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A Constructive Criticism on Turnover Taxes

1. Introduction

During the past decades national tax sovereignty has dramatically changed. Within the framework of the limits imposed by supranational and international law states have partly surrendered the substance of their tax sovereignty, or at least loosened the core of its absolute nature.

Such limits currently operate – *de jure*[2] or *de facto*[3] – as actual constraints on the exercise of taxing powers by the national legislator, questioning how taxes are shaped and determining their validity.

These constraints contribute to outline the contour of national tax policy, also when the latter pursues regulatory goals, as much as constitutional principles and the need for sound economic objectives do, producing important repercussions in cross-border scenarios, too.

In parallel with this phenomenon, the criteria that determine international tax nexus are gradually losing their validity. This is clearly visible in respect

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[2] The existence of a wide network of tax treaties across the world considerably limits the exercise of taxing powers of most countries in addition to the ones that states voluntarily introduce on a unilateral basis by their own domestic legislation. Moreover, in areas of economic integration, such as the European Union, the surrender of sovereignty implicitly also narrows down the exercise of taxing powers in order to preserve the supremacy of supranational over national law of Member States.

[3] The developments nudged by the international tax coordination campaigns – such as the ones on tax transparency and the fight against base erosion and profit shifting – undertaken under the political impulse of the G20 are the best examples of how globally desirable goals in fact affect national tax policies.

of income taxation. Remotely operated business models and risk mainly borne outside the market countries either prevent the exercise of taxing powers by the state of source on income, or end up allocating in fact a limited income to such a country. In such context, the permanent establishment nowadays often fails to achieve a balanced allocation of taxing powers in cross-border situations. Moreover, the COVID-19 pandemics has shown that remote operation of other activities, including various forms of employment, entertainment, and sport, challenge the functioning of the place of exercise of the activity as international tax nexus also for such types of active income.

A comprehensive reform of the international tax nexus[4] is therefore of paramount importance to preserve inter-nation equity and avoid an international tax war, which showed some preliminary warnings already a few years ago.[5]

The current global tax scenario partly reflects a certain degree of chaos and schizophrenia as to income taxation, which exposes business to a significant degree of legal uncertainty and to an undesirable extra tax burden. On the one hand, states show awareness of the importance of international tax coordination to counter base erosion and profit shifting. On the other hand, they are much less concerned with the overkill effects for measures that go beyond countering unintended double non-taxation and may result in double taxation across the borders. The latter situation clearly arises from the exponential growth of anti-avoidance measures introduced in connection with the implementation of the BEPS project. However, such measures may still be justified, especially if one considers that unregulated tax competition still leaves notable room for exploiting cross-border tax disparities and tax rate differentials. A growing consensus for regulatory tax measures across OECD countries may soon lead to a stop in the race to the bottom with the introduction of a global standard of minimum income taxation on business by means of international tax coordination.[6]

[4] The International Tax Law Committee established in 2020 in the framework of the International Law Association is currently conducting a comprehensive study on the reform of international tax nexus, with a view to establishing a new framework that is consonant with inter-nation equity and consistent with public international law. Such conditions are essential for the establishment of a new international tax nexus made to last for several decades and capable of addressing the needs of a globalised community.

[5] See: US Treasury, *White Paper: The European Commission's Recent State Aid Investigations of Transfer Pricing Rulings*, 24 August 2016, https://home.treasury.gov/system/files/131/WhitePaper-EU-State-Aid-8-24-2016.pdf (accessed: 19.07.2021). This paper is the first reaction of the United States to the numerous tax state aid procedures initiated some years ago by the European Union against multinational enterprises, most of which are based in the US.

[6] This is also known as the Second Pillar of the BEPS 2.0 Project. Based on a Franco-German proposal put forward in the framework of international tax coordination studies conducted under the auspices of the OECD (on which see: J. Englisch, J. Becker, *International*

In the absence of a comprehensive reform of an international tax nexus, this situation may soon become unsustainable, especially if one considers a new spontaneous trend that is gaining momentum across the world to protect national tax sovereignty from erosion. Several states have introduced unilateral levies, especially in the form of turnover taxes on digital services. Such taxes expose business to an additional burden on top of income taxation, usually still due in the state of residence.

