A EUROPEAN TAX
LEGAL AND POLITICAL ISSUES

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A European tax does not yet exist. For this myth to become reality both legally and politically, the European Union would need to have taxing competence allowing it to levy taxes for itself; the taxpayers, over whom it would have taxing power, would be the citizens of the European Union and companies headquartered or economically active in the European Union. In return for this tax, whose necessity is a function of the expected degree of EU integration (internal market / federation), a European mechanism of democratic consent to the tax ought to be established. Furthermore, the tax base should be chosen with great care, in line with intended objectives (financial revenue / sense of political belonging of European taxpayers and the addition of a tax dimension to European citizenship).

The idea of creating a European tax is extremely controversial. Indeed, taxes are a mark and evidence of State sovereignty (Buisson 2002), and maybe even the ultimate mark and evidence of this sovereignty: taxation derives from supreme authority; it allows payees to finance their spending; and it requires exercising prerogatives of public power that fall outside the scope of common law. An etymological study of the term “fisc” and its derivatives is very telling in this regard: in ancient times, the Latin work *fiscus* referred, on the one hand, to the basket or bin where tax collectors placed their taking, and on the other, to the Emperor’s private treasury, which was filled with the proceeds of repression (fines and confiscations).

Even though it has since evolved, this initial understanding of taxation can explain why opponents of European integration oppose a European tax on principle, and why the development of European taxation is one of the prime targets of their fantasies and reservations. It also provides a means for understanding why member States are sometimes hostile to the idea of the European Union wielding a competing power to levy and collect taxes.

Yet the legitimacy of a European tax is also clear. Given the role it must play, the European Union has legitimate grounds for seeking financial autonomy and freedom from its financial dependence on the contributions that member States agree to allocate. The Union could undoubtedly achieve financial autonomy if it was able to freely levy a tax for its purposes. At the same time, the creation of a European tax that was accepted and paid by European taxpayers would help close the famous "democratic deficit" that is too often and incorrectly blamed on the European Union.

From a legal perspective this European tax could be defined traditionally, as a "monetary payment required of individuals via an authority, definitively and without consideration, to cover the public functions" (attributed to Jèze, as explained in Négrin 2008, p.139) of the EU. Accordingly, to qualify as a European tax, a levy would have to include five cumulative criteria.

The first criterion concerns the nature of the levy, which must be a monetary payment: since this characteristic does not raise any difficulties, there is no need to expand on it here. The second criterion requires that an authority collect this money: the creation of a European tax must therefore result from the exercise of a *European taxing competence*, that is, a taxing competence that the EU is able to wield freely. Thirdly, the competence must be exercised in relation to European taxpayers: as obvious as this statement may seem, a European tax assumes the presence of European "individuals" (physical persons or businesses) liable for a tax receivable by the European Union, which would accordingly have the power as a public authority to set and collect the tax (exercising *European taxing power*). Finally, fourthly and fifthly, to qualify as a European tax, the levy in question would have to be definitive and allocated to cover European public functions: to do so, it would suffice that the proceeds be applied to the EU budget.

In light of these criteria, one might wonder whether European taxes already exist or have existed. Several types of taxes could probably qualify, such as harmonized taxes or certain earmarked taxes, for example. But given that the most harmonized tax (the value-added tax) still shows disparities, and more importantly, that the European Union does not exercise any coercion over those liable for VAT (since those taxpayers remain national taxpayers), it cannot be labelled a European tax (absence of *European taxing power* and *European taxpayers*). Past or current taxes earmarked for the EU budget are also not "European taxes", be it the "ECSC levy" (created on the basis of article 49 of the ECSC Treaty) or the tax on the salaries of Community staff (that has its origins in article 13 of Protocol n° 36 on privileges and immunities of the European Communities, adopted in 1965).[1] Indeed, these taxes were created by the States, which then allocated the proceeds to the ECSC or to the European Union, rather than by these organisations themselves (absence of *European taxing competence*). And so it appears that a European tax in the strict sense does not yet exist.[2]

In order to create one, the European Union would have to be able to freely levy taxes, and the *taxpayers* would be either citizens of the European Union or companies headquartered or economically active in the European Union. Thus, the question is the necessity of such a tax (1) and the conditions for its implementation (2). Some recommendations will finally be proposed (3).

