Contribution to the report and book "The Protection of Taxpayers' Rights in International Law - Results of the ILA Study Group on International Tax Law 2018-2021"
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A. The Protection of Taxpayers' Rights in International Law - Results of the ILA Study Group on International Tax Law 2018-2021

This document contains the results of the ILA Study Group, then Committee on International Tax Law from 2018 to 2021. We have the ambition to undertake an investigation into human rights challenges in times of global tax transparency. The Study Group, until its transformation to a Committee in November 2020, consisted of the following members:

Co-chairs: Juliane Kokott, Germany
Pasquale Pistone, Italy

Members: Robert Attard, Malta
Philip Baker, United Kingdom
Celeste Black, Australia
Celine Braumann, Austria
Lilian Faulhaber, United States of America
Johann Hattingh, South Africa
Peter Hongler, Switzerland
Robin Miller, Germany
Irma Mosquera Valderrama, Netherlands
Katerina Perrou, Greece
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With contributions on spefic countries from Rifat Azam, Israel, Eduardo A. Baistrocchi, Argentina, Jeremiah Coder, United States of America, Lucy Cruz, Colombia, Cecilia Delgado Ratto, Peru, Anthony Gafoor, The Caribbean, Clara Gomes Moreira, Brazil, Charles H. Gustafson, United States of Amercia, Ashrita Prasad Kotha, India, Na Li, China, Yuri Matsubara, Japan, Panos Merkouris, Greece, Karina Ponomareva, Russia, Luís Eduardo Schoueri, Brazil, Saki Urushi, Japan, Yuri Varela, Chile, and Attiya Waris, Kenya.[1]

[1] The views expressed are strictly personal and do not represent the official position of the institutitions the members and contributors are part of.

Contribution Mosquera Valderrama to the book Taxpayers in International Law: International Minimum Standards for the Protection of Taxpayers' Rights (Kokott J. and Pistone P.)

See contributions and sections below.

4.4. FAIRNESS

4.4.1. General Introduction (Mosquera Valderrama)

Countries, international (e.g. OECD) and supranational (e.g. EU) organizations have referred to the concept of fairness in taxation. However, as it was demonstrated in a 2017 article by Burgers and Mosquera[2], the concept of fairness has been used without a proper definition of what in the context of their arguments is fairness and how the fairness can be achieved, therefore, fairness in taxation is a blurred concept.

For instance, when discussing fairness, there is not clarity to what fairness refers to: "Is this fairness in an economical sense, implying horizontal and/or vertical equity? Is it fairness as perceived by philosophers or politicians? Or is it fairness in a juridical sense implying 'justice', 'legal equality'/non-discrimination, 'legitimacy', 'legal certainty', 'procedural fairness'?".[3]

Burgers and Mosquera also argue that "another question that is relevant for the interpretation of what is meant in the international tax discussion on fairness is whether what is referred to is fairness perceived from a domestic perspective (fairness within the state or (also) from an international perspective (fairness between states); from the perspective of the state (taxpayers should not evade or aggressively avoid taxation; taxpayers should pay their fair share; harmful tax competition is not fair; taxation rights should be allocated fairly between states, legitimacy); or from that of the taxpayer (horizontal and vertical equity, justice, legal certainty, legal procedural fairness, legitimacy)?". [4]

The differences in the approach to fairness are also illustrated in the countries addressed in this report. For instance, the underlying countries have described fairness in a juridical sense addressing equality, non-discrimination and procedural fairness. The instruments used are the Constitution, domestic legislation and taxpayer Charter.

However, at international level, the discussion goes further than juridical fairness, since countries are also addressing fair tax competition (among countries) and fair taxation (countries and taxpayers). Therefore, the approach is from an economic perspective (i.e. economic fair competition is harmed; equitable distribution of tax burden, competitiveness issues, pay taxes where profits are generated, level-playing field[5]) and a political and juridical perspective (i.e. fair share and justice). The different approaches to

[2] Burgers I.J.J. and Mosquera Valderrama I.J. (2017), Fairness: A Dire International Tax Standard with No Meaning?, Intertax 45(12): 767-783.
[3] Burgers I.J.J. and Mosquera Valderrama I.J. (2017), Fairness: A Dire International Tax Standard with No Meaning?, Intertax 45(12): at 767.
[4] Burgers I.J.J. and Mosquera Valderrama I.J. (2017), Fairness: A Dire International Tax Standard with No Meaning?, Intertax 45(12): at 767.
[5] Burgers I.J.J. and Mosquera Valderrama I.J. (2017), Fairness: A Dire International Tax Standard with No Meaning?, Intertax 45(12): at 780.

fairness may have implications for tax competition and the reaction to abusive and fraudulent practices by taxpayers as well as States.

For instance in the BEPS Project and its Action Plan, the OECD stated that aggressive tax planning has reduced the tax burden of multinationals and that this situation has 'led to a tense situation in which citizens have become more sensitive to tax fairness issues'.[6] The OECD also stated that all parties, governments, and individual taxpayers are harmed including also business since 'fair competition is harmed by the distortions induced by BEPS'.[7] Therefore, the BEPS Project focused on tackling base erosion and profit shifting that has resulted in an overall reduction of the tax paid by multinationals mainly by using aggressive tax planning structures. These proposals aimed to address the concerns of citizens and non-governmental (NGOs) organizations[8] regarding the fair distribution of tax burden among taxpayers (i.e. fair share). The European Union has also followed these developments by introducing the EU Action Plan for fair and efficient corporate taxation in the EU (see EU section 3.2.2.2 below).

