).

Competition in direct taxation has intensified within the European Union as a result of tax sovereignty and Member States no longer being able to determine their own monetary policies. This issue was investigated by an international group chaired by the Financial Secretary to the UK Treasury, Dawn Primarolo. The group's report, which was published in 1999, identified the Netherlands as the leader in the field of harmful tax competition. The fierceness of this competition has not decreased since this report was published. On the contrary, the accession of a number of new Member States in May 2004 seems only to have intensified it. The focus of the competition seems, however, to have shifted from competition on tax bases to competition based on tax rates. As are other Member States, the Netherlands is playing a full part in this battle.

Another significant development is the merging of the Member States' economies into a single, large economy (the 'internal market'). An internal market assumes the existence of a level playing field, where production factors can move freely. The internal market has major implications for national taxation laws as there are clearly tensions between the demands that an internal market places on national regulations and the question of national sovereignty in the field of direct taxation.

These various developments were one of the reasons prompting the Tax Law group at the Erasmus University's School of Law in Rotterdam to set up its 'Fiscal autonomy and its boundaries' research programme. One of the subprogrammes involved researching the effects of Community law on national and international tax law. This book is a report on one of the subprogramme projects, which examined the sovereignty of Member States within the European Union.

The focus of the project was not only on taxation. Instead we sought to approach the issue from a wider angle. In Chapter 1, for example, developments in states' sovereignty are considered from a broader perspective. Although the sovereignty of states can be viewed from various angles, it is only sporadically looked at from the perspective of the European Union. Chapter 2 consequently examines how the European Union is funded since a state having its own sources of funding is an absolute precondition for its being able to exercise sovereignty. Chapter 3 looks at the question of the current and possible future effects of the internal market on the fiscal sovereignty of Member States. An important feature of an internal market such as the European Union is the ability to move freely within this market, and so Chapters 4 (free movement of workers), 5 (freedom of establishment) and 6 (free movement of capital) consequently focus on these freedoms as they are provided for in the TFEU. Globalization and the internal market have meant a rapid increase in the numbers of cross-border movements of labour, services and capital, with states having to negotiate with each other and agree on treaties if they are to avoid double taxation. Chapter 7 examines the limits that European law imposes on Member States' policy sovereignty in matters of international tax law. European law not only affects taxes imposed by central

governments as its influence also extends to taxes levied by local authorities, and this subject is examined in Chapter 8. Chapter 9 contains some final thoughts on the subject, while also taking a brief look at the future and the consequences that the Treaty of Lisbon may have for Member States' fiscal sovereignty.

The articles in this were finished in the period between January till 30 November 2009. Therefore the old EC and EU treaty was the basis for these articles. Since 1 December 2009, the new treaties, Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), became effective. Therefore, we have also mentioned the articles of the TEU and TFEU.

The editor is very grateful to the authors: Fabian Amtenbrink, Helena Raulus, Peter van der Hoek, René Barents, Bruno Peeters, Ben Kiekebeld, Daniël Smit, Arnaud de Graaf, Maikel Evers and Henk van Arendonk.

Sjaak J.J.M. Jansen  
Rotterdam, December 2009



# Summary of Contents

<b>Preface</b>	xv
<b>Chapter 1</b>	
<b>Contribution to: Fiscal Policy in the European Union Context – The Semi-detached Sovereignty of Member States in the European Union</b>	<b>1</b>
<i>Fabian Amtenbrink and Helena Raulus</i>	
<b>Chapter 2</b>	
<b>European Union Finances</b>	<b>39</b>
<i>M. Peter van der Hoek</i>	
<b>Chapter 3</b>	
<b>The Single Market and National Tax Sovereignty</b>	<b>51</b>
<i>René Barents</i>	
<b>Chapter 4</b>	
<b>The Fiscal Aspects of the Free Movement of Workers in the EC Context</b>	<b>73</b>
<i>Bruno Peeters</i>	
<b>Chapter 5</b>	
<b>Freedom of Establishment and Transfers of Corporate Seats</b>	<b>99</b>
<i>Sjaak J.J.M. Jansen</i>	
<b>Chapter 6</b>	
<b>EU Free Movement of Capital and Corporate Income Taxation: The Relationship between the Free Movement of Capital and the Other TFEU Freedoms and Justification Grounds in a Third Country Context</b>	<b>119</b>
<i>Ben J. Kiekebeld and Daniël S. Smit</i>	