1. Is a European tax necessary?

Within the current constitutional framework (internal market), the creation of a European tax in the broad sense of identical national taxes would seem to suffice (1.1). However, if the institutional framework evolved towards stronger federalism, the creation of a European tax in the strict sense would become critical (1.2).

1. This protocol was slightly modified by protocol n° 1 annexed to the Lisbon Treaty (See specifically. art. 1, 14), and became protocol n° 7. The tax it established is governed by regulation n° 260/68 of the Council of 29 February 1968 "laying down the conditions and procedure for applying the tax for the benefit of the European Communities".

2. The harmonized or earmarked taxes that have been mentioned can, however, be characterized as broad "European taxes." Likewise, the European Union collects custom duties: given their legal nature (custom duties as opposed to tax duties), they are not taxes in the strict sense of the term.

1.1. The need for European taxes in the broad sense in the internal market

The smooth operation of an internal market involves a level playing field for competition, that is, tax neutrality and standardization of taxes for which companies are liable. The internal market is indeed where European demand and supply meet: in this market tax disparities can only distort trade, since all other things being equal, the goods that are most heavily taxed are less competitive and less attractive for consumers (demand); similarly, in the absence of standardization, taxes weigh in companies' choice of where in the EU to set up (supply).

In the absence of European taxes in the broad sense – that is, taxes with identical bases, rates and methods of collection across all States – tax neutrality cannot be achieved. Granted, many tax obstacles to the smooth functioning of the internal market have already been eliminated, thanks to the prohibition of tax restrictions on the free movement of goods (Treaty on the Functioning of the European Union [TFEU] 2009, art. 30, 110, 111 & 112), the ban on tax barriers to the free movement of people, services and capital,[3] and the control of State aid in the form of taxes (TFEU 2009, art. 107-109). In addition, national VAT and excise (tobacco, alcohol, energy products) tax laws have already been approximated.[4] However, eliminating discrimination in each State does not translate into tax neutrality in the internal market. Moreover, while harmonisation has led to the reduction of some disparities, these remain significant. A uniformization of taxes on businesses is therefore necessary, even though the proceeds from these taxes would be collected by states rather than the Union.

The creation of European taxes in the broad sense also seems necessary because of difficulties resulting from the simultaneous application of different tax systems inside a common area. International operations may be subject to double taxation, which hamper trade, but which the Court of Justice refuses to condemn on the basis of the European freedoms of movement.[5] Further-

3. Since the *Schumacker* decision of 14 February1995 (ECJ, 14 February 1995, Case C-279/93, *Finanzamt Köln-Altstadt v. Roland Schumacker*, Rec., p. I-225), the Court of Justice controls laws applicable to direct taxation that hamper the freedoms of movement.
4. On the basis of article 113 of the Treaty on the Functioning of the European Union.

more, “companies must in the longer term be allowed a consolidated corporate tax base for their EU wide activities to avoid the current costly inefficiencies of [twenty-eight] separate sets of tax rules” (European Commission 2001, p. 20).[6] This is why the European Commission has proposed establishing a consolidated tax base (CCCTB) to allow companies with cross-border and international activities to calculate their overall income according to a single set of rules, and to develop consolidated accounts for tax purposes. A “one-stop-shop” system would allow them to complete their tax returns, which would then be used to determine the taxable base for each company, and to allow the member States in which a company is active to tax a share of this base. The share would be determined by a specific formula based on three factors: fixed assets, labour and revenue (European Commission 2011A).

1.2. The need for a European tax in the strict sense from a federal perspective

If the European Union were to increasingly lean towards federalism, the creation of a European tax in the strict sense would become critical. Furthermore, the creation of this tax is a precondition to any further European integration. Contrary to taxes in the broad sense that were considered above, this tax would have to be created by the European Union and ideally be collected from individuals. This would involve the devolution of *taxing competence* and *taxing power* to the European Union (without this competence and power being exclusive), and hence the existence of *European taxpayers*. As a result, this tax would be able to address financial and political challenges.

The existence of a European tax would give the European Union clear financial autonomy and guaranteed resources. With taxpaying competence and power, the European Union would no longer be dependent on member States to finance its budget. While the Court of Justice has repeatedly ruled that “own

5. The Court believes that EU law does not contain any criterion for the distribution of taxing authority and that member states are not obliged to adapt their tax systems to those of the others (See in particular ECJ, 14 November 2006, Case C-513/04, *Kerckhaert and Morres*, Rec., p. I10967. - 12 February 2009, Case C-67/08, *Margarete Block v. Finanzamt Kaufbeuren*, Rec., p. I-883. - and 16 July 2009, Case C-128/08, *Jacques Damseaux*, Rec., p. I-6823).