In addition, to seeking fairness between taxpayers and countries (i.e. fair share), the OECD and the EU have addressed harmful tax competition (i.e. fairness between countries). In the framework of the OECD BEPS Project, countries have (or are currently doing so) amended their harmful tax regimes following the peer review of these regimes by the Forum on Harmful Tax Practices in BEPS Action 5. The European Union has also addressed harmful tax competition in the EU Package to tackle tax competition and the external strategy for effective Taxation applicable to EU and third (non-EU) countries.

Furthermore, fairness (i.e. pay taxes where profit are generated, equal level-playing field) have been addressed in light of the current proposals to tax highly digitalized business including the introduction of a new set of rules for the alignment of taxing powers between states regarding taxation of the digital economy (Pillar 1) and the duty of states to tax at a minimum tax rate in the global anti-base erosion (GLOBE) proposal (Pillar 2).[9] These proposals are being discussed at the time of writing (January 2020). If these proposals are being adopted, the question of fairness and fair distribution of taxing rights between States will become relevant for further analysis.

4.4.2.4. European Union (Mosquera Valderrama with Peter Hongler)

In the EU fairness has three dimensions, (i) procedural fairness regarding the position of persons (physical or legal) vis-à-vis the administration, (ii) fairness in terms of equal level playing field among countries in order to prevent harmful tax competition (fair tax competition) and (iii) fairness in terms of equitable distribution of tax burden (fair share).[10] Unlike countries mentioned in this report, at EU level, the EU

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[6] OECD (2013),Action Plan on Base Erosion and Profit Shifting, OECD Publishing https://www.oecd.org/ctp/BEPSActionPlan.pdf at 8.

[7] OECD (2013),Action Plan on Base Erosion and Profit Shifting, OECD Publishing https://www.oecd.org/ctp/BEPSActionPlan.pdf at 8.

[8] Examples of these NGOs are Oxfam, Tax Justice Network, Christian Aid and FairTaxMark. See for their approaches to fairness Burgers and Mosquera at 774.

[9] Pillar 1 deals with taxation of highly digitalized business where there is not a physical presence, in order to align taxation with value creation. Pillar 2 deals with rules to prevent global undertaxation of corporate profits by introducing an income inclusion rule and an undertaxed payments rule.

[10] For the approaches to fairness see I.J.J. Burgers and I.J. Mosquera. Fairness: A Dire International Tax Standard with No Meaning?' (2017) 45 Intertax, Issue 12, pp. 767–783,

Charter on Human Rights does not have a section on fair taxation[11], but EU countries may have a reference to fair taxation in their own Constitution or Income Tax Law.[12]

4.4.2.4.1. Procedural fairness

Regarding the procedural fairness, in 1977, the Council of Europe promoted in its Resolution 77(31)[13] the adoption of principles of good administration[14] to ensure fairness between the citizen and the administrative authorities with special focus on the "protection of persons, whether physical or legal, in administrative procedures with regard to any individual measure or decision which is taken in the exercise of public authority and which is of such nature as directly to affect the rights, liberties or interests of persons".[15]

In a 2005 Study under the Luxembourg's Presidency of the principles of good administration in Member States of the European Union[16], reference was made to the right to have one's affairs handled impartially, fairly and within a reasonable time by the Institutions of the European Union. This right "includes: a) The right of every person to be heard, before any individual measure which would affect him or her adversely is taken; b) The right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; c) The obligation of the administration to give reasons for its decisions".[17] This study concluded that this right is applied in most of the Member States either in the Constitution or in statues most often in an Administrative Procedure Act.[18] These principles of good administration exist in some of the European countries and are also applicable to the activities by the tax administration. [19]

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[11] Some references that can influence taxation is for instance fair processing of data (art. 8), fair compensation regarding the right to property (art. 13), right to good administration consisting of the right to handle a person's affairs impartially, fairly and within a reasonable time (art. 41), right to an effective remedy and a fair trial (art. 47). Charter of Fundamental Rights of the European Union (2000/C 364/01)

[12] For example Germany has art. 134 of the Constitution, requiring all citizens to pay taxation in proportion to their means. Donald P. Kommers and Russell A. Miller. The Constitutional Jurisprudence of the Federal Republic of Germany. Duke University Press. Third edition, 2012 at 602.

[13] Resolution (77) 31 On The Protection Of The Individual In Relation To The Acts Of Administrative Authorities. Adopted By The Committee Of Ministers On 28 September 1977 at The 275th Meeting Of The Ministers' Deputies https://rm.coe.int/16804dec56

[14]These principles are (i) Right to be heard, (ii) Access to information, (iii) Assistance and representation, (iv) Statement of reasons and (v) Indication of remedies.

[15] In this way, administrative acts of general applicability; acts that indirectly (but not directly) affect the person and judicial procedures are outside the scope of this Resolution and of the principles of good administration.

[16] Study Principles of Good Administration in Member States available at https://circabc.europa.eu/webdav/CircaBC/eupan/dgadmintest/Library/6/1/2/luxembourg_presidency/ipsg_meeting_2005/IPSG-EVENT_APRIL-2005_DOCUMENT_2005-04-28_principels-of-good-administration-se_en_V01.pdf

[17] Appendix to Resolution (77) 31 On The Protection Of The Individual In Relation To The Acts Of Administrative Authorities. Adopted By The Committee Of Ministers On 28 September 1977At The 275th Meeting Of The Ministers' Deputies https://rm.coe.int/16804dec56

[18] Study Principles of Good Administration in Member States pp. 25-31 Available at https://circabc.europa.eu/webdav/CircaBC/eupan/dgadmintest/Library/6/1/2/luxembourg_presidency/ipsg_meeting_2005/IPSG-EVENT_APRIL-2005_DOCUMENT_2005-04-28_principels-of-good-administration-se_en_V01.pdf

[19] One example is the Netherlands that in the principles of good (proper) administration (*behoorlijk bestuur*) contains the principle of fair play in the activities of the tax administration including the collection of evidence. See IFA 2015 the Netherlands, https://www.ifa-nl.org/asset/document/55aba1882ee66f30.pdf and Gribnau, Hans, Voluntary Compliance Beyond the Letter of the Law: Reciprocity and Fair Play (October 22, 2016). in: B. Peeters, H, Gribnau, and J. Badisco (eds.), Building Trust in Taxation, Cambridge, Antwerp, Portland: Intersentia 2017.

