Marjaana Helminen

EU TAX LAW

Direct Taxation

2022 EDITION

IBFD

EU Tax Law - Direct Taxation 2022

Why this book?

This book is a handy reference tool for tax practitioners, judiciaries, tax administrations and university students alike. Its structure allows quick and easy access to essential information and facilitates a better understanding of the direct tax issues of EU tax law.

EU tax law substantially impacts the domestic tax laws of the EU Member States and the way in which those laws should be interpreted and applied. The effect of EU tax law on national legislation is becoming increasingly complex. Today, anyone working with or interested in tax law or tax planning is confronted with EU tax law issues.

The 2022 edition of EU Tax Law – Direct Taxation provides a clear picture of the EU law norms that are relevant from the perspective of direct taxes. It explains how these norms are, and should be, interpreted and how they affect national tax laws and the tax treatment in EU Member States. The book describes the legal remedies available against tax treatment that is in conflict with EU law.

The study begins with a comprehensive overview of the basic principles and concepts of EU tax law and relevant articles of the Treaty on the Functioning of the European Union, analysing them in the light of direct tax case law. A discussion follows covering relevant EU directives and recommendations and other soft law material on direct taxes. Reference is made to all relevant judgments of the EU Court on direct taxes. The book includes a chapter on the tax treatment of the different EU entity forms and the future of corporate taxation. A separate chapter is dedicated to the EU law issues related to transfer pricing and to the EU law norms on administrative cooperation in tax matters. An extensive bibliography is included that directs the reader to further material on the topic.Title: EU VAT Compass 2022/2023

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Visitors' address:
Rietlandpark 301
1019 DW Amsterdam
The Netherlands

Postal address:
P.O. Box 20237
1000 HE Amsterdam
The Netherlands

Telephone: 31-20-554 0100
Email: info@ibfd.org
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General Outline

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Preface

I got hooked by EU tax law in the early 1990s when I was writing my doctoral thesis. I have had a great passion for teaching and researching EU tax law ever since. Today, no one who is interested in, or working with, tax law or tax planning can avoid dealing with EU tax law issues. EU tax law has a huge impact on the domestic tax laws of the EU Member States and on the way in which the domestic tax laws and tax treaties of the Member States must be interpreted and applied.

There is a substantial body of literature on the different EU tax law issues. However, in my professional endeavours, I missed having a clear and comprehensive work on EU tax law available. There was a need for a reader-friendly, complete presentation of the direct tax law issues of EU tax law. As a professor of international tax law, I felt that it was my duty to remedy this defect. As a consequence, the first edition of this book was published in 2009. The book has been written keeping in mind the needs of practitioners, judiciary, tax administrations, scholars and university students. It provides a complete, in-depth yet easily manageable presentation of the direct tax law issues of EU law. The layout, headlining, figures, tables, bibliography and index are designed to allow fast and easy access to the information needed and to facilitate understanding and learning.

EU tax law develops rapidly, especially because of the growing number of judgments from the EU Court on direct tax matters. Therefore, regular updates of the book are necessary. The most recent judgments have clarified many remaining, unclear issues concerning the impact of EU law on direct taxation. This 2022 edition takes into account all judgments of the EU Court on direct tax matters issued by 8 June 2022. These include, for example, *Viva Telecom Bulgaria* (C-257/20) clarifying the concepts of interest and dividend of the Interest-Royalty Directive and the Parent-Subsidiary Directive in regard to notional interest payments, *A SCPI* (C-342/20) concerning the comparability of collective investment undertakings constituted under statute or in accordance with contract law and *BJ* (C-241/20) dealing with the free movement of workers and the relevance of the fact that an employee does not have substantial income in its state of residence.

Proposals for substantial new legislation concerning corporate tax law were issued in late 2021 and early 2022. These include the Proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU, COM(2021) 565 final, 22 December 2021, the Proposal for a Council Directive on laying down rules on a debt-equity bias reduction allowance and on limiting the deductibility of interest for corporate income tax purposes, COM (2022) 216 final 2022/0154 (CNS), 11 May 2022 and the Proposal for a Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union, COM (2021) 823 final, 22 December 2021. Additionally, Directive (EU) 2021/2101 of the European Parliament and of the Council of 24 November 2021 amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches was adopted.