6. These additional costs are linked to the need to know how several different tax systems function and to complete tax formalities in them.

resources" are resources that belong to the Union budget by nature and from the outset,[7] the Union cannot raise any more revenue than member States agree to provide. In these circumstances, there is no doubt that so long as no taxing competence and no taxing power are given to European bodies, member States could always decide to withhold all resources from the EU budget, or to not pay their contributions.[8] Even when it has a claim on member States, the European Union does not have a claim on national taxpayers: this underscores the difference between the notions of "tax" and "contribution." A "tax" implies a mandatory and direct claim on taxpayers; when the funding is based on "contributions", this claim only exists indirectly, *via* member States, and provided that they accept the contribution in principle.

In turn, the creation of a European tax would deepen European integration through the special relationship the tax would forge between the EU and European taxpayers-citizens. One of the implications of creating a European tax is tax citizenship, which has historically preceded political citizenship.

The creation of European tax common to all European taxpayers should therefore be considered, because it would strengthen European citizenship and Europeans' sense of belonging in the EU, which the tax would fund.

2. What should be the conditions of a European tax?

In exchange for the devolution of taxing competence and power to the European Union that would allow for the creation of a European tax, a European mechanism of consent to the tax would have to be put in place (2.1). In addition, the taxable base would have to be determined in line with intended objectives (2.2).

7. The Court has asserted "Member States are merely to establish those resources and make them available to the Commission [...]. The role of Member States is limited to establishing the Communities' own resources [...], and subsequently making them available to the Commission": ECJ, 18 December 1986, Case 93/85, *Commission v. United Kingdom*, Rec., p. 4011, points 16-18.

8. In December 1978, France, Great Britain and Germany had refused to provide the "VAT proceeds" corresponding to the increase in the Community budget established by the European Parliament. This withholding ceased when an amending budget was adopted on 25 April 1979. A similar scenario unfolded in December 1980, involving France, Germany and Belgium.

2.1. The need for consent to the European tax

The right to impose a tax liability on taxpayers is the exclusive prerogative of the community or the authority that can consent to the tax. In a democratic society, consent to taxation is an essential *legal act* that allows the imposition of burdens on taxpayers.

The development of ties between the European Union and its taxpayers therefore depends on the establishment of a European mechanism of consent to the tax, in line with the idea that "taxes can only be legitimately established through the consent of the people or its representatives" (Rousseau 1755, p. 73).[9] In other words, the establishment of European consent to taxation is a *legal necessity* in the event of deeper European tax integration, but it is also above all a *political necessity*, meeting a democratic requirement. The significance of this consent would therefore lie in its ability to achieve the feat of reducing the Union's democratic deficit while imposing a duty on European taxpayers. Once again, this illustrates the paradox inherent to the very principle of consent to taxation, whereby taxpayers collectively consent to something that is imposed individually.

Seen as a key condition of legal taxation in many member States, the establishment of a European mechanism of consent to taxation would legitimise the European tax in the eyes of European citizens-taxpayers, especially if this consent was granted through a democratically elected body such as the European Parliament.[10] Moreover, it would be worth expanding on Treaty provisions on European citizenship to include a tax dimension: this would allow for the citizen to be merged with the taxpayer, as often happens in democratic states. In fact, it would be dangerous not to do it, as demonstrated by several examples from the history of Western democracies (Great Britain, United States of America, Sweden or

9. Montesquieu adds that this consent must regularly be renewed (Montesquieu, *De l'Esprit des Lois*, 1758, Livre IX, chapitre VI, rééd. Librairie Firmin Didot Frères, 1845, p. 136).

10. Along these lines, see Frans Vanistendael, "No European Taxation without European representation", *EC Tax Review*, 2000, n° 3, p. 143: "the first question is not a question for tax lawyers but for European constitutional lawyers. Suffice it to say that any European decision on tax matters should live up to the standards of the Magna Carta, now almost 800 years ago: "No European taxation without European Representation". These standards are more than just the abolition of the unanimous voting rule. They require an active role for the representatives of the European taxpayers in the European Parliament".