4.4.2.4.2. Fair Tax Competition

Regarding fairness in terms of equal level playing field among countries, the reference to fair tax competition has been used since the 1996 informal ECOFIN Council meeting in Verona to distinguish between harmful and non-harmful tax competition. Before the ECOFIN Council, there were no criteria to understand what constitutes an unfair measure, and therefore, in this Council some "representatives stressed their concerns that the effects of fiscal erosion could ultimately endanger the achievement of vital Community objectives, and, as a result, called for a common approach within the Union". [20]

A year later, in 1997, the EU Package to Tackle Harmful Tax Competition, referred to the positive effects of fair competition, but also "that unrestrained tax competition for mobile forms of business increasingly threatens to cause economic distortions and to erode tax bases within the Community". As a result, one of the measures introduced by the EU to achieve fair competition was the approval of the Code of Conduct of Business Taxation. In this Code, the EU identifies "tax measures that are potentially harmful and provides a framework within which Member States can commit themselves to follow the principles of fair competition". [21]

The 2016 (January) EU Communication on an External Strategy provided a definition of fair tax competition stating that "it means that a third country should not operate harmful tax measures in the area of business taxation. Tax measures which provide for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the third country in question are to be regarded as potentially harmful. Such a significantly lower level of taxation may operate by virtue of the nominal tax rate, the tax base or any other relevant factor. When assessing whether such measures are harmful, account should be taken of the criteria as provided for in the Code of Conduct on Business Taxation endorsed by the Council, as well as practice and guidance agreed by the Code of Council working group'. [22] These criteria are used for the list of non-cooperative jurisdictions and if in the black list, the EU will introduce additional tax and non-tax countermeasures[23]

Later, in November 2016, the criteria for screening jurisdictions was further elaborated by ECOFIN. In respect of fair taxation, it included the following: "(1) the jurisdiction should have no preferential tax measures that could be regarded as harmful according to the criteria set out in 1997 Code of conduct for business taxation; and (2) the jurisdiction should not facilitate offshore structures or arrangements aimed

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[20] European Commission, *Taxation in the European Union. Report on the development of tax systems*, COM 96 (546) final, at 5.

[21] European Commission, *A package to tackle Harmful Tax Competition in the European Union*. 05.11.1997. COM (97) 564 final, Annex 1 at 7.

[22] European Commission, Communication from the Commission to the European Parliament and the Council on an External Strategy for Effective Taxation, COM/2016/024 final, Annex I
(28 Jan. 2016) at 3.

[23] Following the black listing, 'the Council adopted defensive measures against the blacklisted jurisdictions, both non-tax countermeasures (related to the European Fund for Sustainable Development) and tax countermeasures (reinforced monitoring of certain transactions, increased audit risks for taxpayers investing or using structures or arrangements involving the black-listed jurisdictions, and several anti-BEPS measures)'. P. J. Wattel & A. P. Dourado, Third States and External Relations, in European Tax Law: General Topics and Direct Taxation, Fed Fiscale Studieserie vol. 1, 214 (P. J. Wattel, O. Marres & H. Vermeulen eds, Kluwer 2018).

at attracting profits which do not reflect real economic activity in the jurisdiction".[24] However, scholars[25] and NGOS[26] have referred to the vagueness of the concept of fair tax competition and also to the credibility[27] of the EU blacklist and the application of these criteria to third (non-EU) countries and not to EU countries.[28]

4.4.2.4.1.3. Fair and Efficient Taxation of Corporate Profits (Fair Share) and the Problem of Tax-Avoidance

In the 2012 Action Plan to strengthen the fight against Tax Fraud and Tax Evasion, the EU Commission stated that "there is a need to ensure that the burden of taxation is shared fairly in line with the choices made by individual governments. Currently, some taxpayers may use complex, sometimes artificial, arrangements which have the effect of relocating their tax base to other jurisdictions within or outside the Union. In doing this, taxpayers take advantage of mismatches in national laws to ensure that certain items of income remain untaxed anywhere or to exploit differences in tax rates. By paying taxes businesses can have an important positive impact on the rest of society".[29] For this purpose, several measures were recommended to prevent aggressive tax planning[30] including the creation of a Platform for Good Tax Governance.

This Action Plan also addressed fairness in light of the internal market stating the importance of the EU's participation regarding the G20 and G8 international tax developments such as the need to prevent base erosion and profit shifting (BEPS)[31]. For the Commission this participation is needed to "provide a comprehensive and effective response to the various challenges posed by tax fraud and evasion and can thus contribute to increasing the fairness of Member States' tax systems, to securing much needed tax

[24] Council of the European Union, Criteria and Process Leading to the Establishment of the EU List of Non-Cooperative Jurisdictions for Tax Purposes, Fisc 187, ECOFIN 1014 (8 Nov. 2016), http://data.consilium.europa.eu/doc/document/ST-14166-2016-INIT/en/pdf. Annex.

