
Taxation in European Union

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Introduction

The “European tax law” is a set of regulations issued by the EU institutions and designed to provide the control of tax matters over the tax legislations of the Member States.

However, the existence of EU rules aimed to regulate the procedures for taxation in the European Member States is not enough to identify an area of an independent and autonomous law.

In fact, if the tendency to profile the EU law is developing in the recent times, in order to valorize the regulatory provisions of specific areas of the legal system (giving a meaning to the definition of “European private law” or “European administrative law” or even “European trial law”), it must be considered that the identification of an autonomous sector of law requires the logic of a “legal system”; it basically implies the existence of principles and juridical values and the dynamic relationships between the norms.

Therefore, the existence of a set of general rules by EU institutions cannot be considered sufficient to identify a “European tax law”; if these rules compose a mere aggregate without a functional meaning, the element of the systematic unity would be lacking and there should not be an autonomous order of law.

In any case, there are several elements which lead to identify an independent and autonomous sector of law in the set of EU norms regarding the taxation law.

First of all, specific and peculiar sources of EU law may be detected, which clearly express the capacity of the European institutions to proceed independently in the regulation of tax laws over the legislative powers of the Member States.

Moreover, several principles, which are intended to set the basic values of the taxation procedure, would be defined at a primary axiological level and specifically in the Treaty of the European Union. Without anticipating topics that will be developed during this work, some juridical values may be certainly stated as the main guidelines of EU regulation: the removal of customs barriers, the protection of the fundamental economic freedoms in the common market, the principle of fiscal non-discrimination, the prohibition of the State aids, the preservation of national public finances and the tax harmonization.

In the EU derivative law, several specific tax disciplines are formulated on single taxes, where the principles set out in the Treaty are well executed. In this context, it is possible to find typical European regulations, meaning that the taxation models of

national legislations are instrumentally coordinated to the goals of the European integration.

Sources, principles and regulations functionally connected to each other clearly indicate the existence of a systematic core which can appropriately stand as an autonomous legal sector; therefore they seem to justify the assertion of a *jus commune* of European impact concerning tax matters and liable to impose itself to all national tax legislations.

On the other hand, it must be noted that the fiscal discipline drawn up by the EU sharply drifts away from the developmental lines of the modern tax law.

In fact, the whole of the European fiscal regulations essentially meets the logic of the market integration on the basis of the principles of the trading free competition regardless of the nationality or the residence. Therefore, the tax system is free of its potential load of “obstruction” regarding the free movement of capitals, people, goods or services (the four freedoms of European tradition), in order to show up as a system of “neutral” rules compared to the market and the economic forces of a “free system”.

There is a complete lack of the tradition of the European constitutional values which characterize the basic skills of the taxation phenomenon. Particularly, it can be observed as a lack of the “fiscal interest”, intended as the general interest of the associates to the acquisition of tax resources in order to facilitate the social development, the institutional progress, the growth of the Welfare State and the essential equality of all the members of the civil community. Likewise, there is no trace of a reference to the ability to pay, an inescapable principle of distribution of tax burdens among the associates in order to ensure the concrete pursuit of a logic of the national wealth redistribution, which is at the same time a measure of guarantee and a safeguard of the individual sphere from the public administration excesses operated for the tax burden.

Therefore the function assumed by the EU taxation system is very different from that one assumed by the national tax legislations: it is a “negative” function, addressed to limit and to restrict the distortionary effects of the taxation system and not to affect “positively” the consistency of the national wealth and the redistribution process of the income among the members of a civil community.

The “negative” attitude of the EU taxation system clearly allows to highlight one of the features which tends to prefer noticeably the national system compared to the EU system.

In substance, the aim of fostering the process of the market integration brings the European institutions to develop principles and rules which determine the limitation of the power of the national systems without proposing alternative models of taxation. Therefore, EU regulations are set forth in order to contain the tax sovereignty of the Member States and not to replace this sovereignty, establishing a different level of values and rules.

Basically, a criterion of “negative integration” is established, which leads to the correction of the imperfections of the national taxation system through the deletion of all the divergent rules compared to the final neutralization of taxation towards the market and competitors. A new taxation system, which can replace the systems traditionally developed in the Member States, is not established.

In this regard, it can vividly refer to the attitude of the EU institutions to present themselves as an “anti-sovereign”, which terminates the fiscal sovereignty of the other Member States without replacing it with a new sovereignty of their own, thus resulting in a sort of “land of no-one”, which lacks the reference values.