This short study develops some constructive criticism from a legal and policy perspective, with a view to developing the possible cornerstone for using turnover taxes in the framework of coordinated action at the EU and international level. Moreover, it draws some conclusions on potential future developments also in connection with the taxation of digital services and international minimum income taxation.

2. Corporate turnover taxes: the reasons for their global success

Turnover taxes have long been known for operating in the framework of consumption-type[7] and of income-type[8] value-added taxation.

Effective Minimum Taxation – The GLOBE Proposal, "World Tax Journal" 2019, No. 4, pp. 483–528; P. Pistone, J. Nogueira, B. Andrade, A. Turina, *The OECD Public Consultation Document "Global Anti-Base Erosion (GloBE) Proposal – Pillar Two": An Assessment*, "Bulletin for International Taxation" 2020, No. 2, pp. 62–75; A. Perdelwitz, A. Turina (eds), *Global Minimum Taxation? An Analysis of the Global Anti-Base Erosion Initiative*, IBFD, Amsterdam 2021), in 2021 this plan received the endorsement of the reform of US international taxation, proposed by the Biden administration, and of the G20.

[7] Before the introduction of the EU VAT common tax system, taxes on turnover were frequently used in the European Union, but were then gradually faded out, due to their interferences with the goals of the internal market, mainly connected with their cascading effects and implications in cross-border relations. See for instance the Irish turnover tax, or the Italian *imposta generale sulle entrate* (IGE). These taxes still apply in some countries, also as an alternative to VAT. See for instance the case of the South African turnover tax. Moreover, taxation of turnover also operates in the framework of a simplified levying of taxes on small business as a single integrated levy that also replaces the ones on income and VAT on an optional basis. See for instance the case of the so-called *monotributo* in Argentina, operating under the Law 24.977 of 3 June 1998 on Simplified Regime for Small Taxpayers (*Regimen Simplificado para Pequeños Contribuyentes*).

[8] See for instance the numerous examples of the business taxes around the world, such as the French *taxe professionnelle*, the German *Gewerbesteuer*, the Hungarian Local Business Tax, the Italian *Imposta sul Reddito delle Attività Produttive* (IRAP), the Spanish *Impuesto sobre Actividades Económicas* (IAE), and the Mexican *Impuesto Empresarial a Tasa Única* (IETU).

The crisis of income taxation at the international level has sparkled up a blossoming of corporate turnover taxes. In particular, two factors have contributed to the dramatic increase of latter taxes across the globe. First, such taxes allow the market country to exercise its jurisdiction in respect of value created on its territory and otherwise usually lacking corporate income tax nexus. Second, turnover taxes allow the market country to enhance level-playing field, by equalising the tax burden on its territory for all corporate players, as it has concretely occurred also in the case of the Hungarian and Polish sectoral turnover taxes.[9]

In such a scenario, turnover taxes have thus been perceived by the market countries as a quick fix to stop the erosion of tax revenue without infringing the international obligations contracted in respect of income taxes. Moreover, they have been perceived as an instrument of tax fairness, especially considering that, in the absence of single taxation, several multinational corporate players often escape income taxation and thus enjoy a competitive advantage over players operating mainly in a single jurisdiction.

The author acknowledges that, in such circumstances, levying unilateral taxes on turnover was perhaps one of the few tax policy options left. In the absence of a comprehensive reform of international tax nexus, or at least until some concepts are adjusted to the new business models,[10] states have indeed little room for manoeuvring on the side of income taxation. Moreover, in the European Union, action is also difficult on the side of consumption taxes, due to the general scope of value added tax and the existence of additional harmonised levies, such as excise duties.

