



National Tax Autonomy and the European Union

Editor: **Raymond Luja**

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Why this book?

This book contains a selection of contributions presented at the 17th Conference of the Group for Research on European and International Taxation entitled “National (Tax) Autonomy and the European Union: Revival or Demise?”. It was held in Maastricht, the Netherlands on 5 and 6 October 2023.

The future of national tax autonomy is a recurring issue, which is at the heart of choosing the way forward for the European Union (EU). While in direct taxation taxing rights have long been retained by Member States to the extent compatible with the EU’s fundamental freedoms, the unanimity requirement as part of setting new EU tax directives has long been the subject of debate. In this volume, we look into what is left of national tax autonomy in an EU context and how the interaction between designing European (tax) directives and national prerogatives with respect to tax law can be improved.

This volume starts by setting the scene with a discussion of the future of national tax autonomy and how it balances with EU interests from a Member State and a European perspective. We first focus on the legislative procedures and (a potential deficit in) democratic representation in the context of EU tax legislation and then look at the tension between national competence and the discipline of the EU’s internal market. The second part further addresses issues of national tax competence and (legislative) autonomy. The final part concentrates on competition law and tax autonomy, with a focus on State aid and foreign subsidies in particular.

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Preface

This book contains a selection of contributions presented at the 17th Group for Research on European and International Taxation (GREIT) Conference “National (Tax) Autonomy and the European Union: Revival or Demise?”, held in Maastricht, the Netherlands on 5 and 6 October 2023.

The future of national tax autonomy is a recurring issue, which is at the heart of choosing the way forward for the European Union (EU). While in direct taxation taxing rights have long been retained by Member States to the extent compatible with the EU’s fundamental freedoms, the unanimity requirement as part of setting new EU tax directives has long been the subject of debate. In this volume, we will look into what is left of national tax autonomy in an EU context and how the interaction between designing European (tax) directives and national prerogatives with respect to setting tax laws can be improved.

National taxing powers reflect the various roles of taxation: as a means of raising revenue, as a redistributive instrument and as an instrument of economic and social policy. All reasons that led the EU’s founding treaties to reserve most taxing powers to the Member States as still reflected in the need for unanimous decision-making in direct taxation. Whether the EU will be able to move away from unanimity in the future will probably depend on how powers of government and economic and social responsibilities will be divided between the EU and its Member States as taxation does not stand by itself, but is purpose-based. That said, this larger context goes beyond the current state of national tax prerogatives and their delicate balancing with EU legislative initiatives and the Court of Justice’s EU case law, which will be at the centre of this book.

We are grateful to the entire GREIT Board for inviting Maastricht University’s Centre for Taxation (MCT) to host the 2023 Conference. In particular, we thank Cécile Brokelind, Ana Paula Dourado and Pasquale Pistone for their willingness to act as peer reviewers for this volume and as panel chairs.

The editor would like to thank all authors for their contribution to this volume and their valued presentations at the conference. This volume starts with two contributions that set the scene from a Member State perspective and a European perspective, by Sigrid Hemels and Richard Lyal. Next, it will present the contributions from the general panels on national competences and autonomy in the order presented at the conference, i.e. by

Joachim Englisch, Carolin Richrath, Caroline Heber, Matthias Valta and Jasper Korving. The last part will include the contributions of the special panel on competition law and autonomy, presented by Rita Szudoczky and the editor, preceded by a short introduction by the panel's chair.

The papers of the special panel on greening incentives and autonomy, with Marjan Peeters as chair and Pernille Wegener Jessen, Carlo Colombo and Stefanie Geringer as speakers, have not been included in this volume as their contributions either had been published before or were in too early a stage of research for being published at this time.

The MCT and GREIT would like to express their sincere gratitude to our conference's sponsors, the Maastricht University Fund, the Maastricht Faculty of Law's Research Fund and the Globalisation and Law Network for making the conference possible. Finally, we would like to thank the International Bureau of Fiscal Documentation (IBFD) and its publisher Simone Groothuis for their willingness to include this volume in the GREIT book series and IBFD's Georgie Edmonds, T. Carl Hardy and Werner Kapp for their assistance in the preparation and editing thereof.

