MPI Studies in Tax Law and Public Finance

Volume 12

The series MPI Studies in Tax Law and Public Finance focuses on legal and economic research in the field of tax and business law as well as public finance and public economics. Its general purpose is devoted to fundamental academic work on the interaction of the state and its subjects. This includes core work on the law of taxation and on the economic implications of the tax system. Moreover, general features of government action and private activities in different regulatory areas are examined on a legal, economic or interdisciplinary basis. Major issues of national and international taxation like international tax competition or multinational firm structures are discussed as well as related issues like public and corporate governance. Edited by the Max Planck Institute for Tax Law and Public Finance, much of the work published in this series refers to research done and conferences held at this major academic institution.

Isabelle Richelle · Wolfgang Schön ·
Edoardo Traversa
Editors

Abuse of Law in European Taxation

Springer

Editors
Isabelle Richelle
Tax Institute
HEC-University of Liège
Liège, Belgium

Wolfgang Schön
Max Planck Institute for Tax Law
and Public Finance
Munich, Germany

Edoardo Traversa
Faculty of Law and Criminology
University of Louvain
Louvain-la-Neuve, Belgium

ISSN 2196-0011 ISSN 2196-002X (electronic)
MPI Studies in Tax Law and Public Finance
ISBN 978-3-031-87011-8 ISBN 978-3-031-87012-5 (eBook)
https://doi.org/10.1007/978-3-031-87012-5

This Springer imprint is published by the registered company Springer Nature Switzerland AG
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

Preface

In November 2023, the Max Planck Institute for Tax Law and Public Finance, the Université Catholique de Louvain and the Tax Institute of the University of Liège convened a conference at the Palais des Académies in Brussels to discuss a highly controversial topic of European Tax Law: the concept of "abuse of law" in the area of taxation.

Abusive practices and their containment have been a prominent feature in most tax systems for long, but the last decade has seen an unprecedented wave of anti-abuse measures around the world. Part of this movement is due to the global fight against what is called aggressive tax planning, which peaked in the paradigm shift effectuated by the Base Erosion and Profit Shifting (BEPS) Project jointly initiated by the G20 and OECD in 2012. Under EU law, the notion of abuse of law had gained some prominence since the 1990s when the European Court of Justice addressed the issue, e.g. when benefits under tax directives were refused by national tax authorities, and when the justification of unequal treatment under the fundamental freedoms was at stake. Again, the global BEPS movement had a major impact on EU law: A flurry of legislation – ranging from the Anti-Tax Avoidance Directives enacted in 2016 and 2017 to the DAC6 Directive requiring disclosure of tax arrangements, culminating in the all-encompassing Minimum Tax Directive – addressed tax planning strategies by which (corporate) taxpayers try to minimize their tax burden in cross-border situations. This legislative output found its judicial complement in a series of judgments delivered by the European Court of Justice which establish the view that there exists a general principle of law under EU law that EU citizens (in particular taxpayers) cannot rely on EU law to claim benefits in a fraudulent or abusive manner.

As EU tax law stands today, the fight against the abuse of law seems to be omnipresent: as a methodological tool, as a policy goal, as a justification ground in the area of the fundamental freedoms. But does this mean that there exists a uniform concept of abuse of law – and should we try to establish such a homogeneous notion? The goal of this volume is to explore the manifold emanations of tax abuse under European law, to take a closer look at the underlying secondary legislation and the enormous wealth of jurisprudence provided by the European Court of Justice in different contexts.

The editors of this volume are proud and happy that we succeeded in convening a group of contributors whose excellence and expertise is beyond doubt. Leading authors from all over Europe were willing to present and discuss their views on abuse of law in the area of taxation. Starting from foundational issues of methodology and policy, this volume takes a broad perspective, taking stock of existing judicature in areas like customs, indirect taxation and direct taxation, covering both the interpretation and application of tax directives and the impact of the fundamental freedoms. Moreover, recent developments under the BEPS Action Plan and the Minimum Tax Directive, are taken into account. The volume ends with a skeptical view at the attempts to find the "holy grail", i.e. a single concept of tax abuse, behind those different ways and means of application.

The editors would like to thank all contributors for their willingness not only to speak at our conference and to discuss their findings, but also to present their thoughts in writing for this volume. The editors of this book hope that the outcome presented in this volume will be well received by an international audience, giving rise to further debate on the merits of the concept of abuse for fiscal scholarship, legislation, and practice. Last but not least we would like to express our gratitude to Benedikt Folttmann for his diligent work on the publication of the book.

Liège, Belgium — Isabelle Richelle
Munich, Germany — Wolfgang Schön
Louvain-la-Neuve, Belgium — Edoardo Traversa
February 2025

About This Book

This book explores the meaning and the impact of the concept of abuse of law in European taxation. Fighting abusive arrangements has gained prominence along three different dimensions: as a methodological tool to constrain access to tax benefits under EU law, as a ground of justification for disadvantageous treatment of cross-border activities and investment, and as a policy goal underlying recent EU tax legislation.

The contributors to this book — leading academics and practitioners from different European countries — discuss the most burning issues concerning the prohibition of abuse in tax matters. Starting from a general clarification of notions like 'tax avoidance' and 'aggressive tax planning', and informed by a deep-diving comparative analysis of the concept of 'abuse', the authors examine special anti-avoidance rules both in EU legislation on indirect taxes and under the existing EU corporate tax directives. Furthermore, the authors shed a critical light on the effect of European fundamental freedoms on national anti-abuse provisions. Last but not least, the impact of the recently introduced Global Minimum Tax (GloBE) on the operation of anti-abuse rules receives scrutiny. In the end, the book tries to answer whether these different fields of application are informed by a unified notion of fiscal abuse.

Given the worldwide momentum behind the fight against fiscal fraud and tax avoidance, the analytical approach of this volume, bringing together different strands of legislature and jurisprudence, will be of substantial value for the work of both practitioners and scholars in the field of EU taxation.

Contents

Contributors

Philip Baker Field Court Tax Chambers, London, UK

Luc De Broe KU Leuven, Leuven, Belgium

Jesse De Bruyn Cassidy Levy Kent Europe SRL, Brussels, Belgium

Line Hammoud King & Spalding LLP, Brussels, Belgium

Caroline Heber Department of Tax Law, University of Vienna, Vienna, Austria

Georg Kofler Institute for Austrian and International Tax Law, Vienna University of Economics and Business, Vienna, Austria

Adolfo Martín Jiménez Faculty of Law, University of Cádiz, Cádiz, Spain

Yves Melin Cassidy Levy Kent Europe SRL, Brussels, Belgium

Aitor Navarro Max Planck Institute for Tax Law and Public Finance, Department of Business and Tax Law, Munich, Germany

Christine Osterloh-Konrad University of Tübingen, Tübingen, Germany

Fabrizio Pascucci Faculty of Law and Criminology, UCLouvain, Louvain-La-Neuve, Belgium

Isabelle Richelle University of Liège, Tax Institute HEC, Liège, Belgium

Wolfgang Schön Department of Business and Tax Law, Max Planck Institute for Tax Law and Public Finance, Munich, Germany

Edoardo Traversa Faculty of Law and Criminology, UCLouvain, Louvain-La-Neuve, Belgium