*Summary of Contents*

**Chapter 7**

**Pushing Back Frontiers (Un)charted Territories in the Field  
of International Tax Law and EU Law**

**151**

*Maikel Evers and Arnaud de Graaf*

**Chapter 8**

**Local Authorities and Fiscal Autonomy: State Aid?**

**201**

*Henk P.A.M. van Arendonk*

**Chapter 9**

**The Future of Fiscal Sovereignty: Some Closing Thoughts**

**233**

*Sjaak J.J.M. Jansen*

# Table of Contents

<b>Preface</b>	<b>xv</b>
<b>Chapter 1</b>	
<b>Contribution to: Fiscal Policy in the European Union Context – The Semi-detached Sovereignty of Member States in the European Union</b>	<b>1</b>
<i>Fabian Amtenbrink and Helena Raulus</i>	
1. Introduction	1
2. Sovereignty beyond the State: A Brief Introduction	2
3. Distribution of Sovereignty in the EU: A Static Perspective	7
3.1. Revision of the Primary Union Legal Order and Accession to the EU	9
3.2. Legislative Competences of the Union	13
3.3. Effects of the European Legal Order in the National (Constitutional) Legal Order of the Member States: Supremacy and Direct Effect	20
4. Distribution of Sovereignty in the EU: A Dynamic Perspective	26
4.1. Negative Harmonization as a Restraint of National Regulatory Competencies	26
4.2. Implied Union External Competence and the Choice of Legislative Instrument	29
4.3. Limits for Union Action: Subsidiarity and Proportionality	32
5. Conclusions	36

## *Table of Contents*

<b>Chapter 2</b>	
<b>European Union Finances</b>	<b>39</b>
<i>M. Peter van der Hoek</i>	
1. Introduction	39
2. The EU Budget	42
3. Revenues	43
4. Expenditure	45
5. Budgetary Balances	47
6. Summary	49
 <b>Chapter 3</b>	
<b>The Single Market and National Tax Sovereignty</b>	<b>51</b>
<i>René Barents</i>	
1. Introduction	51
2. The Concept of Single Market	52
2.1. Common, Internal and Single Market	52
2.2. The European Area	53
2.3. Market Unity	54
2.4. Fundamental Rights to Free Movement	55
3. The Scope of the Single Market	56
3.1. Discriminations and the Country of Destination Principle	56
3.2. Disparities and the Country of Origin Principle	57
4. The False Paradigm of Tax Sovereignty	58
4.1. The Presumed Special Nature of Direct Tax Law	58
4.2. The Primacy of Fundamental Rights	60
5. The Fluid Border between Tax Autonomy and the Single Market	61
5.1. The Territoriality Principle under Siege	61
5.2. Mutual Recognition	62
5.3. The Country of Destination 'Plus' Principle	63
6. The Plea for a Reversal and its Critique	64
6.1. A Counter Attack	64
6.2. Going Back to 1958	65
6.3. Outside or Inside the Scope of Community Law?	67
7. Trial and Error	68
7.1. Madness?	68
7.2. A Retreat?	69
7.3. Some Points for Consideration	70