Most contributions to this book were closed by 1 December 2023, although some minor updates have been included in some of them in the process of preparing this book.

Raymond Lujia
Editor and Director of the MCT

Part 1

Perspectives on Member State Tax Autonomy

Chapter 1

Tax Autonomy From a Member State Perspective: Are we Faced with a Democratic Deficit?

Sigrid Hemels

1.1. Introduction

Tax legislation imposes the obligation on citizens to contribute part of their income and wealth to the government without a direct return. As the government is more powerful than most citizens, this power to tax needs to be balanced. The legality principle requires taxation to be based on legislation, which in most states guarantees the involvement of parliament.

In this respect, Wattel observed that tax sovereignty is a fundamental part of national sovereignty and that one of the most basic rights of a national parliament is its budget right which includes the right to vote on taxes.¹ The Swedish 1809 *Regeringsform*² (Form of Government) made this very clear by stating that the ancient right of the Swedish people to tax themselves is exercised by parliament alone.³ Harmonization of taxation reduced such tax autonomy for the benefit of the internal market and the prosperity of European Union (EU) citizens. However, the question may be raised whether the legality principle, the approval of taxes by representatives of the people, has been given enough attention in this regard.

This is even more so now that part of Member States' tax legislation is effectively negotiated and set at the international level of the Organization for Economic Co-operation and Development (OECD)/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS) (Inclusive Framework). According to Lind, these global developments make the law-making process generally more of an administrative process rather than a

1. Peter Wattel, "Introduction", in: *Terra/Wattel European Tax Law*, ed. Sjoerd Douma, Otto Marres, Hein Vermeulen & Dennis Weber (Deventer: Wolters Kluwer, 2022), 6.

2. The most important of the Swedish fundamental laws which applied until it was replaced by the 1974 *Regeringsform*.

3. "Svenska folkets urgamla rätt att sig beskatta utöfvas af rikens ständer allena vid allmän riksdag", § 57 Kongl. Maj:ts och Rikets Ständers fastställda Regeringsform, Stockholm 6 June 1809.

political one, which poses new challenges to democracy.⁴ In his 2022 Klaus Vogel Lecture, Bertil Wiman noted that being responsible for adopting tax laws is not the same as being responsible for developing international tax norms. He raised questions on how much influence national parliaments should have, when they should have it and how they should exert it.⁵ He had the feeling that the balance between international organizations active in the international tax field, in particular the OECD and to a lesser extent, the European Commission, and national legislative bodies altered in the last ten to fifteen years in a way that may not be healthy.⁶ During the 2023 International Fiscal Association (IFA) European Region Conference in Amsterdam, a panel member quite boldly called Pillar Two anti-democratic because the Inclusive Framework that makes the decisions is made up of representatives of tax administrations.⁷

These developments merit the question of whether we are faced with a democratic deficit⁸ in this respect and, if so, whether that is problematic. To answer this question, the author will first discuss the more philosophical background of the right to property and taxation in general terms (section 1.2.) and as a matter of national sovereignty (section 1.3.). Is the right to property a man-made concept based on national legislative choices, as claimed by Bentham, or a natural, universal, law as was the view of Grotius and Locke? The answer to this question is also relevant for breaches of such right to property, such as by taxation: can this only be based on national law or also on international law? Subsequently, the author focusses on the constitutional safeguards regarding taxation applied in most jurisdictions (section 1.4.). Section 1.5. discusses the principle of legality in relation to national tax legislation based on EU directives and regulations, which have become more encompassing in the domain of tax over the past years. Even

4. Yvette Lind, “Blurring the Separation of Powers. A legal and political study of the phenomenon of tax administrations moving from the executive branch towards the legislative branch”, *Australian eJournal of Tax Research* 21, no. 2 (2023): 383-405. <https://heinonline.org/HOL/P?h=hein.journals/ejotaxrs21&i=389>.

5. Bertil Wiman, “Klaus Vogel Lecture 2022: Who should be in the driver’s seat in developing international tax norms – civil servants or national parliaments” *Bulletin for International Taxation* 77, no. 4 (2023), 158. <https://doi.org/10.59403/21q3sr>.

