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An EU-Based Solution to Incongruence between Taxation and Representation within the Union?

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Incongruence between Taxation and Representation in the 21st Century from a European Union (EU) Perspective

The phenomenon of increasing mobility of individual taxpayers is manifesting itself all over the world. Within the European Union (EU) territory, this has been facilitated primarily by EU legislation and jurisprudence serving the Union's core agenda of enabling intra-EU movement of persons, goods and services under conditions comparable to those in a domestic market (Article 26 of Treaty on the Functioning of the European Union (TFEU)).^[i] This has been an incentive for EU citizens to establish their living realities between different Member States – for example, by commuting across national borders – for more than 50 years. However, as in other regions, these developments have gained additional momentum during the last decades on account of globalization and digitalization. It was then particularly due to the COVID-19 pandemic that the idea of working from anywhere (where there is a stable internet connection) has received wider acceptance and thus importance, further promoting the mobility of individual taxpayers (also) in the EU.^[ii]

The possibilities offered by such an environment have brought numerous benefits to individual taxpayers. For example, they may decide to live with their family in one Member State while working in another where the working conditions are better. However, their willingness to create cross-jurisdictional living arrangements may also come along with certain drawbacks. They may particularly find themselves in a situation where they pay their taxes mostly in a country where they are not able to influence the underlying legislation, as the right to vote in the national bodies primarily responsible for enacting tax law is usually linked to citizenship.^[iii] Hence, an incongruence between taxation and representation can be detected in these contexts.^[iv]

Provided that this is regarded as an issue that needs to be addressed, solutions could principally be sought at national level. Most notably, countries could decide to extend voting rights to non-citizens. While the political feasibility of such ambitions may be considered rather questionable in the current climate,^[v] the expectable legal diversity resulting from 27 national approaches may moreover be found problematic from a broader EU perspective.

How Could Tax Legislation at Union Level Help to Reduce Incongruence between Taxation and Representation in the EU?

Whether unequal treatment of comparable situations as a result of the definition of solutions to the incongruence issue at national level is considered undesirable, depends very fundamentally on one's perception of the ideal level of EU integration. On the one hand, this phenomenon could be seen as the logical outcome of the continued existence of 27 jurisdictions within the Union, closely interlinked in some respects, but nevertheless constituting autonomous states. Another (integrationist) view might lead to a preference for a common EU approach to mitigate the incongruence between taxation and representation resulting from intra-EU personal mobility. If the latter understanding is taken as a basis, a straightforward solution to the matter could be seen in the increasing (pre-)determination of tax legislation at Union level through relevant regulations or directives.

Secondary EU legislation is usually enacted to harmonise Member States' laws, but how can it (additionally) contribute to restoring congruence between taxation and representation for EU citizens? EU legislative acts in the field of taxation have traditionally been adopted under Articles 113 and 115 TFEU (for the purposes of indirect and direct taxation, respectively).[vi] Both provisions require, quite fundamentally, a unanimous vote in the Council of the European Union. The Council consists of Member States' representatives at ministerial level (Article 16(2) of Treaty on European Union), who are typically indirectly legitimized by the national population through their representatives in national parliaments. Since EU citizens can basically vote in the relevant elections in the Member State of citizenship regardless of where they live or work,[vii] an individual taxpayer's status as 'mobile' or 'immobile' should not make a difference when decisions on tax legislation are taken at Union level. Accordingly, further approximation of tax laws within the EU should principally lead to an increasing convergence of the situations of these two groups of taxpayers in terms of the degree of congruence between taxation and representation.

Why Increasing Tax Legislation at Union Level Is Nevertheless Not (Yet?) the 'Philosopher's Stone' for Solving Incongruence Issues

The specific quality of EU legislative procedures to ensure equal representation of 'mobile' and 'immobile' EU citizens thus obviously speaks in favour of addressing incongruence issues through EU-based solutions. It should not be forgotten, however, that the structures of EU legislation themselves exhibit suboptimal democratic legitimacy standards, with noticeable effects on the issue at hand.