However, not all that glitters is gold. A fair assessment of how turnover taxes operate in European and international tax law requires also a clear understanding of the implications for business when such taxes are levied on top of the ones on income and consumption. Turnover is not only a proxy for value consumption, but also for value creation. However, considering that in the current scenario countries usually levy turnover taxes only on some types of business, it is important to verify whether this policy decision, prompted by revenue goals, is also consonant with fundamental legal

[9] As indicated below in section 3, turnover taxes are currently used as an instrument to pursue fairness of tax competition. As shown by the Hungarian and Polish cases analysed by the Court of Justice, sectoral corporate turnover taxes target some market players only.

[10] This could for instance be the case of adjusting income tax nexus for business with a virtual permanent establishment concept, which reflects the significant economic presence in a country other than that of residence of the enterprise. Such a solution (first proposed by P. Hongler, P. Pistone, *Blueprints for a New PE Nexus to Tax Business Income in the Era of the Digital Economy*, "IBFD White Papers", Amsterdam 2015, pp. 1–63) would have the merit of changing the allocation of taxing powers while preserving the traditional conceptual categories of income taxation.

principles and in line with the requirements established by competition law. Both are particularly important within the internal market, where EU Member States preserve taxing powers at the national level and must exercise them consistently with the supremacy of EU law, thus also with the supranational competition policy established by Art. 107 TFEU.

The cases of the progressive turnover taxes levied by Poland on retailers and by Hungary on advertisements have received particular attention within the tax community in Europe, due to the failed attempts by the European Commission to question their validity and compatibility with the prohibition of state aid. After admitting that such taxes were compatible with the non-discrimination principle, the Court of Justice also acknowledged that such taxes do not infringe the prohibition of state aid.[11]

The analysis of the implications arising from those taxes for the exercise of tax sovereignty and the legitimacy of taxes on turnover within the European Union is particularly important to evaluate the extent to which they are a desirable feature of tax systems across the world.

3. The implications of the European judgments for turnover taxes

In two important blocks of judgments,[12] the Court of Justice of the European Union has assessed, during the years 2020 and 2021, the compatibility of turnover taxes with EU law, focusing in particular on the non-discrimination principle and the prohibition of state aid.[13]

The endorsement by the Court of Justice to the validity of turnover as economic indicator[14] is a good starting point for the conceptual remarks that also address some fundamental principles of taxation.

[11] See below in section 3.

[12] CJEU, judgement, 3 March 2020, *Vodafone Hungary*, C-75/18; CJEU, judgement, 3 March 2020, *Tesco*, C-323/18; CJEU, judgement, 16 March 2021, *Commission* v. *Poland*, C-562/19 [retail sales tax]; CJEU, judgement, 16 March 2021, *Commission* v. *Hungary*, C-596/19 [advertisement tax].

[13] Moreover, the judgment *Vodafone Hungary*, C-75/18 also addressed the compatibility of turnover taxes with the common EU VAT system, based on the interpretation of Art. 401 of the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, Official Journal of the EU L 347, 11.12.2006, pp. 1–118.

[14] CJEU, judgement, 3 March 2020, *Vodafone Hungary*, C-75/18, Para. 50; CJEU, judgement, 3 March 2020, *Tesco*, C-323/18 Para. 70; CJEU, judgement, 16 March 2021, *Commission* v. *Poland*, C-562/19, Para. 41; CJEU, judgement, 16 March 2021, *Commission* v. *Hungary*, C-596/19, Para. 47.

The fact that a taxpayer derives a turnover from the exercise of an economic activity shows indeed that such a taxpayer may be asked to pay taxes by reference to such turnover. In the Hungarian cases decided in 2020,[15] the Court indicated that progressive taxation may be based on turnover, as it constitutes a neutral criterion of differentiation and a relevant indicator of a person's ability to pay taxes.[16] Then it added from a state aid perspective that progressivity was a structural feature of turnover taxes, and, as such, suitable to integrate the so-called reference framework used to determine when a selective tax advantage occurs.[17]