6. Wiman, “Klaus Vogel Lecture 2022”, 157.

7. This statement did not make it into E. Burkadzė’s official panel report (<https://www.ifa-nl.org/media/aflompej/tax-directors.pdf>), the author recollected it from personal notes taken at the conference.

8. A term also used by Edwin Visser, “Comments on professor Bertil Wiman’s lecture “Who should be in the driver’s seat in developing international tax norms – civil servants or national parliaments?””, *Bulletin for International Taxation*, 77, no. 4 (2023), 164, <https://doi.org/10.59403/eg1fks> and by Felipe Yañez, The importance of democratic legitimacy in international tax decisions, *Tax notes international* 111, (18 September 2023), 1545.

though parliaments have to adopt such legislation, for which reason at least technically the legality principle is met, one may question, as Wiman did in his aforementioned Klaus Vogel Lecture, whether this is also substantially the case if all details of the legislation have already been set on a European or international level and Member States' parliaments do not have leeway to make changes to the implementation proposal. Are the safeguards in European law, such as the requirement of unanimity, the right to information and the subsidiarity control mechanism, and the involvement of the European Parliament in the making of EU tax legislation, sufficient to redress the de facto restrictions of national parliaments' autonomy to fully exploit their democratic rights? In section 1.6. the author elaborates further on these questions in relation to EU directives based on norms set within the OECD/G20 Inclusive Framework. This includes the position of developing countries, the reduced effect of regular checks and balances, the outsourcing to accounting standards-setting bodies, the role of later OECD guidance, the debate (and seemingly double standards) in the United States, the weighing of tax technical perfect legislation against less perfect and slower but democratically legitimised legislation and the need for rebalancing the trias politica, Montesquieu's separation of power. Subsequently, the author comes to a conclusion in section 1.7.

1.2. The right to property and taxation

The English philosopher Jeremy Bentham (1748-1832) was of the view

that there is no such thing as natural property, and that it is entirely the work of law. (...) Property and law are born together, and die together. Before laws were made, there was no property; take away laws, and property ceases. As regards property, security consists in receiving no check, no shock, no derangement to the expectation founded on the laws of enjoying such and such portion of good. The legislator owes the greatest respect to this expectation which he has himself produced.⁹

Bentham also formulated a catalogue of cases in which some portion of security regarding property must be sacrificed to preserve the greater mass of it.¹⁰ These included general wants of the state for defence against exterior and internal enemies (violators of the law) and to furnish aid in cases of physical calamity. The fifth element of this catalogue was “[a] tax upon the property of individuals to furnish the ability of applying remedies to the

9. Jeremy Bentham, *Theory of Legislation*, (London: Trübner & Co, [1802] 1871), 111, 113.

10. Bentham, *Theory of Legislation*, 125.

evils above mentioned, by means of courts of justice, institutions of police, and an armed force.” In addition, he also discussed the wants of the State on which it could be debated whether they ought to be provided for by forced contributions, such as the care of the poor (indigent), public worship and the cultivation of the arts and sciences.¹¹ In his view, private savings against the risk of becoming poor and voluntary contributions to the poor have many imperfections and thus provide insufficient resources for the care of the poor. According to Bentham, the legislator ought to establish a regular contribution, a tax, for the wants of indigence. The “title” of indigent was, in his view, stronger than the “title” of proprietor as the pain of death, falling on the starving poor, is a more serious evil than the pain of disappointment which falls upon the rich when a portion of his superfluity is taken from him. He stressed that in all cases it is the legislator that must make choices and include these choices in legislation.

1.3. The right to property and taxation as a matter of national sovereignty

The reasoning of Bentham can also be recognized in international law in which each nation has sovereignty over its own territory including the sovereignty to recognize property rights in its legislation and to use its legislation to make breaches of such rights, including by way of taxation. This became very clear in the aftermath of the Russian Revolution of 1917 when, to a certain extent, private property was abolished, and the Soviet government included national ownership of property in the constitution. International recognition of this government also meant the recognition of this constitutional approach to private property. It led Harriman to state in 1926:

As to the moral basis of the right of property, there is always opportunity for argument. The legal right of property, however, must be definite, local and conventional, because law itself is definite, local and conventional [...] the existence and extent of a legal right of property is necessarily dependent upon the will of the government which makes that law. [...] It is a mere truism, therefore, to say that the legal right to property is a matter of local law.¹²

11. Bentham, *Theory of Legislation*, 126-137.

12. E.A. Harriman, “The Right of Property in International Law”, *Boston University Law Review* 6, no. 2 (April 1926): 103, 104.