<b>Chapter 4</b>	
<b>The Fiscal Aspects of the Free Movement of Workers in the EC Context</b>	<b>73</b>
<i>Bruno Peeters</i>	
1. Introduction	73
2. Conditions of Application	75
2.1. Notion of Worker	75
2.2. Intra-Community Economic Movement	75
2.3. Relationship between Article 39 EC/45 TFEU and the Articles 43 and 56 EC/49 and 63 TFEU	77
2.4. Relationship between Article 39 and Article 18 EC/45 and Article 21 TFEU	78
2.5. Relationship between Article 39 and Article 49 EC/45 and Article 56 TFEU	80
3. Prohibition of Discrimination	80
3.1. Prohibition of Discrimination Based on Nationality and the Principle of Equal Treatment	80
3.2. Overt and Covert Discrimination on the Basis of Nationality	81
3.3. Reversed Tax Discrimination	82
3.4. Concrete Assessment of the Prohibition of Discrimination	84
3.5. Remedy	88
4. Prohibition on Fiscal Impediment of the Free Movement of Workers	89
4.1. Generalities	89
4.2. Restrictions Resulting Inevitably from the Co-existence of National Tax Systems (Tax Disparities)	91
4.3. Justification Grounds	92
5. Conclusion	97
<b>Chapter 5</b>	
<b>Freedom of Establishment and Transfers of Corporate Seats</b>	<b>99</b>
<i>Sjaak J.J.M. Jansen</i>	
1. Introduction	99
2. Exit Taxes on Companies	101
3. Company Law and the Right of Freedom of Establishment	102
3.1. General	102
3.2. Case Law on the Transfer of Corporate Seats	103
3.3. Scope of Case Law on Transfers of Seat	105
3.4. Transfer of Seat in the Case of a European Company	106
4. Tax Consequences	107
4.1. General	107
4.2. Wider Interpretation of Tax Consequences	108
4.3. Narrow Interpretation of Tax Consequences	110

## Table of Contents

5.	Are Exit Taxes Permitted?	111
5.1.	General	111
5.2.	Do Exit Taxes Constitute an Obstacle?	111
5.3.	Grounds for Justification	112
5.4.	Requirement for Proportionality	114
5.5.	Some Case Law	115
6.	Policy Developments	116
6.1.	General	116
6.2.	European Commission's View	116
6.3.	European Council	117
7.	Main Conclusions	117

## Chapter 6

### **EU Free Movement of Capital and Corporate Income Taxation: The Relationship between the Free Movement of Capital and the Other TFEU Freedoms and Justification Grounds in a Third Country Context**

119

*Ben J. Kiekebeld and Daniël S. Smit*

1.	Introduction	119
2.	Concept of Capital Movements and Concept of Establishment	121
3.	The Relationship between the Free Movement of Capital and the Freedom of Establishment	123
3.1.	Test Claimants in the Thin Cap Group Litigation, Skatteverket versus A and B and Lasertec: Exclusive Application of Freedom of Establishment where the Contested Tax Measures is Targeted only at Relations within a Group of Companies	123
3.2.	<i>Glaxo Wellcome</i> : Exclusive Application of Free Movement of Capital Where the Contested Tax Measures is Targeted Only to Capital Transactions	125
3.3.	FII and Holböck: versus <i>Burda</i> , KBC Bank NV, Aberdeen Property Fininvest Alpha Oy: Parallelism in Case of 'Generic' Restrictions?	126
3.4.	A Call for Clarity	127
3.5.	Conclusion	128
4.	Justification Grounds and Third Countries	129
4.1.	Introduction	129
4.2.	Territoriality	131
4.3.	Fiscal Coherence	133
4.4.	Tax Avoidance and Evasion	135
4.5.	Effective Fiscal Supervision	138
4.6.	Effective Collection of Tax	141
4.7.	Loss of Income	142
4.8.	Administrative Difficulties	143