When assessing the potential indirect discrimination, the Court had to verify whether the levying of such taxes could indirectly disfavour business exercising fundamental freedoms as compared to purely domestic situations. When assessing the potential tax state aid, the Court had to verify whether the powers of the EU Commission had been exercised in conformity with the rule of law and had given sufficient evidence of the existence of a selective advantage in favour of those business operators, which either do not pay these taxes, or do so at more favourable conditions, namely such that would create distortions to the internal market, which would be incompatible with Art. 107 TFEU. Not even by bundling both types of scrutiny can we reach a comprehensive assessment of the consistency of those taxes with the principles of fair taxation and the constitutional principles, which will require a separate analysis.[18]

Even if turnover represents a valid economic indicator, the validity of sectoral turnover taxes must be reconciled with their ability to achieve the policy goals for which they have been established. Accordingly, if we get back to the specific EU law perspective, the judgment of the Court of Justice on the Hungarian and Polish sectoral turnover taxes should not be perceived as giving *carte blanche* to the levying of these taxes in the European Union.

In most tax systems, taxes on turnover are always bundled together with other taxes that also relate to value creation, such as in particular the ones levied on income. The CJEU judgments on the Hungarian and Polish cases have hardly explored the profiles concerning the combined effect of income and turnover taxes, except for the fact that the levying of sectoral turnover taxes on certain economic activities does not per se give rise to indirect discrimination and/or to an infringement of the prohibition of state aid.

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[15] CJEU, judgement, 3 March 2020, *Vodafone Hungary*, C-75/18; CJEU, judgement, 3 March 2020, *Tesco*, C-323/18.

[16] See: CJEU, judgement, 3 March 2020, *Tesco*, C-323/18, Para. 70.

[17] See: CJEU, judgement, 16 March 2021, *Commission* v. *Hungary*, C-596/19, Para. 47.

[18] See below section 5.

Turnover is per se a less refined economic indicator than income, as the latter goes beyond showing value creation and, especially in the form of net income, it reflects an increase in the taxpayer's capital.

Yet, if the economic activity exercised by a person produces a given turnover, the latter is also a sound criterion for triggering the tax liability of such a person. Assessing whether the levying of turnover taxes is fair and legitimate requires a more in-depth analysis of the scenarios in which such taxes operate.

The recent trends of turnover taxes show that they hardly ever apply on a general basis; rather, they present the typical features of sectoral taxes and are levied on specific types of activities. This occurs in the case of the taxes levied in Hungary and Poland, scrutinised by the Court of Justice, as well as in the ones that many other EU Member States levy on digital services. It is reasonable to expect that the EU itself may introduce turnover taxes at the supranational level on the supply of digital services.

In the cross-border scenario, turnover taxes may hardly fall within the objective scope of tax treaties.[19] Insofar as they do not, such taxes, unlike the ones levied on income, are not subject to the limitations established in the framework of the said tax treaties. This concretely means that states may levy turnover taxes without any international restriction on their taxing powers and thus regardless of whether they keep the jurisdiction to levy taxes on income.

An example can show more concretely the implications of such a situation. In the absence of a permanent establishment, only the country of residence can levy taxes on profits. By contrast, no similar restriction affects the exercise of taxing powers on turnover by the state in which the economic activity is exercised, also often known as the market country. In the example of the Polish and Hungarian taxes, this circumstance has allowed exercising the tax jurisdiction on turnover regardless of whether the same occurs on income. Accordingly, some economic activities pay taxes on income and turnover in Hungary and Poland, and others pay taxes in such countries on turnover, but not on income. However, in such a case the country of residence preserves the right to tax income, thus giving rise to a potential situation in which the same value creation is taxed by reference to the turnover in one country and to income in another country. Even though this is not double taxation in a strict sense, it remains a form of