Thus, international law traditionally has no impact on property rights except in a few specialized situations such as the expropriation of foreign nationals and the destruction of civilian property during wartime.¹³

Notwithstanding the fact that international law takes as a starting point that property rights in a certain territory exist to the extent that they are recognized by the law of that particular nation, the right to property has also been regarded as a natural or God-given right. Hugo de Groot (Grotius, 1583-1645) stated that God conferred upon the human race a general right over things of a lower nature and that from this common and undivided possession of all men, it followed that each man could at once take whatever he wished for his own needs and that the enjoyment of this universal right served the purpose of private ownership as one could not take what had been taken by another except by an unjust act.¹⁴

Also, John Locke (1632-1704) endeavoured to show how men came to have property in several parts of that which God gave to mankind in common:

The same law of Nature that does by this means give us property, does also bound that property too. (...) God gave the world to men in common, but since He gave it them for their benefit and the greatest conveniences of life they were capable to draw from it, it cannot be supposed He meant it should always remain common and uncultivated.¹⁵

In his reasoning, Locke refers to America (“in the beginning, all the world was America”¹⁶). Colonists used this reasoning to take possession of (or rather expropriate) land on which indigenous people lived.¹⁷ Locke’s work also inspired declarations of rights adopted by several American colonies in the 18th century which endorsed the right to property as natural law.¹⁸

13. John Sprankling, “The Global Right to Property” *Columbia Journal of Transnational Law* 52, no. 2 (2014): 467.

14. Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres* [1625] in the 1925 translation of Francis W. Kelsey, 186.

15. John Locke, *Two Treatises of Government, Chapter V, Of Property* (Glasgow: R. Griffin and Co. [1689], 1823), parag. 30, p. 117 and para. 33, p. 118.

16. Locke, *Two Treatises of Government*, para. 49, p. 125.

17. David Graeber and David Wengrow, *The dawn of everything: a new history of humanity* (London: Allen Lane, 2021), Chapter 4 (in the Dutch 2022 version of the book: p. 168; in the English kindle version of the book: p. 149). In the last section of chapter 4, the authors claim that this reasoning was absurd as those indigenous societies might not have used the Roman law and English common law concepts of property, but that this did not mean they did not have a concept of property, it was just a different concept. They argue that there is a resemblance between concepts of property and concepts of sacredness in that they are both instruments of exclusion.

18. Sprankling, “The Global Right to Property”, 468.

This, in its turn, inspired the 1789 *Déclaration des droits de l'homme et du citoyen* (Declaration of the Rights of Man and of the Citizen) in France.¹⁹ Article 2 of this declaration included four natural and imprescriptible rights of man the preservation of which should be the aim of all political association. One of those rights was *la propriété* (the right to property). Article 17 of this declaration held that as all property was an inviolable and sacred right, no one should be deprived thereof except where public necessity, legally determined, clearly demands it, and then only on condition that the owner had been previously and equitably indemnified. The right to own property and not to be arbitrarily deprived of it is also included as a fundamental human right in article 17 of the Universal Declaration of Human Rights (UDHR) which was adopted by the General Assembly of the United Nations (UN) in 1948.²⁰

No matter how important the UDHR is, it is not a treaty and thus a non-binding instrument not creating legal obligations for governments. The fact that well into the 20th century many countries deprived married women of the right to property, already shows that this was by no means a *universal* right (just as many other civil rights were only supposed to apply to certain White men). Valencia Rodriguez observed in a 1993 expert report for the UN Commission on Human Rights that the

degree of ratification and accession to universal conventions containing this right does not allow us to state that we deal with a universally recognized right.²¹

The right to property is not included in the 1966 International Covenant on Civil and Political Rights²² nor in the International Covenant on Economic, Social and Cultural Rights²³ of the same date. This can be explained by the fact that the right to property is controversial both in terms of its existence and interpretation. The Soviet Union objected to the creation of a global right to property and new nations arising in the process of decolonialization wanted to be able to expropriate property owned by citizens of the former colonial powers.²⁴

19. See <https://www.conseil-constitutionnel.fr/le-bloc-de-constitutionnalite/declaration-des-droits-de-l-homme-et-du-citoyen-de-1789>.

