# **Table of Contents**

#### Preface / 15

### Keynote Speeches / 17

## H. Onno Ruding

# The European Union, the Internal Market, Euro-area Crisis and Harmonisation of Corporate Taxes / 19

- 1. The euro area and the EU: internal market and corporate taxation / 19
- 2. National differences in corporate tax rates / 21
- 3. Harmonisation of the tax rate vs. the tax base / 22
- 4. France and Germany / 25
- 5. Harmonisation of the tax base (CCCTB) / 26

#### Frans Vanistendael

#### Should Poland Access Euroland? / 28

- 1. Why a contribution on the euro crisis in a book on R&D? / 28
- 2. Two very different objectives of the EU / 29
  - 2.1. The objective of the internal market / 29
  - 2.2. The objective of the Economic and Monetary Union  $\,$  /  $\,$  30
  - 2.3. The difference between the two objectives / 30
- 3. Principles governing the Economic and Monetary Union / 30
  - 3.1. Three government functions in public finance / 30
  - 3.2. The stabilisation function / 31
  - 3.3. The level of government responsible for the stabilisation function in the eurozone / 31
- 4. The legal framework of taxation in the European EMU / 32
  - 4.1. Taxing power in indirect taxation / 32

- 4.2. Taxing power in direct taxation / 33
- 4.3. Impact of the fundamental freedoms on taxing power / 33
- 5. The framework for economic governance in the European EMU / 34
  - 5.1. The existing treaty framework for economic governance / 35
  - 5.2. New procedures for economic governance / 36
  - 5.3. Role of the European Central Bank / 37
- 6. The institutional framework of the European EMU / 39
- 7. The budgetary framework in the European EMU / 40
- 8. Preliminary conclusion / 41
- 9. Solution: federalisation of the stabilisation function / 42
  - 9.1. Transfer of the stabilisation function to the European level / 42
  - 9.2. Indirect budgetary monitoring / 43
  - 9.3. Euro power to table a motion of no confidence in a national parliament / 44
  - 9.4. Emergency powers in the case of financial crisis / 44
- 10. Procedural way to reform / 46
  - 10.1. Reforms within the general framework of the European treaties / 46
  - 10.2. Specific rules in accordance with Chapter 4 TFEU / 47
  - 10.3. Establishment of a specific euro budget authority / 48
- 11. What about Poland? / 49
  - 11.1. The figures / 49
  - 11.2. The rules / 51
  - 11.3. The conclusion / 52

#### Part One

# General Report / 53

#### Adam Zalasiński

# General Report – Tax Aspects of Research and Development within the European Union / 55

- 1. General remarks / 55
- 2. The structure of the R&D tax system in EU Member States / 56
  - 2.1. Research and development activities / 56
  - 2.2. (Tax) Legislative background / 57
    - 2.2.1. Domestic law / 57

- 2.2.2. EU law / 58
- 2.2.3. International law double taxation conventions / **59**
- 2.3. The approach of tax legislation towards R&D activities / 59
  - 2.3.1. R&D-neutral tax legislation / 59
  - 2.3.2. R&D incentives / 60
  - 2.3.3. (Cross-border) R&D disincentives / 61
  - 2.3.4. Rules affecting the scope of R&D tax incentives and R&D tax disincentives "rules of the second degree" / 61
- 3. The dynamic of the R&D tax system in EU Member States / 62
  - 3.1. The actors and their roles / 62
  - 3.2. The continuous development and interaction of the elements of the system / 63
- 4. Main conclusions of the thematic reports / 64
  - 4.1. EU Control of State Aid and R&D Tax Incentives / 64
  - 4.2. R&D Mobility and EU Law Application of the Fundamental Freedoms / **67**
  - 4.3. EU Secondary Tax Legislation and R&D Mobility in the EU Application of the Interest and Royalties Directive / 71
  - 4.4. Transfer Pricing Aspects of Transfers of Intellectual Property / 74

#### Part Two

### EU Control of State Aid and R&D Tax Incetives / 77

#### Anna Nykiel-Mateo

# State Aid Limitations on Fiscal Support to R&D&I $\,$ / 79

- 1. General remarks / 79
- 2. Qualification of fiscal measures as state aid / 79
  - 2.1. Advantage / **80**
  - 2.2. Granted by the state or through state resources / 80
  - 2.3. Selectivity / 81
  - 2.4. Distortion of competition and effect on trade / 83
- 3. The GBER / 83
- 4. The R&D&I Framework the balancing test / 84