Turku, 8 June 2022

Marjaana Helminen

Chapter 1

EU Tax Law as Part of the Legal System

1.1. Concepts

European Union

The European Union (EU) is the consequence of the European integration development that started in the 1950s after the Second World War.[1] The European Union in its present form was created by the Treaty on European Union (TEU), i.e. the Treaty of Maastricht, signed in 1992 and entered into force in 1993.[2]

The European Union originally consisted of three pillars or sectors of cooperation. These were (1) the European Communities, (2) common foreign and security policy, and, (3) police cooperation and judicial cooperation in criminal matters.

The most relevant cooperation from the perspective of tax law has been the cooperation based on the European Communities. The European Communities were formed by the European Coal and Steel Community (ECSC), established by the Treaty of Paris signed in 1951, the European (Economic) Community (EEC), and the European Atomic Energy Community (Euratom) established by the Treaty of Rome signed in 1957. By the Lisbon Treaty, which entered into force on 1 December 2009, the European Communities were replaced and succeeded by the European Union.[3]

TFEU

The Treaty on the Functioning of the European Union (TFEU; originally the EC Treaty) has the most relevance with respect to taxation. The TFEU is based on the Treaty establishing the European Economic Community signed in 1957 in Rome, as replaced by the Treaty of Maastricht signed in 1992 and amended by the Treaty of Amsterdam signed in 1997, the Treaty

1. *See* e.g. Craig & de Búrca 2011, pp. 1-30.
2. The Treaty on European Union has been amended by the Treaty of Amsterdam, signed in 1997 and entered into force in 1999, the Treaty of Nice, signed in 2001 and entered into force in 2003 and the Treaty of Lisbon, signed on 13 December 2007 and entered into force on 1 December 2009. The abbreviation "TEU" is used in this book to refer to the Treaty on European Union in the form as amended by the Treaty of Lisbon.
3. *See* art. 1(3) TEU.

of Nice signed in 2001 and the Treaty of Lisbon signed in 2007. The TFEU entered into force on 1 December 2009.

EU tax law

EU law consists of the founding treaties (the TEU and the TFEU) and the legal provisions based on the legislative powers delegated to the European Union by the founding treaties. The part of the EU law provisions that may have an effect on taxes is referred to as EU tax law. After the entry into force of the Lisbon Treaty, the European Convention on Human Rights also became a part of EU law.[4]

Territorial scope

EU tax law provisions limit the sovereign taxing rights of the EU Member States in the area of direct taxation chiefly in situations in which the tax object or the tax subject has a connection to two or more Member States. However, for example, the free movement of capital principle of article 63 of the TFEU is relevant also in situations in which the other state is a non-Member State.

Besides certain exceptions, EU law provisions are relevant in relation to the whole territory of the European Union.[5] The territorial scope of application of the EU law provisions in relation to each Member State depends on each state's own accession agreement. Article 355 defines how the founding treaties apply to certain associated and dependent territories of the EU Member States.[6]

Literature

There is substantial literature on EU tax law published in different languages of the Member States. The most comprehensive work in English is Terra and

4. Art. 6(2) TEU and the Protocol to the Treaty of Lisbon on Article 6(2) of the Treaty on the European Union, on the accession to the European Convention on Human Rights and basic freedoms. *See* e.g. the judgment of the European Court of Human Rights in cases *Jussila v. Finland* (73053/01), *Hentrich v. France* (13616/88), *Burden and Burden v. United Kingdom* (13378/05), *Jokela v. Finland* (28856/95) and e.g. Kofler, Maduro & Pistone 2011, Greggi 2007, pp. 610-615, Baker 2007, pp. 587-588, Baker 2008, pp. 315-316, Baker 2008a, pp. 643-646, Baker 2010, pp. 259-261, Baker 2012, pp. 584-586 and Craig & de Búrca 2011, pp. 362-406 about questions concerning human rights and taxes in the European Union.
5. *See* art. 52 TEU and arts. 349 and 355 TFEU.
6. About the EU law provisions that apply to different territories, *see also* e.g. Pancham, Fibbe & Ruiter 2007, pp. 164-175 and Smit 2011, pp. 40-61 and about the territorial scope of EU law, *see* Kavelaars 2007, pp. 268-273.