20. See <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

21. Luis Valencia Rodriguez, *The right of everyone to own property alone as well as in association with others: completed final report* (Geneva: United Nations, 1993), para. 97, p. 22 (English version). <https://digitallibrary.un.org/record/178581?v=pdf>.

22. See <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

23. See <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>.

24. Sprankling, "The Global Right to Property", 471.

Questions on the right to property include the reasons for which property can be restricted, such as regulations, nationalization in the public interest and, taxation. This relates to the definition of “not arbitrarily” in article 17(2) of the UDHR. Valencia Rodriguez concluded: “The most effective implementation of human rights requires domestic commitment.”²⁵

Article 1 of the 1952 Protocol to the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms²⁶ is more specific and safeguards the right not to be deprived of possessions *except* in the public interest and subject to the conditions provided for by law and by the general principles of international law. The provision makes clear that this right does not in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. In interpreting article 1 of the Protocol, the European Court of Human Rights (ECtHR) does not indicate which “technical” elements should be contained in such a fiscal law, leaving that function to the discretion of the states as they are supposed to have a better insight into the needs of their societies.²⁷ Thus the ECtHR allows states a wide margin of appreciation in tax matters and does not quickly assume a breach of this article in relation to taxation.

In this provision, one clearly sees the weighing of the individual right to property against the collective need for government funding. Valencia Rodriguez observed that the right included in article 1 of the Protocol “is part and parcel of the very form of government.”²⁸ Article 17 of the 2000 Charter of Fundamental Rights of the EU also includes the right not to be deprived of possessions, except in the public interest and in the cases and under the conditions provided for by law.

Valencia Rodriguez observed that there is no such thing as absolute private ownership, as in national systems in which productive property is not state-managed or controlled, the private use of productive property is nonetheless regulated to a greater or lesser degree by the State, not only with regard to the permissible uses of the property but by the requirement to share its

25. Valencia Rodriguez, “The right of everyone to own property”, para. 504, p. 94.

26. See <https://www.echr.coe.int/european-convention-on-human-rights>.

27. Court of Justice of the European Union’s (CJEU’s) Directorate-General for Research and Documentation, *Research note. Scope of the principle of the legality of taxation, particularly in relation to value added tax* (Luxembourg: CJEU, September 2018) para. 12, p. 5.

28. Valencia Rodriguez, “The right of everyone to own property”, para. 94, p. 22.

value or product, through taxation. Therefore, the real difference between State and private systems of property ownership is a matter of the degree of centralization of management, and the proportion of the product which is redistributed.²⁹

Sprankling observes that the right to property is a relative right, the scope of which may be affected by cultural, social, and economic factors, which may evolve over time.³⁰ The individual right to property is balanced with (collective) societal needs which includes the collection of taxes. This relativization can also be found in article 29(2) of the UDHR which states that

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

It is important to appreciate that limitations to human rights, such as the right to property, can only be based on legislation. This is also true for taxation.

This brings us back to the view of Jeremy Bentham that the right to property is not a natural (or God-given) phenomenon, but the result of human-made, national legislation, reflecting choices made by that national legislator. This then also applies to infringements on that right, such as by way of taxation.

1.4. Constitutional safeguards regarding taxation

Many national constitutions, including those that do not explicitly include a right to property, require that taxation, an infringement of property rights, may only be based on legislation. This legality principle ensures that a government cannot impose taxes itself, but that taxation requires the cooperation of the elected representatives of the people in a certain territory, that is to say, of those with voting rights.³¹

29. Valencia Rodriguez, “The right of everyone to own property”, para. 88, pp. 20-21.

30. Sprankling, “The Global Right to Property”, 499.

31. For a critical discussion on taxation without representation of non-residents and companies, see, for example, Yvette Lind, “A critical analysis of how formal and informal citizenships influence justice between mobile taxpayers.” in: *Tax Justice and Tax Law. Understanding Unfairness in Tax Systems*, ed. Dominic De Cogan & Peter Harris (Oxford: Hart Publishing, an imprint of Bloomsbury Publishing, 2020, 2022).