### Raymond H.C. Luja

# R&D, Innovation and Tax Incentives: Do They Have a Joint Future under State Aid Rules? / 89

- 1. Introduction / 89
- 2. Does the CCCTB allow for R&D incentives? / 90
  - 2.1. Can R&D benefits be general? / 90
  - 2.2. Are national R&D incentives blocked? / 90
- 3. The GBER / 92
- 4. Should R&D incentives be granted regardless of legal form? / 94
- 5. R&D incentives between state aid and fundamental freedoms / 95
- 6. Conclusion / 97

#### Part Three

# R&D Mobility and EU Law – Application of the Fundamental Freedoms / 99

#### Adam Zalasiński

# General Prohibition of Restrictions on Cross-border R&D Activities and IP Mobility – Application of the TFEU Freedoms $\,/\,101$

- 1. General remarks / 101
- 2. Basic concepts of the internal market / 102
  - 2.1. The concept of discrimination  $\ /\ 102$
  - 2.2. The concept of restriction on free movement / 103
- Prohibition of tax discrimination/restriction on cross-border IP development and migration
  - examples of the ECJ's case law / 110
  - 3.1. Case C-254/97 Société Baxter (covert) discrimination infringing the right of establishment / **110**
  - 3.2. Case C-39/04 Laboratoires Fournier SA restriction on the free movement of services / 111
  - 3.3. Case C-10/10 Commission v. Austria restriction on the free movement of capital / 112
- 4. Conclusion / 115

#### Frans Vanistendael

# R&D Mobility in the EU and the Fundamental Freedoms / 116

- 1. Introduction: scope and structure of the topic / 116
- 2. Transfer of intangibles in international taxation / 117

- 3. EU Merger Directive: transfer of entities and transfer of seat / 118
- 4. Transfer of residence and exit tax / 121
  - 4.1. Daily Mail case / 121
  - 4.2. Lasteyrie du Saillant and N. cases / 124
  - 4.3. National Grid Indus (NGI) case / 126
  - 4.4. Conclusion on transfer of residence and exit tax / 129
- 5. Some critical remarks: comparing EU and international tax principles / 130
- 6. Conclusion: how should the taxing power be allocated? / 133

#### Philip Baker

### CFC Aspects of Intellectual Property / 135

- Controlled foreign company rules on passive income from royalties / 135
- 2. The impact of CFC rules / 135
- 3. Problems for research and development stemming from CFC rules / 138
- 4. European Court case law on CFC rules / 140
- 5. Problems for research and development from CFC rules in the European Union / 142

#### Part Four

# EU Secondary Tax Legislation and R&D Mobility in the EU – Application of the Interest and Royalties Directive / 145

# Mauritz von Einem

# The EU Interest and Royalties Directive: Current Issues / 147

- 1. Introduction / 147
- 2. Overview of the current Interest and Royalties

Directive / 149

- 2.1. Personal scope / 149
- 2.2. Substantive scope / 151
- 2.3. Legal consequences / 153
- 2.4. Status of implementation / 153
- 3. ECJ case law / 155
  - 3.1. Scheuten Solar Technology case / 155
  - 3.2. Other judgments / 157
  - 3.3. Conclusion / 158

- 4. Deficiencies of the current Directive / 158
  - 4.1. Subject-to-tax requirement / 158
  - 4.2. Other aspects / 161
    - 4.2.1. Associated companies / 161
    - 4.2.2. Internal payments / 161
- 5. Commission Proposal / 162
- 6. Suggestions and outlook / 164

#### Part Five

### Transfer Pricing Aspects of Transfers of Intellectual Property / 169

#### Giammarco Cottani

## **Transfer Pricing Aspects of Business Restructurings**

- an International Perspective / 171
  - 1. Introduction / 171
    - 1.1. Importance / 171
  - 2. Types of business restructurings / 173
    - 2.1. Common tax consequences arising from business restructurings / 178
      - 2.1.1. Transfer of functions and risks arising from business restructurings / 183
      - 2.1.2. Transfer of intangibles arising from business restructurings / 183
      - 2.1.3. Transfer of going concern / 184
      - 2.1.4. Termination or substantial renegotiation of existing arrangements / 186
  - 3. Operational considerations / 187
  - 4. Conclusion / 188

## Aneta Błażejewska-Gaczyńska

# Business Restructuring – Practical Application of Transfer Pricing Rules: a Case Study / 189

- 1. Introduction / 189
- 2. Business restructuring definitions and practice / 191
  - 2.1. Business restructuring definition / 191
  - 2.2. Business restructuring examples / 191
  - 2.3. Business restructurings key points / 194
    - 2.3.1. Special considerations for risks allocation / 195