[25] See Irma Johanna Mosquera Valderrama, 'The EU Standard of Good Governance in Tax Matters for Third (Non-EU) Countries' (2019) 47 Intertax, Issue 5, at 464. See also C. Panayi, Europeanization of Good Tax Governance, 36(1) Y.B. Eur. L. 442 (2017) at 461-462, and A. P. Dourado. The EU Black List of Third-Country Jurisdictions. Editorial. Intertax, Volume 46, Issue 3, at 179. See also P. J. Wattel & A. P. Dourado, Third States and External Relations, in European Tax Law: General Topics and Direct Taxation, Fed Fiscale Studieserie vol. 1, 214 (P. J. Wattel, O. Marres & H. Vermeulen eds, Kluwer 2018).

[26] G. Turner, Tax Justice Network, EU Tax Blacklist Is a Whitewash (8 Dec. 2017), https://www.taxjustice.net/2017/12/08/eu-tax-haven-blacklist-toothless-whitewash/

[27] Dourado rightly concludes that the 'worldwide credibility of the EU black list will very much depend on the implementation of the fair taxation criterion by the EU Member States themselves'. A. P. Dourado. The EU Black List of Third-Country Jurisdictions. Editorial. Intertax, Volume 46, Issue 3, at 180.

[28] See for a discussion on the application of the Standard of Good tAx Governance to third (non-EU) countries. Irma Johanna Mosquera Valderrama, 'The EU Standard of Good Governance in Tax Matters for Third (Non-EU) Countries' (2019) 47 Intertax, Issue 5, pp. 454–467

[29] Communication from the Commission to the European Parliament and the Council. An Action Plan to strengthen the fight against tax fraud and tax evasion. COM/2012/0722 final at 6. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52012DC0722

[30]See also 2012/772/EU: Commission Recommendation of 6 December 2012 on aggressive tax planning. OJ L 338, 12.12.2012, p. 41–43 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012H0772

[31] In the Action Plan, reference was made to the G20 Leaders Declaration of 19 June 2012, Los Cabos. "We reiterate the need to prevent base erosion and profit shifting and we will follow with attention the on-going work of the OECD in this area" Communication from the Commission to the European Parliament and the Council. An Action Plan to strengthen the fight against tax fraud and tax evasion. COM/2012/0722 final at 15

revenues and ultimately to improve the proper functioning of the internal market".[32]

In 2015, the EU adopted the Action Plan for fair and efficient corporate taxation in the EU. The aim of this Plan is to distribute the tax burden equitably, to promote sustainable growth and investment, to diversify funding sources of the European economy, and to strengthen the competitiveness of Europe's economy. For the European Commission "the fact that certain profitable multinationals appear to pay very little tax in relation to their income, while many citizens are heavily impacted by fiscal adjustment efforts, has caused public discontent. This perceived lack of fairness threatens the social contract between governments and their citizens and may even impact overall tax compliance". [33]

In order to introduce a fair, simple and more effective corporate taxation in the EU, in January 2016, the EU introduced an Anti-Avoidance Package with "concrete measures to prevent aggressive tax planning, to boost transparency and create a level playing field for all business in the EU". [34] The Chapeau Communication for this Anti-Tax Avoidance Package refers to the priority of the Commission to "develop a deeper and fairer Internal Market, which is fundamental to delivering a thriving economy that benefits all".[35]

For the EU Commission companies should pay taxes where profits are generated and this principle has been undermined by aggressive tax planning.[36] Therefore, the EU Commission provides for the introduction of general and specific anti-tax avoidance provisions to be applicable in the European Union and in its external strategy with third (non-EU) countries. This external strategy also includes the introduction of the Standard of Good Tax Governance in agreements concluded with third (non-EU) countries and a condition to have access to EU development aid.[37] In the January 2016 EU Communication on an External Strategy, the European Commission stated that "third (non-EU)countries should be encouraged to adhere to "the internationally agreed good governance standards, ensure a level playing-field for EU business and reduce the opportunities for outbound profit shifting". [38] See standard of good tax governance below.

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[32] Communication from the Commission to the European Parliament and the Council. An Action Plan to strengthen the fight against tax fraud and tax evasion. COM/2012/0722 final at 15.

[33] A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action, COM(2015) 302 final, p. 2 Available at http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/fairer_corporate_taxation/com_2015_302_en.pdf

[34] See EU Commission Website for anti-avoidance package at http://ec.europa.eu/taxation_customs/taxation/company_tax/anti_tax_avoidance/index_en.htm

[35] Communication from the Commission to the European Parliament and the Council. Anti-Tax Avoidance Package: Next steps towards delivering effective taxation and greater transparency in the EU. COM (2016) 23 final. Date 28 January 2016P. 2 http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0023&from=EN

[36] For the Commission, " The majority of businesses do not engage in aggressive tax planning and suffer a competitive disadvantage to those that do. The aggressive behaviour of these companies distorts price signals and allows them to enjoy lower capital costs, disrupting the level playing field in the Single Market. Small and medium sized businesses are particularly affected by this phenomenon". Communication from the Commission to the European Parliament and the Council. Anti-Tax Avoidance Package: Next steps towards delivering effective taxation and greater transparency in the EU. COM (2016) 23 final. Date 28 January 2016P. 2 http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0023&from=EN

[37] European Commission, Communication from the Commission to the European Parliament and the Council on an External Strategy for Effective Taxation, COM/2016/024 final, Annex I (28 Jan. 2016) at 3.