This involvement of representatives in taxation is deeply rooted. The requirement in chapter 12 of the 1215 Magna Carta, that the King could not raise tax without the approval of the council of barons,³² is a very early example. Article I, section 8 of the 1787 Constitution of the United States provides that the Congress has “power to lay and collect taxes”,³³ which is not surprising given that one of the driving forces behind the American War of Independence was the claim “no taxation without representation”.

This concept is not limited to the Anglo-Saxon world. According to Valencia Rodriguez, most states require the involvement of the national representative body (which might be called Congress, Parliament or something else) in applying a restriction on private ownership constituted by the exercise of the State’s power of taxation.³⁴ In article 197 of the 1815 constitution of the Kingdom of the Netherlands, for example, it was stated that taxes could only be levied based on a law.³⁵ Similar wording is still included in article 104 of the current Dutch constitution. Also, the Japanese Constitution, which came into effect on 3 May 1947 includes in article 30 that “The people shall be liable to taxation as provided by law.”³⁶

In a 2018 research note, the Directorate-General for Research and Documentation of the Court of Justice of the European Union (CJEU) observed that the principle of the legality of taxation was, in essence, recognized by all the EU legal orders covered by their survey.³⁷ In most

32. “Nullum scutagium vel auxilium ponatur in regno nostro, nisi per commune consilium regni nostri, nisi ad corpus nostrum redimendum, et primogenitum filium nostrum militem faciendum, et ad filiam nostram primogenitam semel maritandam, et ad hec non fiat nisi racionabile auxilium; simili modo fiat de auxiliis de civitate London.” See https://www.orbilat.com/Languages/Latin/Texts/06_Medieval_period/Legal_Documents/Magna_Carta.html. In the English translation:

No scutage nor aid shall be imposed on our kingdom, unless by common counsel of our kingdom, except for ransoming our person, for making our eldest son a knight, and for once marrying our eldest daughter; and for these there shall not be levied more than a reasonable aid. In like manner it shall be done concerning aids from the city of London.

“Scutage” means tax or contribution raised by someone holding lands by knight’s service used to furnish the King’s army. See <https://avalon.law.yale.edu/medieval/magframe.asp>.

33. See <https://www.loc.gov/item/90898138/> and https://www.senate.gov/about/origins-foundations/senate-and-constitution/constitution.htm#a1_sec8. Tax Bills originate in the House of Representatives (article I, section 7 of the Constitution of the United States).

34. Valencia Rodriguez, “The right of everyone to own property”, para. 343, p. 65.

35. See https://www.denederlandsegrondwet.nl/id/vi6jejc6xxzb/artikel_197_belasting-heffing.

36. See https://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html.

37. CJEU’s Directorate-General for Research and Documentation, “Scope of the principle of the legality of taxation”, p. 2, para 8.

of the then-EU Member States, the principle is enshrined directly in a constitutional act.³⁸

In two relatively recent decisions, the CJEU identified the principle of legality as part of the legal order of the EU as a general principle of law. The CJEU still formulated this in a retained way in the 2019 *Związek* case on value-added tax (VAT): “as is apparent from the constitutional traditions common to the Member States, the principle of fiscal legality *may* be regarded as forming part of the EU legal order as a general principle of law.” (emphasis added by the author)³⁹ However, in the 2022 *FIAT* case on State aid, the Court was no longer holding back in this respect as it observed that the principle of legality of taxation

forms part of the legal order of the European Union as a general principle of law, requiring that any obligation to pay a tax and all the essential elements defining the substantive features thereof must be provided for by law, the taxable person having to be in a position to foresee and calculate the amount of tax due and determine the point at which it becomes payable (emphasis added by the author).⁴⁰

Van der Vlugt notes that the CJEU does not allude to the democratic procedure of coming to such a tax law and that this was also not dealt with in the 2018 research note.⁴¹ Where he can understand this in the context of the specific cases, he suggests that not making the connection to the democratic or representative element that forms an essential part of the national interpretation of the legality principle, may be a deliberate omission in the 2018 research note. He warns that this omission might lead to difficulties in the future.