4.9.	Absence of Compensatory Taxation	143
4.10.	Lack of Reciprocity	146
5.	Summary and Conclusions	148

## Chapter 7

### **Pushing Back Frontiers (Un)charted Territories in the Field of International Tax Law and EU Law** **151**

*Maikel Evers and Arnaud de Graaf*

1.	Introduction	151
2.	Background	152
3.	Abolition of Double Taxation: Meaning of Article 293 EC [Old]	154
4.	Policy Integration and Negative Integration: The Relationship between Them	155
4.1.	Introduction	155
4.2.	Mutual Recognition: Cassis de Dijon	157
4.2.1.	Introduction	157
4.2.2.	Kerckhaert-Morres	158
4.2.3.	Columbus Container Services	159
4.2.4.	Orange European Smallcap Fund	160
4.2.5.	Block	162
4.2.6.	Deutsche Shell	162
4.3.	Interim Conclusion	163
5.	Policy Integration and the Elimination of Double Taxation	163
6.	Negative Integration	165
6.1.	Introduction	165
6.2.	Triangular Cases	166
6.2.1.	Introduction	166
6.2.2.	Triangular Cases: Exercising Allocation of Taxation Powers	168
6.2.2.1.	Purely Intra-EU Triangular Cases	168
6.2.2.2.	Triangular Cases with a Third Country as Source State	170
6.2.2.3.	Possibility of Invoking Neutralizing Effect?	171
6.2.2.4.	Interim Conclusion	173
6.3.	Treaty Shopping	174
6.3.1.	Introduction	174
6.3.2.	Open Skies Rulings	174
6.3.3.	Test Claimants in Class IV of the ACT Group Litigation	175
6.3.4.	Further Considerations	177
6.3.5.	Denial of Right to Invoke EU Freedom in the Case of a Conduit Arrangement	178

## Table of Contents

6.4.	Most-Favoured-Nation Treatment and Access to Treaty Benefits	180
6.4.1.	Introduction	180
6.4.2.	The D, Test Claimants in Class IV of the ACT Group Litigation and Orange European Smallcap Fund Cases	180
6.4.3.	Dutch Tax-Sparing Credit Cases	183
6.4.4.	The KBC Bank Case: Most-Favoured-Nation Treatment for Third Countries under the Parent-Subsidiary Directive?	184
6.5.	Method of Allocating Taxation Powers	188
6.6.	State Aid and the Allocation of Taxation Powers	191
6.6.1.	Introduction	191
6.6.2.	Effect of the State Aid Prohibition in the TFEU	191
6.6.3.	Upholding the State Aid Prohibition	193
6.6.4.	State Aid and the Allocation of Taxation Powers	193
6.6.4.1.	Forms of Establishment and Triangular Cases	194
6.6.4.2.	Limitation on Benefits	195
6.6.4.3.	Most-favoured-nation Treatment	196
6.6.5.	Interim Conclusion	197
7.	Conclusion	197

## Chapter 8

### **Local Authorities and Fiscal Autonomy: State Aid? 201**

*Henk P.A.M. van Arendonk*

1.	Introduction	201
2.	State Aid	202
3.	Local Democracy and Taxation	206
4.	Influence of European Cooperation on Municipalities	208
5.	State Aid: Central Governments versus Local Authorities	209
6.	Local Authorities and State Aid	209
7.	Local Authorities and Fiscal State Aid	211
8.	Case Law in Respect of Local Fiscal Autonomy	213
9.	New Constitutional Relationships with the Netherlands Antilles/Aruba	224
10.	New Constitutional Relationships and Europe	225
11.	Tax and the New Public Bodies of Bonaire, Sint Eustatius and Saba	228
12.	Closing Thoughts	230



**Chapter 9**

**The Future of Fiscal Sovereignty: Some Closing Thoughts** **233**

*Sjaak J.J.M. Jansen*

1.	Introduction	233
2.	General	234
3.	Funding	236
4.	Internal Market	237
5.	Free Movement of Persons and Capital	239
6.	International Tax Law	242
7.	State Aid	242
8.	Role of the European Court of Justice	243
9.	Treaty of Lisbon	245
10.	The Way Forward?	246