[38] Communication from the Commission to the European Parliament and the Council on an External Strategy for Effective Taxation. 28 January 2016 COM (2016) 24 final. P. 5. http://eur-lex.europa.eu/resource.html?uri=cellar:b5aef3db-c5a7-11e5-a4b5-01aa75ed71a1.0018.02/DOC_1&format=PDF

Fair Tax Competition and Fair Taxation in the Standard of Good Tax Governance

Since 2008, the ECOFIN Council[39] is using the criterion of fair tax competition as one of the criteria of the Standard of Good Tax Governance to be introduced in agreements concluded by the EU or EU countries with third (non-EU) countries. [40] Under this Standard, third (non-EU) Countries will be (or have been) assessed in respect of the compliance of the criteria of good tax governance which includes transparency, exchange of information and fair tax competition. Insofar as fair tax competition is concerned, this assessment includes consideration of whether the country engages in harmful tax competition and whether real economic activity is being carried out in the country. In 2018, the ECOFIN Council changed the criterion of fair tax competition to fair taxation and, introduced the additional requirement for third (non-EU) countries to implement the 4 Minimum Standards of the Base Erosion and Profit Shifting (BEPS) Project.[41]

8.1.5. EQUITY (Mosquera Valderrama)

In general equity is defined as "fairness and impartiality towards all concerned"[42]. In taxation, the concept of equity has been used differently in international and domestic discussions of fairness. In addition, there are some discussions in literature on the usefulness of these concepts to address fairness due to the lack of common understanding (inter-nation equity) or to lack of usefulness of these principles to steer international tax policy (horizontal and vertical equity).

At an international level*,* ***inter-nation equity*** has been used as a principle to achieve a fair allocation of income and mainly to justify a certain income allocation between the country of source and country of residence.[43] However, some scholars argue that "this principle has often been misused and misunderstood in the debate about redesigning the international tax regime". [44] In order to use this principle as a normative principle to design the international tax regime, a common understanding of this principle is required and its content should be explained in detail.[45]

In many jurisdictions a distinction has been made between ***horizontal and vertical equity***. Both concepts have been dealt with in the literature and sometimes as a criteria of "good tax".[46] Public finance scholars "such as Musgrave and Kaplow have defined horizontal equity as the requirement that equals be treated alike and vertical equity as requiring an "appropriate" pattern of differentiation among unequals".[47]

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[39] ECOFIN Council Meeting 14.05.2008 Reference 8850/08.

[40] See Irma Johanna Mosquera Valderrama, 'The EU Standard of Good Governance in Tax Matters for Third (Non-EU) Countries' (2019) 47 Intertax, Issue 5, pp. 454–467

[41] ECOFIN Council Meeting, 26.04.2018, Reference 8644/18.

[42] http://www.businessdictionary.com/definition/equity.html

[43] P. Hongler, Justice in International Tax Law, IBFD 2019, at 407.

[44] P. Hongler, Justice in International Tax Law, IBFD 2019, at 407.

[45] P. Hongler, Justice in International Tax Law, IBFD 2019, at 410.

[46] For instance regarding horizontal equity. See David Elkins. Horizontal Equity as a Principle of Tax Theory. Yale Law & Policy Review. Vol. 24:43, 2006.

[47] I.J.J. Burgers and I.J.Mosquera Fairness: A Dire International Tax Standard with No Meaning? Vo. 45, Issue 12, 2017 at 769. See also Richard A. Musgrave, The Theory of Public Finance 160 (1959); Louis Kaplow, Horizontal Equity: Measures in search of a principle, Discussion Paper No. 8 5/85, Harvard Law School, 2 Nal'l Tax J. 139 (1989), http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kaplow_8.pdf; quoted by Paul R. McDaniel and James Repetti, Horizontal and Vertical Equity: The Musgrave/Kaplow exchange,

In taxation, Repetti and Ring have stated that horizontal equity "requires that individuals with the same income should pay the same tax".[48] Whereas vertical equity "has generally been thought to require a progressive rate structure that imposes progressively higher rates on individuals with higher incomes". [49] In literature, there are differences regarding the use of vertical and horizontal equity as tools for tax policy.

According to Mc Daniel and Repetti, both horizontal and vertical equity do not have any independent normative content since the "content must be supplied by reference to economic assumptions and a theory of justice"[50]. Repetti and Ring when analysing this argument also concluded that "vertical equity and horizontal equity are together a single concept which lacks normative content and is itself only a proxy for theories of distributive justice and morality. It is a detour in history that led us to frame the issues of equality and fairness in the tax system in the language of vertical equity and horizontal equity". [51]

Regarding vertical equity, it is not clear what constitutes "appropriate" differences in treatment (vertical equity).[52] For instance, Repetti and Ring have argued the importance of addressing a theory of distributive justice. Referring to McDaniel and Repetti these authors stated that "vertical equity, by itself does not lead to the conclusion that we need a progressive income tax. It is necessary to refer to an underlying theory of justice and to make some key economic assumptions in order to conclude that a progressive rate structure is desirable". [53]

Regarding horizontal equity, Elkins argue that the normative grounds of horizontal equity are problematic, and therefore the normative justification of horizontal equity should depend "upon the moral entitlement of each individual to his free-market holdings". Therefore, "horizontal equity, if justifiable must derive from the conception that a person is morally entitled to his or her pre-tax level of well-being, and that the state, through its tax structure, must respect that position".[54] Therefore, as argued by Burgers and Mosquera, one of the challenges in defining horizontal equity requirements is that these requirements "can only be satisfied in respect of income taxes if individuals have identical tastes and a single type of ability or income and if it can be determined which differences are important and why these differences justify different tax treatment". [55]

Florida Tax Review, Volume 1, Number 10, 1993, http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1706&context=lsfp

[48] James Repetti and Diane Ring. Horizontal Equity revisited. Florida Tax Review. Vol. 13, Number 3, 2012 at 136.

[49] James Repetti and Diane Ring. Horizontal Equity revisited. Florida Tax Review. Vol. 13, Number 3, 2012 at 136.

[50] Paul R. McDaniel and James Repetti, Horizontal and Vertical Equity: The Musgrave/Kaplow exchange, Florida Tax Review, Volume 1, Number 10, 1993, http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1706&context=lsfp, p. 621.