Wattel's *European Tax Law* (2019). Certain international tax periodicals, such as *EC Tax Review* published by Kluwer, *European Taxation* published by IBFD and *EC Tax Journal* published by Key Haven Publications, specialize in issues concerning EU tax law.

1.2. Relation to other legislation

1.2.1. Competences

Sovereignty

Despite the European Union and the Commission (the executive branch of the European Union), the Member States have broad sovereignty in the area of direct taxation.[7] The organs of the European Union do not have their own taxing powers with regard to direct taxes.[8] However, both the European Union and the Member States can make decisions concerning tax legislation.

Each Member State executes its own taxing powers by domestic tax laws. Each Member State decides which are the criteria that determine the scope of direct taxation in the state concerned. The Member States may, for example, choose to apply the territoriality principle for the purposes of income taxation and to tax non-residents only on the income from sources in the country concerned.[9] The Member States, however, must exercise their taxing powers consistently with their obligations under the founding treaties and the legislative provisions given on the basis of such treaties.[10]

7. *See* arts. 3-6 TFEU and art. 5 TEU for the competence of the European Union. *See also* e.g. Bizioli 2008, pp. 133-140 and Isenbaert 2009, pp. 264-278.

8. *See*, however, art. 12 Protocol on the privileges and immunities of the European Union, [2016] OJ C 202/266, according to which officials and servants of the European Union are liable to a tax for the benefit of the European Union on salaries, wages and emoluments paid to them by the European Union. The income that falls under the Protocol must not even indirectly have an impact on the amount of national taxes. For interpretation of the Protocol, *see Humblet* (6/60), *Bourges-Maunoury and Heintz* (C-558/10), *Gistö* (C-270/10) and *Pazdziej* (C-349/14). *See also* Helminen 2010a, pp. 541-544, KHO 2010/1295 and KHO 2011/3121 (88). *See* Kofler (2019), ch. 23 for the EU taxation system of its staff.

9. *See* e.g. *Schumacker* (C-279/93), *Royal Bank of Scotland* (C-311/97), *Futura* (C-250/95) and *Marks & Spencer* (C-446/03), para. 39.

10. *See Commission v. France* (*avoir fiscal*) (270/83), para. 24, *Schumacker* (C-279/93), para. 21, *Wielockx* (C-80/94), para. 16, *Asscher* (C-107/94), para. 36, *Futura* (C-250/95), para. 19, *Safir* (C-118/96), para. 21, *ICI* (C-264/96), para. 19, *Royal Bank of Scotland* (C-311/97), para. 19, *Gschwind* (C-391/97), para. 20, *Eurowings* (C-294/97), para. 32, *Vestergaard* (C-55/98), para. 15, *Baars* (C-251/98), para. 17, *Verkooijen* (C-35/98), para. 32,

Principle of conferral

In accordance with articles 4 and 5 of the TEU, the European Union shall act only within the limits of the competences conferred upon it by the Member States in the founding treaties to attain the objectives set out therein. All other competences belong to the Member States. This scope of competence is in accordance with the legality principle and the principle of legal certainty.

The founding treaties do not expressly confer competence to the European Union regarding direct taxes. The general competence of the European Union based on the founding treaties, however, is broad. In accordance with article 352 of the TFEU, the Council can take any action that is necessary for the attainment of the EU objectives in the functioning of the common market. This general competence does not exclude taxation.

Division of competence

Strictly interpreted, the lack of express EU competence means that direct taxation falls within the competence of the Member States. However, because of the general competence of the European Union, the Union also has a certain competence. In this regard, direct taxation falls under the scope of divided or shared competence.[11] The competence of the European Union, however, is fairly limited. Positive harmonization of direct taxation in the Member States is possible, provided that it affects the realization of the internal market that the harmonization actions are made unanimously and that the subsidiarity principle is followed.[12]

Subsidiarity

In accordance with the subsidiarity principle stipulated in article 5 of the TEU, in areas that do not fall within its exclusive competence, the European Union shall act only if and in so far as the objectives of the proposed action cannot