The legality principle as understood in the national context entails that also other national safeguards that apply for the enactment of legislation apply to tax laws, such as obligatory advice of specific bodies, public hearings

38. Belgium, Bulgaria, Cyprus, Denmark, Spain, Estonia, Finland, France, Greece, Ireland, Italy, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, the Czech Republic, Romania, the United Kingdom, Slovakia and Sweden. See https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-11/ndr-2018-005_neutralisee_synthese_en.pdf, p. 3-4, para 9, footnotes include references to the provisions in the respective constitutions.

39. CJEU, 8 May 2019, *Związek Gmin Zagłębia Miedziowego w Polkowicach*, Case C-566/17, ECLI:EU:C:2019:390, para 39.

40. CJEU, 8 Nov. 2022, *Fiat Chrysler Finance Europe*, joined cases C 885/19 P and C 898/19 P, ECLI:EU:C:2022:859, para 97.

41. Sam van der Vlugt, “The principle of legality of taxation as a general principle of EU law: national and supranational differences of interpretation and potential difficulties”, *EC Tax Review* 32, no. 5 (2023), 218, 221.

or consultations.⁴² For example, in the Netherlands, the government must send a legislative proposal to the Advisory Division of the Council of State before it can send the proposal to Parliament.⁴³ The advice of the Council of State must not only be sent to Parliament but it must be accompanied by a reaction of the government. The government can use the advice to adapt the proposal. Insofar as the government did not follow the advice, Parliament can use it – and the reaction of the government – in the legislative process.

1.5. The principle of legality and EU tax legislation

A relatively new phenomenon that is becoming increasingly more important in the tax field is that national legislators implement rules that are set in international forums. In the EU there is already quite some experience in this regard with directives and regulations that must be implemented in national legislation.

EU tax directives and regulations became much more all-encompassing over the years, not just in relation to indirect taxation and customs, but also regarding direct taxation. The CJEU has consistently held that, in the absence of harmonization, direct taxation falls within the competence of the Member States as long as they respect the fundamental freedoms and State aid restrictions.⁴⁴ In the past few years, we have seen harmonization of direct tax law and proposals for such harmonization with a much broader scope than before, for example, Anti-Tax Avoidance Directives ATAD1⁴⁵ and ATAD2,⁴⁶ the withdrawn Common (Consolidated) Corporate Tax Base C(C)CTB proposals⁴⁷ and the recent Business in Europe: Framework for

42. It goes without saying that these safeguards differ between countries; in this respect Juliana Cubillos Gonzáles and Frederik Heitmüller, “Influence of domestic constituencies in the implementation of international tax standards and legitimacy of global tax governance”, *Intertax* 52, no. 3 (2024):,207-225.

43. For more information in English on the Dutch Council of State and the English translation of the Dutch Council of State Act, see <https://www.raadvanstate.nl/talen/artikel/>.

44. Rita Szudoczky & Dennis Weber, “Constitutional Foundations: EU Tax Competences; Treaty Basis for Tax Integration; Sources and Enactment of EU Tax Law”, in: *Terra/Wattel European Tax Law*, ed. Sjoerd Douma, Otto Marres, Hein Vermeulen & Dennis Weber (Deventer: Wolters Kluwer, 2022) paragraph 2.1, p. 11.

45. Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.

46. Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries.

47. Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (C(C)CTB), COM(2011) 121/4 (withdrawn), Proposal for a Council Directive on a Common Corporate Tax Base COM(2016) 685, Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (C(C)CTB), COM(2016) 683.