- 2.3.1.1. Contractual terms / 195
- 2.3.1.2. Significance of risks allocated examples / **196**
- 2.3.1.3. Control over risks allocated / 198
- 2.3.2. Compensation for restructuring / 199
  - 2.3.2.1. Business reasons for the restructuring/ alternative options realistically available to the parties / 202
- 2.3.3. Remuneration of post-restructuring transactions / 204
- 2.3.4. Recognition of the actual transactions undertaken / 206

#### Giammarco Cottani

### Transfer Pricing Aspects of Transfers of Intellectual Property / 208

- 1. Overview / 208
  - 1.2. Business restructurings and domestic anti-abuse rules / 209
- 2. Tax effects of cross-border business restructurings: overview / 210
  - 2.1. Transfer of risks and functions / 211
  - 2.2. Transfer of intangible assets / 212
  - 2.3. Transfer of going concern / 214
  - 2.4. Termination or substantial renegotiation of existing arrangements / 216
  - 2.5. Recognition of the actual transactions undertaken / 217
  - 2.6. Permanent establishment issues / 217
- 3. Change of a full-fledged distributor into commissionaire or low-risk distributor / 219
  - 3.1. Change of manufacturing activities / 222
  - 3.2. Centralisation of intangible property rights and research and development activities in a specific IP company / 224
- 4. Relationship to EU law  $\,/\,$  227
- 5. Summary and conclusions / 227

#### Anuschka Bakker

# Intangibles: a Legal, Accounting and Tax Perspective / 231

- 1. Introduction / 231
- 2. Setting the scene / 233
- 3. Definition of intangibles / 235

- 3.1. Value drivers / 236
- 3.2. Legal definition / 236
- 3.3. Tax / 238
  - 3.3.1. Article 12 OECD Model Convention / 238
  - 3.3.2. Transfer pricing purposes / 239
  - 3.3.3. Various definitions used by countries / 242
- 3.4. Valuation / 244
- 3.5. Accounting / 246
- 4. Valuation / 247
  - 4.1. TP methods / 247
  - 4.2. Financial valuation methods / 253
- 5. Conclusion / 255

#### Monika Laskowska

# Transfer of Profit Generators Aiming to Exploit Location Advantages in the Area of Research and Development / 256

- 1. Introduction / 256
- 2. Location savings / 258
- 3. Location specific advantages (LSAs) and location rent / 259
- 4. Existence and quantification of LSAs / 263
- 5. Bargaining position/Attribution of location rent / 265
- 6. Computation / 266
- 7. R&D in Poland / 268
- 8. Conclusion / 269

#### Part Six

# Comparative Aspects of Taxation of Research and Development / 271

Dominik Mączyński, Ryszard Sowiński

# R&D Incentives under Polish Tax Law / 273

- 1. Introduction / 273
- 2. Terminology / 273
- 3. Income tax incentives supporting R&D activity  $\,/\,\,276$ 
  - 3.1. Preferential treatment with respect to income costs / 276
  - 3.2. Depreciation based on preferential principles / 277
  - 3.3. Deduction of R&D costs from the taxable base / 278
  - 3.4. Exemption from tax of a part of income assigned for statutory activity / 280

- 4. Other tax R&D incentives / 280
  - 4.1. VAT / 280
  - 4.2. Preferences within the scope of land tax / 283
  - 4.3. Preferences within the scope of stamp duty / 283
- 5. Summary / 283

#### Ewa Bienkowska

#### R&D Incentives in Selected EU Member States / 287

- 1. Introduction / 287
- 2. Selected R&D schemes in the European Union / 293
  - 2.1. The Netherlands / 293
    - 2.1.1. R&D tax incentives in the Netherlands / 293
    - 2.1.2. Innovation box in the Netherlands / 294
    - 2.1.3. Amendments to the Netherlands R&D tax system / 295
  - 2.2. The United Kingdom / 295
    - 2.2.1. R&D tax incentives in the United Kingdom / 295
    - 2.2.2. UK patent box / 297
    - 2.2.3. Amendments to the UK R&D tax system / 298
  - 2.3. Spain / 299
    - 2.3.1. R&D tax incentives in Spain / 299
    - 2.3.2. Spanish patent box / 300
- 3. R&D tax incentives and the way forward to enhance the EU innovativeness / 301
  - 3.1. Current state of R&D taxation in the European Union / **301**
  - 3.2. Recommendations of R&D tax treatment in the European Union / 304
- 4. Conclusion / 305

List of Authors / 309

Centre of Tax Documentation and Studies / 315