This issue of the identification of a “European taxation law” appears so complex, since it may discover elements “for” and elements “against” such a nominalist choice.

Undoubtedly there exists a set of regulations which poses as a functional and systematic unit, suitable to be qualified as an autonomous legal system.

On the other hand, the lack of the essential values of the constitutional dialectic of the taxation phenomenon and the absence of a link with the sovereignty seem to testify a characterization of the regulatory system in a quite different way compared to tax law (as traditionally known).

In the awareness of such qualifying difficulty, some lexical doubts came out. In this regard, different nominalist choices have been proposed, such as “European Union tax law”, essentially indicating the relevance of the tax regulations to the competence of the EU institutions; “taxation law in EU relations”, in order to express the tendential supranational dimension of the EU tax system, primarily aimed at providing regulations for the Member States; or even “EU international law”, in order to bring the taxation system of the European Union in the context of the international tax law, enhancing the pactional profile of such system.

However, while bringing the issue to an essentially formal and nominalist area, the choice of the expression “European tax law”, as well as the great qualifying simplicity (and therefore a more didactic and classificatory assertiveness), contains an axiological impetus towards the establishment of the united Europe posing as a real federal State, which is indeed likely to overcome the conservative resistances and the particularities of the individual nation-States.

Therefore, the “European tax law” expresses a vital suggestion rather than a principled position: it is the wish for the actual development of the European integration process, which leads to the direction of an institutional organization of the European people according to the values that traditionally denote the tax law in the constitutions of the European countries.

This work is aimed primarily at those who are close to the tax matters for study purposes (university, specialization, professional qualification). Therefore, the text structure is imagined to provide an overall and systematic framework of the main topics of the “European tax law”. The sequence of arguments answers to an institutional logic, and namely, it respects the progression usually addressed in the academic tradition of the tax law.

Basically, the book can be divided in two parts: the first one is devoted to the examination of the EU institutions for tax matters, and the second one is addressed to the analysis of the principles of EU taxation law.

Initially, the relevance of the taxation power in the European legal tradition is proposed following the main historical steps of the taxation relationship and highlighting similarities and differences that exist in the several European tax jurisdictions.

Subsequently, the general framework of the EU institutions is outlined, addressing special attention to the set of regulations regarding taxation, with particular reference to the stage of formation of EU rules and to the potential contrast with the national legal systems.

Then, the analysis of the European sources of law is carried out. First, the general principles of taxation set out in the Treaty of the European Union are examined. Second, the taxation system contained in the so-called derivative EU law is analysed (considering the rules formulated by regulations, directives and other regulatory tools). Finally, the case law of the Court of Justice, formed in order to address the main tax issues, is illustrated.

In the second part of the book, a particular attention is given to the general principles emerging from the European framework which typically involve the taxation system. This brings to a detailed examination of the fiscal importance of the customs Union, the European freedoms, the principle of tax non-discrimination, the balance between national interest and EU values, the tax harmonization, the State aids, the harmful tax competition and other general principles applicable in the tax jurisdiction.

Finally, an overall judgement about the development of the European integration process is proposed, with particular regard to the nexus between taxation power and sovereignty and to the values of taxation matters, in order to highlight the possible next stages of the evolution of “European tax law”.

In the book, the European Union will be referred to as a community of 28 countries (qualified as Member States), as enforced at the date of the publishing. The exit of the United Kingdom (usually called “Brexit”) is not considered because it is not currently effective.

Therefore, in the text, there is a continuous reference to the current number of 28 Member States.

My personal expectation is that this book can constitute a real contribution to the development of a European sensibility about a fundamental theme of the institutional framework of the common life: the tax relationship involves, indeed, some basic elements of the relation between the public power and the general interests of the social community, on one side, and the individual sphere of liberty and property of the single citizens, on the other side.

The European legal order is currently the fundamental framework within which the tax relationship should be determined and regulated and is going to become the point of reference of the taxation power.

Therefore, the analysis of principles and institutions of European tax law allows the formation of a solid background not only about the tax discipline but moreover about the dialectic of fundamental values of the social and civil life in the European territories.

I hope so that the European tax law can develop adequately in the national legal orders assuming the leading role of a common juridical basis for the definition of a unified and harmonized framework for the exercise of the taxation power in the current European democracies.

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