AMID (C-141/99), para. 19, joined cases *Metallgesellschaft* (C-397/98 and C-410/98), para. 37, *Danner* (C-136/00), para. 28, *X and Y* (C-436/00), para. 32, *Lankhorst-Hohorst* (C-324/00), para. 26, *De Groot* (C-385/00), para. 75, *Skandia and Ramstedt* (C-422/01), para. 25, *Lindman* (C-42/02), para. 18, *Commission v. France* (fixed levy) (C-334/02), para. 21, *de Lasteyrie du Saillant* (C-9/02), para. 44, *Turpeinen* (C-520/04), para. 11, *Schempp* (C-403/03), *Manninen* (C-319/02), para. 19, *Oy AA* (C-231/05), para. 16, *Meilicke* (C-292/04), *Marks & Spencer* (C-446/03), para. 29, *Cadbury Schweppes* (C-196/04), para. 40 and *Test Claimants in Class IV of the ACT Group Litigation* (C-374/04), para. 36. *See also* e.g. Weber 2006, pp. 585-616.

11. *See also* art. 2(2) TFEU and the Protocol of the Treaty of Lisbon on the exercising of shared competence.

12. *See also* Pistone 2002, p. 68, and an in-depth analysis on the competence of the European Union in the area of direct taxation in Kofler 2020, pp. 11-50.

be sufficiently achieved by the Member States but can rather, by reason of the scale or effects of the proposed action, be better achieved at EU level.[13]

EU tax law provisions direct the domestic tax laws of the Member States only to the extent that it is necessary for the realization and the functioning of the internal market.[14] The purpose of the founding treaties is not to totally harmonize the tax laws of the Member States.

Proportionality

In accordance with the proportionality principle stipulated in article 5 of the TEU, the actions of the European Union must not go beyond what is necessary for the attainment of the objectives of the founding treaties. The measures used and the objectives pursued must be in the right proportion to each other.[15]

The measures taken must be appropriate for the attainment of the objective, must be necessary because a less restrictive measure is not available and must be sufficient for the attainment of the objective.[16]

Flexibility

Even though EU-wide harmonization of direct taxes requires unanimous decision-making by the Member States, certain Member States may enter into tighter cooperation in accordance with the flexibility principle. This alternative includes differentiated or flexible integration; for example, by means of bilateral tax treaties that are in accordance with EU law.

1.2.2. Separateness and interaction

Legal systems of tax law

Each EU Member State has its own national tax system. EU tax law, the tax treaties concluded by each Member State and the national tax laws of

13. The institutions of the European Union apply the principle of subsidiarity as laid down in the Protocol of the Lisbon Treaty on the application of the principles of subsidiarity and proportionality. National parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.
14. Arts. 3-6 TFEU and art. 5 TEU.
15. *See* e.g. *Fromançais* (66/82) and *Fédéchar* (8/55).
16. The institutions of the European Union must apply the principle of proportionality as laid down in the Protocol to the Lisbon Treaty on the application of the principles of subsidiarity and proportionality. *See* e.g. Freyer 2017, pp. 384-392 about the proportionality principle under EU law.

each Member State are parts of the national tax laws of the Member States. In accordance with the principle of autonomy, EU tax law, tax treaties and national tax law of each Member State are separate legal systems belonging to the national legal system of the Member State concerned. These different parts of tax law, however, are in a strong interaction with each other. For example, EU law has a substantial impact on the national tax laws of the Member States.

No EU tax

At present, the EU does not use direct taxes for its own recourse collecting purposes. There is no general EU-level income tax[17] and the income taxes levied in the Member States are based on the national tax provisions of each Member State's own domestic legislation. The tax revenue from the income taxes levied by the Member States goes directly to the Member State concerned or to a local authority thereof. The European Union does not benefit directly from the tax revenue.[18]

Conflicts

EU tax law, the national tax laws of the Member States and the tax treaties concluded by the Member States each has a language, concepts and provisions of its own. The provisions of EU tax law, the national tax laws and the tax treaties may therefore conflict which each other. The relationship and the primacy order among the different segments of tax law must be determined in order to determine the tax consequences in a cross-border situation.