[19] Depending on their actual features some of them do, some others do not. Moreover, different opinions have been held in literature, including that of the author, who is generally not inclined to admit that turnover taxes may fall within the scope of Art. 2 OECD MC. See further on this in: P. Pistone, A. Ullmann, *Digital Taxes and Art. 2 OECD Model Convention 2017*, [in:] G. Kofler, M. Lang, P. Pistone, A. Rust, J. Schuch, K. Spies, C. Staringer (eds), *Taxes Covered – The Scope of Double Taxation Conventions*, IBFD, Amsterdam 2021 and the literature quoted therein.

duplication of taxes in respect of the same value creation, which ought to be addressed through dedicated measures. Currently, no such measures exist at the international level.[20]

When both taxes on turnover and income are levied in the same country, some form of coordination between them is more likely to take place, for instance by deducting turnover tax from the one levied on income. This helps in addressing the difference in treatment that the levying of sectoral turnover taxes would otherwise determine in comparison with the tax burden applicable on other economic activities.

By contrast, no such coordination is often to be found when two different countries use the two different proxies for taxing the same value creation, as neither of such countries is willing to unilaterally surrender a portion of the collected tax revenue.

The likely introduction of an international minimum standard for taxing corporate income may in fact produce indirect repercussions on the need to levy turnover taxes, going as far as undermining one of its two rationales. The reason is simple to explain: an international minimum income taxation will prevent undertaxation of global players and thus remove any competitive tax advantage that they otherwise enjoy in respect of economic players that operate in the purely domestic scenario of the market country. However, insofar as the presence of business does not trigger the income tax nexus, as in the example indicated earlier, income tax will be levied by the residence state, rather than by the market one. Therefore, the issue may arise as to whether one could still justify the levying of turnover taxes in the market country, and, even more, whether their progressive nature will still fit into a conceptual framework that creates a global coordination for securing an effective taxation of income.

4. Turnover taxes from a policy perspective

The policy choice of levying sectoral taxes on turnover from some business activities per se generates a different treatment as compared to the one applicable to activities that are not liable to such taxes. Considering the

[20] The Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018)148 final, Brussels, 21 March 2018, mentioned this type of issues in its recital 27, indicating that EU Member States were expected to give a deduction of turnover from corporate taxes. However, such indication was left without a corresponding provision within the articles of the said proposed Directive.

arguments put forward by the Court of Justice in the Hungarian and Polish cases,[21] this policy choice is per se neither problematic, nor arbitrary.

The steep progression of the Hungarian and Polish sectoral turnover taxes ended up mainly targeting sizeable operators, which are in fact almost exclusively non-residents. This policy choice relies upon the assumption that such operators do not pay a fair share of taxes, including in the market country. Said assumption partly justifies the heavier tax burden on them, in order to re-establish level-playing field with smaller players,[22] but in fact gives rise to a sui generis form of redistributive taxation.[23]

The Court of Justice endorsed it as a structural feature of both types of turnover taxes, which also presuppose the likelihood of low taxation, resulting from the policy choices of the residence state and the general absence of liability for income tax purposes in the market country.

Even though, in principle, this is often the case, one may have doubts as to the overall legitimacy of a schedular application of compensatory taxation, i.e. as to the fact that the latter applies regardless of what happens in the country of residence of the large business operators. Especially when the latter country keeps and exercises taxing rights on income of such taxpayers, the combined application of such tax with the one levied by the market country on corporate turnover may give rise to overtaxation and unfair conditions for the exercise of economic activities across the borders.

The rationale of progressive corporate turnover taxes in the Hungarian and Polish experience, as well as in the similar sectoral levies applicable in other countries, including on turnover from digital services, shows an interesting development from a constitutional perspective. In particular, fairness justifies a special kind of compensatory taxation across different types of taxes, i.e. more turnover tax in the market country replaces the likelihood of less income tax levied in the residence state.

In such a context, the function of compensating the likelihood of lower income taxes abroad contributes to the validation of a tax policy choice underlying progressive corporate turnover taxes and their overall fairness goals. By doing so, it adds a cross-border dimension of justice to

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[21] See above section 3.