[51] James Repetti and Diane Ring. Horizontal Equity revisited. Florida Tax Review. Vol. 13, Number 3, 2012 at 155.

[52] R. Bird and E. Zolt, Introduction to Tax Policy Design and Development, prepared for a course on Practical Issues of Tax Policy in Developing Countries, World Bank, April 28-May 1, 2003, http://www.gsdrc.org/document-library/introduction-to-tax-policy-design-and-development/, section 3.

[53] James Repetti and Diane Ring. Horizontal Equity revisited. Florida Tax Review. Vol. 13, Number 3, 2012 at 139 also referring to Paul R. McDaniel and James Repetti, Horizontal and Vertical Equity: The Musgrave/Kaplow exchange, Florida Tax Review, Volume 1, Number 10, 1993 at 610.

[54] David Elkins. Horizontal Equity as a Principle of Tax Theory. Yale Law & Policy Review. Vol 24:43, 2006. at 87.

[55] I.J.J. Burgers and I.J. Mosquera Fairness: A Dire International Tax Standard with No Meaning? Vo. 45, Issue 12, 2017 at 769.

At an international level, it becomes even more difficult to us these principles for tax policy decisions. The main reason lies in the fact that international tax policy has to deal with persons in different societies and different basic structures. This disables to draw the right comparison both in a horizontal and a vertical perspective as we are comparing persons in different societies and different basic structure. Therefore, both horizontal and vertical equity might lack a normative base for the purpose of designing the international tax regime.[56]

8.1. EQUALITY

8.1.6. CONCLUSION ON EQUALITY (Mosquera Valderrama)

8.1.6. Conclusion on equality

8.1.6.1. Introductory Remarks

The principle of equality can be found in different legal instruments, such as national constitutions, domestic provisions, bilateral tax conventions, or other international conventions. Taxpayers may use all of these instruments to claim the application of the principle of equality. Therefore, different judicial institutions secure the effective protection of the principle of equality, ranging from ordinary courts to constitutional courts. Furthermore, in the presence of supranational law or international conventions, additional courts protect the functioning of this principle.

Equality is the bedrock substantive legal principle for taxation. There are many expressions of the principle of equality in tax law.

First, the general principle of equality as such is of paramount importance in tax law, since it preserves equal treatment including equal enforcement of taxes due by all taxpayers. Second, the principle of ability to pay, expressly recognized in some national Constitutions,[57] is a more specific expression of the principle of equality. Third, the principle of equality implies competition neutrality. And fourth, it secures fairness and justice across taxpayers. The following paragraphs will summarize the different expressions of the principle of equality in tax law around the globe.

8.1.6.2. The General Principle of Equality

The general principle of equality requires formal equality between taxpayers before the law and establishes the main reference framework for the legislator. It applies to individual and corporate taxpayers. The principle of equality binds the legislator to treat similar situations alike for tax purposes and different situations differently. It also requires tax authorities to apply tax law in an equal way in respect of all taxpayers and implies, at the same time, a consistent treatment of all taxpayers, including, in some cases and generally in the EU, among residents with different nationalities,[58] insofar as they are

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[56] See for details Peter Hongler, Justice in International Tax Law, IBFD 2019, p. 393 et seq.

[57] See for instance Brazil, Greece, Italy and Spain.

[58] See for instance the introduction of a 15 % tax rate to non-Australian nationals with a specific immigration status i.e. working holiday makers, whereas income is tax-free for Australian nationals. In this case, the Australian court held that this violated Article 25 of the tax convention between Australia and the United Kingdom, *Addy v. Commissioner of Taxation*, FCA 1768 (30 October 2019). In the European Union, the non-discrimination principle phrobits discrimination of nationals of other Member States and between nationals of different Member States. Non-discrimination under the freedom of capital movement even applies with regard to third country nationals.

in a similar situation. The general principle of equality also includes the requirement of equal implementation of tax law. That means effective implementation in order to protect cooperative taxpayers from being burdened with the share of aggressive tax planners. National constitutions guarantee equality either to all persons or only to nationals. Some constitutions, however, guarantee equal protection of the law and equality before the law to all persons, whereas the general principle of equality, which also binds the legislator, is reserved to nationals. Other, notably African, constitutions are ambigious regarding the application of the constitutional principle of equality to the tax area. The underlying idea may be not to restrict the legislature's discretion in that area.

8.1.6.3. Ability to Pay

The principle of ability to pay is recognized as a general principle of law applicable to taxation in the constitutional orders of the world. It establishes a connection between the taxpayers' ability to pay and their obligation to contribute to the State budget. It can be used to guarantee equal fair sharing of the tax burden among taxpayers.[59] Ability to pay is also linked to progressive taxation.[60] It applies to individuals and in some countries also to legal persons[61]. It applies not only to direct taxes (income tax), but also to indirect taxes (e.g. VAT).[62]

Moreover, ability to pay can be useful to guarantee that there is sufficient time between the taxable event and the payment of tax. The ability to pay principle can also be invoked to provide a different treatment between single taxpayers and taxpayers with dependent family members. Conversely, ability to pay may also serve to justify higher tax burdens.[63]

It is not clear whether there should be an international, cross-border application of the ability to pay principle in tax matters. The Court of Justice of the European Union applies the ability-to-pay-principle to situations where more than one jurisdiction is involved.

However, it is only in the framework of discrimination that the CJEU will address possible conflicts with the ability to pay principle, which becomes a benchmark for assessing the existence of the discrimination.[64]

More recently[65], the CJEU stated that the existence of a progressive tax rate based on turnover for the

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59 For instance, Australia and Brazil linked the principle of equality to ability to pay.