France): when a tax is not consented to, institutions are challenged and tax revolts can become political revolutions.

2.2. The need for an adequate tax base

Furthermore, the European tax base would need to be carefully selected to reflect the intended objectives. Several options could meet financial or political goals.

If the sole purpose of a European tax were to provide financial resources to the European Union, the ideal solution would be for the Union to create a tax similar to the tax on financial transactions, as initially considered by the European Commission. Following a communication dated 7 October 2010 (European Commission 2010), the Commission had indeed proposed that member states adopt a directive "on a common system of financial transaction tax and amending Directive 2008/7/EC" (European Commission 2011B). More specifically, the Commission had suggested that this tax be collected from transactions on financial instruments between financial institutions;[11] this would bring in around 54 billion euros per year to member states and the Union, for which the tax would be collected. In return, it would have been possible to reduce member State contributions to the EU budget[12] (European Commission 2012) and to fund new spending – in part to help fight the financial crisis and to pay down state debt.

If European taxation had a solely political objective, however, it would require imposing a direct tax on individuals residing in the European Union. Only this form of taxation could create a political link between the payee and the taxpayers, that is, between Europe and its citizens. Similarly, only a direct common tax – of which Europeans could take ownership, and which would play a part in their identity – is likely to create solidarity among Europeans.

Finally, if European taxation had both a political and financial objective, it could take the form of an indirect tax, such as the tax on plane tickets that was also considered at one point (European

11. It was proposed that share and bond trades be subject to a rate of 0.1%, and that derivative contracts be taxed at a rate of 0.01%.

12. According to the European Commission, the allocation of a third of the proceeds of such a tax to national budgets, and the remaining two thirds to the EU budget, would reduce the "GNI" contributions of member States by 50%.

Commission 2005), or an additional VAT tax.[13] In contrast to a direct tax, this type of tax would have the advantage of being easier to collect and control. It would also be more profitable, because it would require less administration and would generate more revenue. That being said, while such a tax would be common to all Europeans, it would not directly link European taxpayers to the European Union: as a poorly identified component of the price of products, it would paradoxically go unnoticed.

In the end, the creation of a common tax to fund EU spending, levied on citizens and consented to by their representatives, would likely represent a major step forward in European integration. Like the common currency, it would probably be challenged. But just like the common currency, it would create links not only between the Union and its citizens, but also the citizens among themselves. In any case, the tax should not be an end in of itself, but rather a means to accomplish the European project.

3. Recommendations

— A deepening of European integration is not seriously conceivable without taxation. Tax harmonisation is often presented as an ideal, but should only be seen as one step in preparation for a European tax.

— From a legal perspective the creation of such a tax would imply that the European Union has taxing competence and taxing power over European taxpayers. In return, the latter should be able to consent to taxation through their representatives.

— If this tax had a solely financial objective, it could be an indirect tax (share of VAT revenue; or a tax on financial transactions). Conversely, if it had a political objective (strengthening the sense of belonging and the creation of a European tax citizenship), a direct tax on individuals would be more adequate.

13. Other indirect taxes might be considered, such as taxes on electronic communications: see the Committee on Finance, the General Economy and the Plan session of 3 May 2006 (11-hour session) devoted to the hearing of MEP Alain Lamassoure on the European Communities' own resources, record n° 62, pp. 2-9.

References

Buisson, J 2002. "Impôt et souveraineté." *Archives de philosophie du droit*, 46: 25–31.

European Commission 2012. *Communication* n° IP/12/300.

European Commission 2011A. "Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)." *COM(2011)* 121/4

European Commission 2011B. "Proposal for a Council Directive on a common system of financial transaction tax amending Directive 2008/7/EC." *COM(2011)* 594, final.

European Commission 2010. "Taxation of the Financial Sector." *COM(2010)* 549, final.

European Commission 2005. "A possible contribution based on airline tickets as a new source of financing development: technical reflections in the run up to the UN High Level Event." *SEC (2005)* 1067.

European Commission 2001. "Towards an Internal Market without tax obstacles – A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities." *COM(2001)* 582, final.

Négrin O., 2008. "Une légende fiscale : la définition de l'impôt de Gaston Jèze." *RDP*, 1: 139.

Rousseau, J.-J. 1755. "Discours sur l'économie politique." *Treaty on the Functioning of the European Union 2009*: 73.