Income Taxation (BEFIT) proposal,⁴⁸ to name just a few. According to Szudoczky and Weber, the principles of subsidiarity and proportionality are not very effective in what they call “halting the ‘competence creep’, i.e. the slow but steady expansion of the Union’s competence.”⁴⁹

Tax also became more political in the European arena, leading to the need to grasp “the political momentum” for agreeing on a new directive. This might result in hasty and not always well-thought-through directives. Smit observes, for example: “The ATAD proposal was adopted surprisingly quickly (if not overhasty).”⁵⁰ Hultqvist was of the opinion that the adoption of the ATAD raised a number of principled questions on how far the EU’s legislative power in the area of taxation extends and whether the principle of subsidiarity constitutes a weak protection for political ambitions within the EU administration, especially as there is no proper requirement to show why coordination at Union level is necessary “for the functioning of the internal market”. He pointed out that it is not only the national influence that diminishes with increased ambitions on the EU level, but also the democratic influence, especially if proposals are poorly motivated and the preparation times are short.⁵¹ Wiman noted that historically, the pace was much slower allowing more time for national governments and parliaments to be informed about the need for changes and examining the effects of measures already undertaken. In his view, the fast pace of developments in which one jumps to the next focus without allowing the already decided measures to play out are causes for concern.⁵²

Such speedy processes provide national parliaments with even fewer opportunities to influence the outcome of the (technical) meetings between the Council and the European Commission. In addition, directives such as ATAD, Pillar Two and BEFIT impose duties on taxpayers instead of giving them rights as previous tax directives, such as the Parent-Subsidiary Directive, the Interest and Royalty Directive and the Merger Directive, did. This makes the involvement of elected representatives even more important.

48. Proposal for a Council Directive on Business in Europe: Framework for Income Taxation (BEFIT), COM(2023) 532.

49. Szudoczky & Dennis Weber, “Constitutional Foundations”, 10.

50. Daniël Smit, “The Anti-Tax Avoidance Directive (ATAD)”, in: *Terra/Wattel European Tax Law*, ed. Sjoerd Douma, Otto Marres, Hein Vermeulen & Dennis Weber (Deventer: Wolters Kluwer, 2022), 530.

51. Anders Hultqvist, ”Anti-Tax Avoidance Directive (ATAD) och subsidiaritetsprincipen – Svenska folkets urgamla rätt att sig beskatta eller EU:s rätt?” *Skattenytt*, no. 12 (2016), 853.

52. Wiman, “Klaus Vogel Lecture 2022”, 158.

The implementation of directives and – insofar as necessary – regulations in national law is done through the normal legislative process. Technically, such legislation meets the legality principle. However, one may question whether this is also substantially the case if all details of the legislation have already been set on a European level and Member States’ parliaments do not have leeway to make changes. Are the safeguards in European law, such as the requirement of unanimity, the subsidiarity control mechanism, and the involvement of the European Parliament in the making of EU tax legislation, sufficient to redress the de facto restrictions of national parliaments’ autonomy to fully exploit their democratic rights?

1.5.1. Requirement of unanimity

Directives and regulations relating to both indirect and direct taxes must be adopted in the European Council based on unanimity, as stated in articles 113 and 115 of the Treaty on the Functioning of the European Union (TFEU), respectively. This requirement guarantees national involvement in the phase of negotiations on such directives and national consent. However, unlike normal parliamentary processes, such negotiations usually take place behind closed doors. In addition, only governments are directly involved in those negotiations, not national parliaments. Weatherill was of the opinion that executive power, rather than parliamentary control, has too often been the reality of Council practice. This, in his view, is one reason why EU legislative competence has crept outwards. He observes that national parliaments are the principal losers.⁵³

Furthermore, the European Commission sometimes seems to look for ways to “circumvent” the unanimity principle by avoiding the “t”-word and using a different legal basis for directives that, in substance, seem to regard taxation. In such cases, national governments can no longer autonomously decide on taxation in their country. Even if they vote against the measure, it might be adopted which results in an obligation to implement it.

An example is the public country-by-country reporting (CbCR) obligation. This was not designed as an amendment to the Directive on Administrative Cooperation (DAC),⁵⁴ which already included the CbCR obligation as a

53. See also S. Weatherill, “The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court’s Case Law has become a ‘Drafting Guide’”, *German Law Journal*, 12, no. 3 (2011), 827-86.

54. Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC as amended.



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