60 For a different view see J. Hey, Steuersystem und Steuerverfassungsrecht, in Tipke/Lang (2018[23]), pp. 65 et seq. and 127, § 3, no. 212.

61 E.g. Hungary and Poland. The European Commission considers progressive turnover-based taxation "State aid" to companies with a lower turnover, cf. joined cases C-562/19 P and C-596/19 P, Commission/Poland and Hungary (pending).

62 Constitutional Court of Colombia, judgment of 5 December 2019, C-593/19. See J. Englisch, in Lang/Melz/Kristofferson, Value Added Tax and Direct Taxation – Similarities and Differences (2009), pp. 1 et seq. and 20 et seq. However, some scholars reject this view.

63 With regard to tax progression cf. Brazilian Federal Supreme Court, extraordinary appeal no. 562045/RS (6 February 2013).

64 In judgment of 12 May 1998, *Gilly*, C-336/96, ECLI:EU:C:1998:221, paragraphs 49 to 51, the existence of tax disparities prevented the CJEU from invoking the application of the ability to pay principle to personal deductions.

65 In CJEU, judgment (Grand Chamber) of 3 March 2020, *Tesco-Global Áruházak,* C-323/18, ECLI:EU:C:2020:140, Hungary introduced a special (progressive) tax for all companies operating in the store retail trade sector and in CJEU, judgment (Grand Chamber) of 3 March 2020, *Vodafone Magyarország* C-75/18, ECLI:EU:C:2020:139, Hungary introduced a special (progressive) tax for all undertakings operating in the

application of a special tax falls within the discretion of each Member State.[66]

On the international plane, ability to pay could be invoked against double taxation. To tax the same event more than once has nothing to do with taxation according to the principle of ability to pay. Moreover, it burdens taxpayers who operate cross-border. This conflicts with the principles underlying the EU single market and the WTO system.

However, it is difficult to apply the principle of equality, including its specific expression of ability to pay, where more than one tax jurisdiction is involved. The reason for such difficulty is, on the one hand, that remedying double taxation requires either the determination of *one* responsible State or close cooperation between the two States concerned. Both approaches are difficult for the judiciary to implement.

On the other hand, there is nevertheless more and more discussion at the international level whether single taxation constitutes a generally accepted substantive taxation principle. This development is connected with the call for international tax coordination, which has significantly expanded in the framework of BEPS. The BEPS project aims to prevent cases of unintended double non-taxation among countries by eliminating tax disparities based on a consistent exercise of taxing powers across the countries, in other words, single taxation. Therefore, single taxation is gaining ground, including with the project requiring minimum global taxation (also known as GLOBE). Even though GLOBE's underlying idea of a duty to tax is difficult to reconcile with the core concept of tax sovereignty, the international single taxation movement could thus lead to decreased double taxation and, at the same time, to taxation more in line with the ability to pay principle.

8.1.6.4. Competition Neutrality

The principle of equality in competition in tax law serves to prevent distortions of competition and preserves neutrality across taxpayers. Tax should not be the determining factor influencing business decisions. Taxpayers in comparable situations, comparable transaction and comparable products should be treated equally. The legislator has large discretion, but there shall be no arbitrary distinctions. Generally, there is judicial restraint when applying the principle of equality, including competition neutrality, to tax legislation. Nevertheless, the Colombian Constitutional Court e.g. held that higher taxation through a cascading consumption tax constitutes inadmissible discrimination based on the lenght of the production chain.[67]

At the international level, neutrality can be a challenge, since it is difficult to have the same tax rates worldwide. However, some attempts have been made in the BEPS project to harmonize taxation so that it is not driven by harmful tax competition.[68] The recent GLOBE proposal aims to prevent a race to the bottom regarding tax rates, and to establish a level playing field by minimum taxation. This new proposal is a challenge since it may conflict with the principle of tax sovereignty.

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telecommunication sector. In both cases, the aim of the law was ‘to impose a tax on taxable persons who have an ability to pay that exceeds the general obligation to pay, *Tesco*, paragraph 70, and *Vodafone*, paragraph 51.

[66] *Tesco*, paragraphs 70 and 74, and *Vodafone*, paragraphs 49, 51 and 56. In both cases, the tax was applicable to all companies irrespective of where they have their registered office (in Hungary or another Member State).

[67] Constitutional Court of Columbia, judgment of 5 December 2019, C-593/19.

[68] See Action 3 introducing Controlled Foreign Corporation (CFC) rules and Action 5 preventing harmful tax competition.

8.1.6.5. Tax Justice, Fairness, Equity

The principle of equality finally also provides a framework for an underlying theory of justice, whereby taxpayers can be treated as equals (horizontal equity) or with an appropriate pattern of differentiation among unequals (vertical equity). However, this is controversial.[69]

Moreover, if there was international minimum taxation (as currently discussed), one question that would need to be addressed is how to share efficiency gains from this tax among countries. This means concretely that additional revenue resulting from compensation of lower taxes in the residence State of an investor should not necessarily stay in such country, but possibly also be shared with others, including, in particular, the country where such income is sourced. This discussion also relates to the discussion of fairness of tax treatment within one State and in the relations between States, also known as inter-nation equity. Even if the latter is an important tax policy objective,[70] it falls out of the scope of Part I of our study.

8.2.3. NEUTRALITY (Mosquera Valderrama)

In taxation, the concept of neutrality "pleads for equal treatment of taxable events, irrespective of where they are located".[71] Therefore, in order to achieve neutrality, taxes should not be a factor influencing taxpayers' business decisions.