1.2.3. The primacy of EU law

Founding treaties

Unlike indirect taxes, the TEU and TFEU (the founding treaties) do not mention direct taxes. The only express reference to direct taxes was included

17. *See*, however, art. 12 Protocol on the privileges and immunities of the European Union, [2016] OJ C 202/266, according to which officials and servants of the European Union are liable to a tax for the benefit of the European Union on salaries, wages and emoluments paid to them by the European Union. The income that falls under the Protocol must not even indirectly have an impact on the amount of national taxes. For interpretation of the Protocol, *see Humblet* (6/60), *Bourges-Maunoury and Heintz* (C-558/10), *Gistö* (C-270/10) and *Pazdziej* (C-349/14). *See also* Helminen 2010a, pp. 541-544, KHO 2010/1295 and KHO 2011/3121 (88). *See* Kofler (2019), ch. 23 for the EU taxation system of its staff.
18. About the need and the possibilities for an EU tax, *see* e.g. Plasschaert 2004, pp. 470-479 and Viherkenttä & Scherleitner 2022, pp. 293-302.

in article 293 of the EC Treaty concerning the right of the Member States to conclude tax treaties in order to avoid double taxation. Such an express reference is no longer included in the TEU or the TFEU in the form as amended by the Lisbon Treaty. Both the TEU and the TFEU, however, apply to direct taxes despite the lack of an express reference.[19]

Case law

No express provision exists concerning the interrelationship between EU law and the national laws of the Member States. Based on the judgments given by the Court of the European Union (the EU Court),[20] however, it is clear that EU law takes precedence over national laws. The primacy of EU law applies both in relation to the founding treaties and the EU directives. Even though direct taxation falls under the purview of the Member States, the states must follow the EU law rules and principles when exercising this power.[21]

EU law norms override national law provisions that are in conflict with EU law, regardless of the status or the age of the national law provision. EU law norms take precedence also in the case of a conflict between an EU law provision and a national constitutional provision.[22] Because of the primacy of EU law, the Member States must not enact legislation or conclude tax treaties, nor apply existing legislation or tax treaties in conflict with EU law. Domestic laws and tax treaties of the Member States must be applied and interpreted in accordance with EU law.

19. *See also* Kemmeren 2008b, pp. 156-158.
20. E.g. *Filipiak* (C-314/08), paras. 81-85, *Simmenthal* (106/77) and *Costa v. ENEL* (6/64).
21. *See Avoir fiscal* (270/83), para. 24, *Schumacker* (C-279/93), para. 21, *Wielockx* (C-80/94), para. 16, *Asscher* (C-107/94), para. 36, *Futura* (C-250/95), para. 19, *Safir* (C-118/96), para. 21, *ICI* (C-264/96), para. 19, *Royal Bank of Scotland* (C-311/97), para. 19, *Gschwind* (C-391/97), para. 20, *Eurowings* (C-294/97), para. 32, *Vestergaard* (C-55/98), para. 15, *Baars* (C-251/98), para. 17, *Verkooijen* (C-35/98), para. 32, *AMID* (C-141/99), para. 19, joined cases *Metallgesellschaft* (C-397/98 and C-410/98), para. 37, *Danner* (C-136/00), para. 28, *X and Y* (C-436/00), para. 32, *Lankhorst-Hohorst* (C-324/00), para. 26, *De Groot* (C-385/00), para. 75, *Skandia and Ramstedt* (C-422/01), para. 25, *Lindman* (C-42/02), para. 18, *Commission v. France* (fixed levy) (C-334/02), para. 21, *de Lasteyrie du Saillant* (C-9/02), para. 44, *Turpeinen* (C-520/04), para. 11, *Schempp* (C-403/03), *Manninen* (C-319/02), para. 19, *Oy AA* (C-231/05), para. 16, *Meilicke* (C-292/04), *Marks & Spencer* (C-446/03), para. 29, *Cadbury Schweppes* (C-196/04), para. 40 and *Test Claimants in Class IV of the ACT Group Litigation* (C-374/04), para. 36.
22. *See* e.g. *Filipiak* (C-314/08), paras. 81-85. *See also* e.g. Szudoczky 2020, pp. 93-118 about the relationship between EU law and national law.