[22] The other possible justification for levying heavier corporate turnover taxes is that the bigger economic operators are more competitive than the smaller ones. However, if that were the case, then the two categories would also not be comparable for other purposes, which the Court of Justice denies in connection with the application of state aid rules.

[23] The capacity of turnover taxes to pursue redistributive goals (especially when levied on persons other than the ultimate bearers of the ability to pay taxes) can be questioned from various perspectives. See further on this: P. Pistone, J. Nogueira, A. Turina, *Digital Services Tax: Assessing the Policy Reasons for its Introduction in the European Union*, "International Tax Studies" 2021, No. 4, IBFD Tax Research Platform/el.

the constitutional principles of equality and ability to pay.[24] The need to establish a level-playing field justifies the different treatment of sizeable operators in the market country as compared to the one that such a country applies to small and medium size (mainly domestic) business operators.

In the author's view, the need for a consistent application of the latter principle should also produce another corollary, which can become particularly important in the future scenario of international standards of minimum corporate income taxation. No significantly higher taxation may apply in the market country, when the residence state exercises its taxing jurisdiction on the same value creation by levying either income or turnover taxes. This corollary does not solve the issues of inter-nation equity, which require an adjustment of tax nexus in order to align it for income and turnover taxes. This alignment will avoid major inconsistencies across the systems that could generate forms of overtaxation that are detrimental to cross-border business activities.

5. Turnover taxes from a constitutional perspective

From a constitutional perspective, the levying of sectoral taxes on turnover raises various issues, which essentially concern the equality principle and its related expression, usually known as the ability-to-pay principle. Besides the general endorsement by the Court of Justice, it remains to be seen whether possible frictions with the said constitutional principles may arise in connection with the concrete functioning of progressive turnover taxes.

The steep progression of the Hungarian and Polish sectoral corporate turnover taxes raises the issue as to whether this policy choice really fits within the constitutional framework. Leaving aside the analysis of the positive dimension of the said principles in the specific Hungarian and Polish legal system, the point is that progressive taxation is generally used to pursue substantial equality among the ultimate holders of the ability to pay taxes. In such a context, imposing a heavier contribution for the richer ones to contribute to funding the state budget is in line with the redistributive goals of taxation.

By contrast, taxes levied on corporate income are hardly ever progressive. This may be due to the circumstance that such taxes usually operate as an advance payment of tax due by taxpayers that have a separate legal personality from those which are the holders of the ultimate ability

[24] See further below in section 5.

to pay taxes. However, it must be acknowledged that several tax systems across the world apply different (and generally more favourable) taxes to small and medium enterprises. Different views can be held as to whether such more favourable tax conditions are meant to pursue redistributive goals in the strict meaning of the expression, or to secure some form of intervention to allow such a business to preserve a reasonable degree of competition with multinational enterprises. However, in the presence of such more favourable conditions, also corporate income tax ends up presenting some progressive features, thus confirming that, even if for a different specific goal, also when levied on persons other than the ultimate owners of the ability to pay, progressive taxes may have a sound rationale.

Taken into account such a consideration, the author submits that the justification of progressive taxation of business is more closely connected with the protection of free competition within the EU internal market than with their capacity of reflecting the different ability to pay.[25]

The actual relevance and boundaries of the ability to pay principle in European Union law and its links with the constitutional dimension of such principle are still surrounded by a certain degree of uncertainty.

The constitutional relevance of the ability to pay is expressly stated in some countries[26] and in other countries derived by reference to the principle of equality and the goals that it pursues.[27] Such systems may differ as to the boundaries and implications of the said principle. However, from a conceptual perspective, insofar as the ability to pay principle presupposes the levying of taxes in connection with a suitable economic indicator, it establishes a legal framework for tax fairness, which can be used to question the validity of tax policy choices made by the legislator.

In search for a common constitutional dimension of this principle, the Court of Justice has evolved its interpretation in three main phases. First, when applying the EU fundamental freedoms it acknowledged that, in connection with the application of the EU non-discrimination principle, ability to pay justified consideration of the personal situation of the taxpayer

[25] Nevertheless, the author is aware that the Court of Justice, in its judgments on the Hungarian and Polish cases, has endorsed the view that the levying of progressive turnover taxes is justified in the light of the ability to pay principle.