At international level,[72] Elkins has addressed two different ways that neutrality can be achieved.[73] One way is to tax worldwide income of their individual residents and domestic corporations at the same rates[74]. Another way is to harmonize "the tax regimes of the various countries, at least as far as the taxation of international investments is concerned. Again, if an investor faces similar tax burdens wherever it chooses to invest, then investment decisions will not be driven by tax forces and capital will

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[69] According to *McDaniel* and *Repetti*, both horizontal and vertical equity do not have any independent normative content since the 'content must be supplied by reference to economic assumptions and a theory of justice'. *Repetti* and *Ring* when analysing this argument also concluded that 'vertical equity and horizontal equity are together a single concept which lacks normative content and is itself only a proxy for theories of distributive justice and morality. It is a detour in history that led us to frame the issues of equality and fairness in the tax system in the language of vertical equity and horizontal equity'. See P. R. McDaniel and J. Repetti, Horizontal and Vertical Equity: The Musgrave/Kaplow exchange, Florida Tax Review, Vol. 1 (1993), Number 10 (1993), p. 621, and J. Repetti and D. Ring, Horizontal Equity revisited, Florida Tax Review, Vol. 13 (2012), Number 3, at 155.

[70] See K. Brooks, Inter-Nation Equity: The Development of an Important but Underappreciated International Tax Policy Objective, in J. G. Head and R. E. Krever (eds.), Tax Reform in the 21st Century: A Volume in Memory of Richard Musgrave (2009), p. 487 ff.

[71] Wolfgang Schön, , Neutrality and Territoriality — Competing or Converging Concepts in European Tax Law? (June 8, 2015). Bulletin for International Taxation April/May 2015.

[72] There are also two ways to address neutrality which are the Capital Export Neutrality and Capital Import Neutrality. These two ways refer to methods to prevent double taxation, and therefore, outside of the scope of this report. See Shaheen, Fadi, International Tax Neutrality: Reconsiderations (2006). Virginia Tax Review, Vol. 27, p. 203, 2007. Available at SSRN: https://ssrn.com/abstract=2245382

[73] See David Elkins , A Critical Reassessment of the Role of Neutrality in International Taxation). Northwestern Journal of International Law & Business, Vol. 40, No. 1, 2019. See also Shaheen, Fadi, International Tax Neutrality: Reconsiderations (2006). Virginia Tax Review, Vol. 27, p. 203, 2007. Available at SSRN: https://ssrn.com/abstract=2245382

[74] See David Elkins , A Critical Reassessment of the Role of Neutrality in International Taxation). Northwestern Journal of International Law & Business, Vol. 40, No. 1, 2019 at 6 referring also to Michael P. Devereux, Taxation of Outbound Direct Investment: Economic Principles and Tax Policy Considerations, 24 OXFORD REV. ECON. POL'Y 698, 707 (2008) and Edward Troup & Paul Hale, *EU Initiatives on Tax Harmonization: Do as I Say, Not as I Do?*, 17 TAX NOTES INT'L 1081, 1082 (1998

flow to where it can produce the highest pretax return."[75]

These two objectives have been addressed in the current OECD-G20 BEPS Project. For instance, the first way can be achieved by introducing CFC rules which is included in BEPS Action 3. [76] The second way can be achieved by fighting tax competition which is included in BEPS Action 5. [77] Furthermore, the current discussion to introduce a global anti-base erosion proposal (GloBE) that provides a minimum tax rate in the income inclusion rule also can influence neutrality. [78] This proposal aim to prevent countries engaging in tax competition to attract investors, and therefore, to prevent a race to the bottom regarding tax rates.

At national level, tax can also be a factor influencing the decision making of persons (physical or legal). However, there are problems in achieving full neutrality. As rightly argued by Schön "a tax as such, or a particular tax provision, can be neutral if it does not exercise any influence on the decision of a person to act in a specific manner. Any such distortion of private decision-making could result in welfare losses, i.e. "deadweight losses". Income taxation creates an inefficient bonus in respect of leisure over labour and net wealth taxation involves an inefficient bonus in respect of consumption over saving. It is nearly self-evident that in a world where there are taxes the objective of full neutrality cannot be realized". [79]

Moreover, at an international level, the problem is that efficiency gains through improving neutrality cannot be shared among the parties as they can in a domestic structure. Therefore, a certain reluctance is necessary to claim that the international tax regime should be as neutral and as efficient as possible. Several authors have already highlighted the weaknesses of neutrality as a normative goal for international tax policy.[80]

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[75] David Elkins , A Critical Reassessment of the Role of Neutrality in International Taxation). Northwestern Journal of International Law & Business, Vol. 40, No. 1, 2019. at 6.
[76] David Elkins , A Critical Reassessment of the Role of Neutrality in International Taxation). Northwestern Journal of International Law & Business, Vol. 40, No. 1, 2019. at 6.
[77] See section 3.2.2.2. Fairness and the criteria of fair tax competition.
[78] The income inclusion " would tax the income of a foreign branch or a controlled entity if that income was subject to tax at an effective rate that is below a minimum rate" OECD (2019), Public Consultation Document, Global Anti-Base Erosion Proposal ("GloBE") - Pillar Two, 8 November2019 –2 December 2019, OECD https://www.oecd.org/tax/beps/public-consultation-document-global-anti-base-erosion-proposal-pillar-two.pdf.pdf
[79] Wolfgang Schön, Neutrality and Territoriality — Competing or Converging Concepts in European Tax Law? (June 8, 2015). Bulletin for International Taxation April/May 2015 at 272.
[80] Michael Graetz, The David Tillinghast Lecture, Taxing International Income – Inadequate Principles, Outdated Cocepts, and Unsatisfactory Policies, Tax Law Review (2001), p. 282 et seq.; Peter Hongler, Justice in International Tax Law, p. 421 et seq.; Cees Peters, On the Legitimacy of International Tax Law, IBFD 2014, p. 106 et seq. and p. 364 et seq.