Conflict must be abolished

The domestic laws and tax treaties of the Member States may include provisions that are in conflict with EU law. Once the conflict has been discovered, these provisions must be amended or abolished in order to comply with EU law. For reasons of legal certainty, the conflicting provisions must be amended or abolished even though the tax authorities of the state concerned would not apply them in practice.[23]

Loyalty

In accordance with the loyalty principle (or principle of sincere cooperation) stipulated in article 4 of the TEU, the Member States must take all necessary measures in order to comply with their EU law obligations (positive Union loyalty). The Member States must also refrain from any measures that endanger the realization of the objectives of the European Union (negative Union loyalty).[24] The loyalty obligation also binds, in addition to the legislator, the tax authorities and the courts of the Member States.[25]

Effectiveness

Effectiveness or the *effet utile* principle has a close connection to the loyalty principle. The Member States must provide for the effective realization of EU law in their legislation, administration and jurisdiction. The Member States must provide for effective legal remedies for the purposes of the realization of the rights based on EU law before the tax authorities and the courts. They must give full force and effect to EU law as interpreted in the decisions of the EU Court.[26]

Assimilation or equivalence

The assimilation, or equivalence, principle obliges the Member States to use as efficient measures for the execution of their EU law obligations as they do for the execution of national provisions.[27] It must not be more complicated to appeal to EU law than it is to appeal to national laws.

23. *See* e.g. *Commission v. Italy* (C-358/98), paras. 16 and 17, *Commission v. France* (C-160/99), para. 22 and *Commission v. Belgium* (C-522/04), para. 70.
24. *See* e.g. *Simmenthal* (106/77), paras. 16 and 21 and *Factortame* (C-213/89), para. 19.
25. *See also* e.g. van Thiel 2009, pp. 292-299 and Wittock 2014, pp. 171-188 about the loyalty principle in tax matters.
26. *Simmenthal* (106/77), *Heylens* (222/86), *Borelli* (C-97/91), *Kühne and Heitz* (C-453/00), *Kapferer* (C-234/04) and *Pelati d.o.o.* (C-603/10), paras. 23 and 24. *See also* e.g. van Thiel 2009, pp. 299-301 about the effectiveness principle.
27. *See* e.g. *Kapferer* (C-234/04), *Meilicke* (C-262/09) and *Pelati d.o.o.* (C-603/10), para. 23. *See also* e.g. van Thiel 2009, pp. 301-305.

Primacy and direct effect

The primacy and direct application of the EU law provisions by the domestic authorities and courts have a close connection to the efficiency and the loyalty principles.[28] The EU law provisions and principles must be applied ex officio, even if the taxpayer would not refer to them.[29]

1.2.4. Tax consequences

More lenient tax treatment

The main purpose of the EU tax law norms is to abolish tax obstacles within the internal market. Therefore, in relation to direct taxes, the precedence of EU law has traditionally meant that EU law takes precedence over the domestic law or tax treaty provisions when EU law leads to more lenient tax consequences for the taxpayer.

The domestic law or tax treaty norms on direct taxation that mean more lenient tax consequences to the taxpayer than EU law requires have traditionally not been in conflict with EU law. EU tax law, for example, does not require a minimum corporate tax, i.e. that national corporate taxes exceed a certain level.[30] Except for certain exceptions, the Member States have the right to choose not to levy certain direct taxes, provided that the tax treatment does not amount to selective state aid forbidden by the TFEU.[31]

Taxing obligation

Despite the primary purpose of the EU founding treaties to abolish obstacles within the internal market, the principle of the most lenient provision is not without exception. The number of such EU tax law provisions that require taxation irrespective of a possibly more lenient domestic law or tax treaty provision have increased. The legitimacy of such EU tax law provisions may be based, for example, on the assumption that tax avoidance is harmless to the proper functioning of the internal market.

28. *Costa v. ENEL* (6/64) and *Van Gend & Loos* (26/62).
29. *Van Schijndel* (C-431/93).
30. Unlike in the case of direct taxes, the principle of the most lenient provision cannot be followed in the case of indirect taxes that are subject to broader harmonization than direct taxes.
31. About state aid, *see* sec. 1.6.2.; for the limits of non-taxation, *see* e.g. Sullivan 2009, pp. 189-198.

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