[26] See: Art. 53 of the Italian Constitution; Art. 31 of the Spanish Constitution: Art. 24(1) of the Cypriot Constitution; Art. 4(5) of the Greek Constitution; Arts. O and XXX of the Hungarian Constitution. For a comprehensive analysis of such issues, see: J. Kokott, P. Pistone, *Taxpayers in International Law: International Minimum Standards for the Protection of Taxpayers' Rights*, Hart Publishing, Oxford 2022, sec. 8.1.4.

[27] See for instance the German Basic Law, on which see: J. Kokott, P. Pistone, *Taxpayers…*

in order to secure the consistent exercise of fundamental freedoms.[28] Then, the Court of Justice expanded this line of interpretation of the non-discrimination principle to business-related deductions.[29] Eventually, the Court endorsed the relevance of ability to pay as a principle validating the levying of the Hungarian and Polish turnover taxes.[30]

Even though one could argue that there is no(t yet an) express recognition of the relevance of the ability-to-pay principle in European Union law, the statements included by the Court of Justice in the Hungarian and Polish judgments show that such principle has in fact gained momentum also within the framework of supranational law. In particular, by using ability-to-pay to validate corporate progressive turnover taxes the Court has implied the need for complying with such principle in order to avoid forms of arbitrary taxation that could be unacceptable for EU law. On turn, arbitrary taxation could lead to violations of the principle of equality and thus interfere with the common principles underlying non-discrimination and the prohibition of state aid.

In the light of the arguments already put forward earlier,[31] the author submits that the validity of turnover taxes should be assessed not only in a purely domestic situation and by reference to a domestic reading of the constitutional principles, but in a more general framework that also involves the potential implications arising for supranational law and in the international context.

Moreover, also taking into account the circumstance that turnover taxes are usually bundled together with income taxes and generally have the features of sectoral taxes, it is important to determine the implications of the ability to pay principle in such a scenario. Among others, this may also be relevant when determining whether the combined effect of such taxes can give rise to a disproportionate tax burden in connection with the levying of different taxes, or even whether it may raise possible problems of confiscatory taxation.

Such issues have to be addressed both when arising in connection with the exercise of taxing powers by one country, or as a consequence of cross-border tax disparities arising from the levying of different taxes and at different conditions by different countries.

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[28] See: CJEU, judgement, 14 February 1997, *Schumacker*, C-279/95, Para. 32. This interpretation has since become settled case law.

[29] See: CJEU, judgement, 12 June 2018, *Bevola*, C-650/16, Paras. 39 and 49–50.

[30] See: CJEU, judgement, 16 March 2021, *Commission* v. *Poland*, C-562/19, Paras. 40–41; CJEU, judgement, 16 March 2021, *Commission* v. *Hungary*, C-596/19, Paras. 46–47; CJEU, judgement, 3 March 2020, *Vodafone Hungary*, C-75/18, Para. 50; CJEU, judgement, 3 March 2020, *Tesco*, C-323/18, Para. 70.

[31] See above section 4.

Insofar as turnover operates as an additional proxy for value creation as compared to income, the assessment of tax fairness through the ability to pay principle should be conducted in the light of the tax burden that results from the combined levying of both taxes. When assessing such fairness, it can be useful to remember that the absence of a common supranational tax policy in the European Union may not deprive EU Member States of their prerogatives in this field, but nevertheless obliges to exercise them in conformity with the supremacy of EU law. In such circumstances, therefore, the fact that the Court of Justice has endorsed the levying of progressive turnover taxes in the Hungarian and Polish cases does not automatically mean that all such taxes would be compatible with EU law. The compatibility might indeed remain problematic in the presence of connected with a steeper progression, or without taking into account the combined effects of turnover and income taxes. This applies from both the perspectives of indirect discrimination and the prohibition of state aid.