The main competence provisions for EU tax legislation allocate all decision-making powers to the Council, hence a body that is not directly elected by EU citizens. Their influence on tax policy at this level is thus diminished, compared to the direct voting procedures established for purposes of elections to national parliaments. A similar assertion could be made even if the relevant competence bases provided for joint decision-making by the Council and the European Parliament (as in the ordinary legislative procedure[viii]), considering especially the significantly divergent rules in place in the Member States on elections to the European Parliament.[ix]

These well-known deficiencies should principally be less impactful on 'mobile' taxpayers who are not entitled to vote in the Member State where they (mostly) pay their taxes. After all, their degree

of representation should generally be improved by an increasing (pre-)definition of national taxes by EU legislation, if they do not have the possibility to influence national tax decision-making. On the contrary, those EU citizens whose living realities (almost) exclusively take place in the Member State of citizenship would be worse off as a result of such developments. This is because they would then be confronted with a situation in which their direct representation in the relevant decision-making bodies would be degraded to a ‘mere’ indirect one.

Concluding Remarks

In the light of the ideal of democratic legitimation of taxation, the incongruence between taxation and representation as a result of (intra-EU) taxpayer mobility is an increasingly relevant and pressing issue in the 21st century. There are compelling reasons to question the ability of individual states to adequately address these concerns, especially in a tight-knit community such as the EU. However, as the preceding analysis has shown, it is equally difficult to identify a convincing or even an optimal EU-based solution to the matter within the existing EU legal framework. This is due to the negative impact of transferring tax decision-making to the Union level particularly on the position of EU citizens who pay their taxes primarily in the Member State of citizenship. Therefore, when considering the option of EU-based measures, their ambiguous implications in terms of incongruence between taxation and representation should be taken into account.

[i] To name a representative example for each: Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States; CJEU 3 July 1974, Case C-9/74, *Casagrande v Landeshauptstadt München*, EU:C:1974:74.

[ii] Miranda Stewart, ‘Tax and Government in the Twenty-First Century’ (Cambridge University Press, 2022), p. 272; Svetislav Kostić, ‘Taxation and Immigration’, in ‘A Research Agenda for Tax Law’, edited by Leopoldo Parada (Edward Elgar, 2022), pp. 133–135.

[iii] Yvette Lind, ‘Voting rights compared to income taxation and welfare benefits through the Swedish lens’, *Florida Tax Review*, Vol. 23, Issue 2 (Spring 2020), pp. 713–742; Yvette Lind, ‘A Critical Analysis of How Formal and Informal Citizenships Influence Justice between Mobile Taxpayers’, in ‘Tax Justice and Tax Law’, edited by Dominic de Cogan and Peter Harris (Hart Publishing, 2020), pp. 117–132.

[iv] Wolfgang Schön, ‘Taxation and Democracy’, *Tax Law Review*, Vol. 72, Issue 2 (2019), p. 235.

[v] Apart from the fact that there are justifiable reasons for the restriction of voting rights to citizens; Ruth Mason, ‘Citizenship Taxation’, *Southern California Law Review*, Vol. 89 (2016), pp. 190–191.

[vi] Recently, Article 122 TFEU has been used for the first time for the purposes of EU tax legislation. However, as decision-making under this competence norm is likewise limited to the Council level (albeit with different majority requirements), the argument below applies mutatis

mutandis.

[vii] Leaving aside the issue that under national electoral laws citizens may lose their right to vote if they have lived abroad for a sufficiently long period of time (as is the case in some Member States).

[viii] See representatively, Robert Schütze, ‘European Union Law’, 3rd ed. (Oxford University Press, 2021), pp. 249–255.

[ix] European Parliament, ‘2024 European elections: National rules’, PE 754.620 (April 2024), [https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/754620/EPRS_ATA\(2023\)754620_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/754620/EPRS_ATA(2023)754620_EN.pdf) (accessed 9 June 2024).

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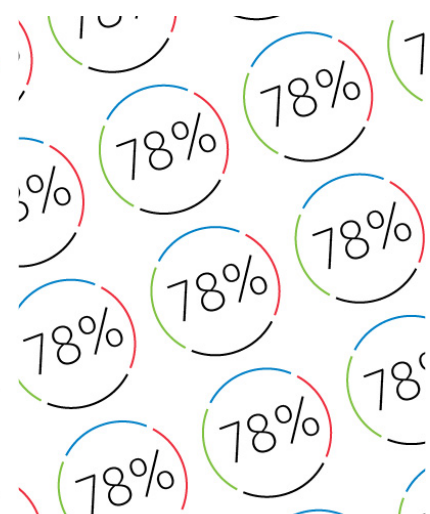
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