6. Conclusions

Turnover taxes have become extremely popular in the recent years for various reasons, including the fact that states could introduce them without violating their international obligations at least from a formal perspective. It is reasonable to expect that they are there to stay also for the years to come. However, some changes are indispensable in order to allow such taxes to reflect the goals of tax fairness that have prompted their introduction.

In particular, insofar as one can agree that fair tax competition among business operators requires a level-playing field, it is important not only to avoid undertaxation of the ones operating across the borders, but also their overtaxation. For such a purpose, it is essential to establish forms of coordination between the various taxes levied on value creation and to do so across the residence and market countries. Fixing the international tax nexus is an essential component of the required changes, in order to bring back corporate income taxation within the boundaries of inter-nation equity also in respect of the new business models and avoid unintended tax bias from the exploitation of cross-border tax disparities.

Once these changes will be introduced, the point remains as to whether turnover should replace income taxation for catching value created by corporate players. Answering this question is perhaps the most difficult challenge for this essay. On the one hand, new business models are often loss-making or generating ultra-low profits in order to allow a business to increase its global market share. From such a perspective, turnover may therefore be more suitable than net income to generate tax revenue. On the other hand, turnover is a less refined indicator of value creation and more difficult to coordinate with income taxation of the ultimate bearers of the ability to pay, i.e. individuals.

References

Englisch J., Becker J., *International Effective Minimum Taxation – The GLOBE Proposal*, "World Tax Journal" 2019, No. 4.

Hongler P., Pistone P., *Blueprints for a New PE Nexus to Tax Business Income in the Era of the Digital Economy*, "IBFD White Papers", Amsterdam 2015.

Kokott J., Pistone P., *Taxpayers in International Law: International Minimum Standards for the Protection of Taxpayers' Rights*, Hart Publishing, Oxford 2022.

Perdelwitz A., Turina A. (eds), *Global Minimum Taxation? An Analysis of the Global Anti-Base Erosion Initiative*, IBFD, Amsterdam 2021.

Pistone P., Ullmann A., *Digital Taxes and Art 2 OECD Model Convention 2017*, [in:] G. Kofler, M. Lang, P. Pistone, A. Rust, J. Schuch, K. Spies, C. Staringer (eds), *Taxes Covered – The Scope of Double Taxation Conventions*, IBFD, Amsterdam 2021.

Pistone P., Nogueira J., Turina A., *Digital Services Tax: Assessing the Policy Reasons for its Introduction in the European Union*, "International Tax Studies" 2021, No. 4.

Pistone P., Nogueira J., Andrade B., Turina A., *The OECD Public Consultation Document "Global Anti-Base Erosion (GloBE) Proposal – Pillar Two": An Assessment*, "Bulletin for International Taxation" 2020, No. 2.

US Treasury, *White Paper: The European Commission's Recent State Aid Investigations of Transfer Pricing Rulings*, 24 August 2016, https://home.treasury.gov/system/files/131/WhitePaper-EU-State-Aid-8-24-2016.pdf (accessed: 19.07.2021).

Abstract

This chapter focuses on the international implications arising in connection with the uncoordinated exercise of taxing sovereignty by states. It uses the case of sectoral turnover taxes in Hungary and Poland to put forward the merits of coordination with income taxation and the international obligations that countries contract when signing international treaties in tax matters. The chapter acknowledges the growing popularity of those taxes, taking into account their valid policy rationale and their visible implications in the collection of revenue. However, it also stresses the undesirable repercussions arising from the lack of coordination at the international level. All these elements are meaningful components of a comprehensive reform of the international tax nexus, which should not lead each country to pursue just the maximisation of its tax revenue, but also and especially fairness in the allocation of taxing rights at the global level. The author includes arguments drawn from national constitutions and EU law, which support the need for developing this conceptual framework for the exercise of taxing sovereignty in the years to come.

Keywords: turnover taxes, tax sovereignty, EU tax law, Inter-country tax equity, ability to pay