

The need of tax harmonization within the wealth taxation in the European Union

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1. Introduction and wealth taxation characterization

Though widely used in the European Union, the wealth taxes account for a relatively small part of the EU Member States' tax revenue, when compared with the main sources of revenue[i]. At the same time, the political debate and the scientific research developed in the field of wealth taxation is very incipient, when compared to another taxation bases[ii]. Not even the fact that this kind of taxation constitutes one of the oldest ways employed by the states to obtain revenue was able to counter the identified trend[iii].

However, in the current time of fiscal consolidation and macroeconomic adjustment, taxation of wealth is gaining momentum. The lack of alternatives capable of generating an increase in tax revenue within the income and consumption taxation[iv], the growing interest in the fairness and redistributions aspects of the tax system[v] and the need to adjust the tax system to make it more growth friendly[vi], can be pointed out as the main reasons for the recent academic and political debate on wealth taxation.

When we talk about wealth taxation we're referring to a very complex reality, capable of reunite a very large group of different taxes[vii]. Although there are many types of wealth taxes, and with very different characterization between them, we consider that they can be grouped into two major categories[viii]: taxes on wealth transfers; and taxes on wealth itself. Inside these two main categories it is possible to identify a wide variety of distinct taxes.

The taxes on wealth transfers usually assume the following characterization[ix]: (i) taxes on onerous transfers – as the onerous movable transfers are subject to VAT, in this subcategory we include the taxes levied on onerous immovable transfers[x]; (ii) and taxes on gratuitous transfers – in this subcategory we include the inheritance and gift

taxation[xi]. The taxes on wealth itself can be classified as follows[xii]: (i) taxes levied on the holding or ownership of specific assets – usually immovable property[xiii]; and (ii) taxes levied on the taxpayer's aggregate net-wealth[xiv].

Furthermore, the wealth taxation may reveal itself through taxes that are specifically levied on wealth, but can also be configured as provisions regarding wealth in non-wealth taxes[xv]. That's what happens, for example, with the Portuguese stamp duty, when it establishes the taxation of gratuitous transfers.

The exposed context of growing interest in wealth taxation, the fact that the taxation of wealth manifests itself in very different ways, as well as the recent legislative changes that can be being identified at this level in the different EU Member States, lead us to consider the need/usefulness of tax harmonization within the wealth taxation.

2. The European Union tax harmonization phenomenon

The tax harmonization phenomenon reflects an effort to eradicate the disparities between EU Member States' internal laws by imposing the same tax solutions between them. Indeed, through time, EU law has strongly influenced Member States legal tax systems not only by laying down legal rules which played a key role in shaping national legislation, but also through the decisions made by the EU Court of Justice (ECJ), which has delimited the outlines of the intrastate legislation while interpreting EU treaties. However, such influence is not identical in the various areas of tax law, as it is felt with more intensity in the field of indirect taxation than in the field of direct taxation.

Tax harmonization has been developed with greater preponderance under the indirect taxes as result of the content of article 113 of the Treaty on the Functioning of the EU (TFEU), resulting, for example, in the emanation of the Council Directive 2006/112/EC of 28 November 2006, on the common system of value added tax[xvi].

Regarding direct taxation, there is no specific legal rule requiring the harmonization of the Member States legislation. In this context, we can identify specific movements of tax harmonization, established through the emanation of legal standards of EU law governing

specific aspects of direct taxation, under Article 115 of the TFEU, which allows the development of directives for the approximation of laws, regulations and administrative provisions of the Member States that directly affect the establishment or functioning of the internal market. However, tax harmonization has been mainly promoted through the jurisprudence of the ECJ[xvii].

Indeed, it is possible to identify some solutions in the EU law which aim the adoption of joint solutions by Member States on specific aspects of direct taxation, especially income taxation level[xviii]. However, in the context of direct taxation, the leading role in harmonizing the tax legislation of the Member States has been played by the ECJ, which, through its case-law, establishes tax harmonization solutions, through the application of the European freedoms.

Even though we could not find examples of tax harmonization, regarding wealth tax, promoted through the formal European lawmaking, it is possible to identify some specific cases in which the ECJ, using the European freedoms, has established limits to solutions established by the Member States under their domestic law[xix]. In fact, it's not difficult to understand that, when configured in certain way, the imposition of taxes on wealth can may restrict the the movement of capital between Member States and between Member States and third countries in an illegitimate manner, which is prohibited in accordance with Article 63 of the TFEU.

We consider that we could state a number of reasons, which, jointly considered, may support the need/usefulness of establishing solutions harmonizing the domestic laws of Member States in the area of wealth taxation, through the production of legal rules at the EU level.

3. The need/usefulness of tax harmonization within the wealth taxation in the European Union

As previously mentioned, we believe that it's possible to identify a set of reasons that may support the need/usefulness of establishing solutions harmonizing the domestic laws of Member States in the area of wealth taxation. The importance of these reasons is reinforced by the fact that wealth taxation has gained momentum in academic and

political discourse. Without losing sight of the implementation difficulties associated with it[xx], the EU Member-States' seem to be focused on reform the wealth taxation to ensure a fairer and growth-friend tax systems.

Without aiming into a deep and definitive analysis on the referred reasons, and assuming the objective to expose them in a brief and clear way, as a way to draw attention to the relevance of the topic, we'll state the reasons that lead us to affirm the need/usefulness of tax harmonization within the wealth taxation:

1. First of all, the definition by the EU of a common legality block in the wealth taxation subject is an effective way to prevent potential restrictions imposed into the European freedoms by the Member-States' intern laws.
2. The establishment of common tax bases on wealth taxation between the Member States can be conceived as a way to simplify the fight against elimination of double taxation. Ultimately, it may even happen that certain reality is taken for relevant in the context of property taxation in one Member State and considered relevant in the context of income or consumption taxation in another Member State. Such cases may constitute an obstacle to the purpose of elimination of double taxation. Furthermore, they may even become deviations from the tax harmonization solutions instituted in the indirect taxation context. For instance, certain property transfer operations could be considered relevant in the context of consumption taxation in some Member States and under income taxation in others.
3. In addition to the above, the displacement of revenue between the different existing taxes in the national context may result on a reduction in tax revenues destined to the EU budget. That may happen, for instance, if certain taxable realities are excluded from its taxation under value added tax and considered relevant for the purpose of taxation in other taxes.
4. As it can represent a reduction on tax competition, the implementation of common solutions into the wealth taxation between the EU Member States intern laws may represent a very significant step forward in the effectiveness of this form of taxation. In fact, one of the great problems associated with wealth taxation is the easiness of re-domiciliation of the taxpayers or the relocation of their assets. A Member-State, when alone, won't be able to avoid a residence transfer from a certain taxpayer to another Member-State, motivated for tax reasons. That taxpayer will be able to benefit from a

more favourable tax regime, without major consequences. However, if the wealth taxation between Member-States is similar, the taxpayer will not be so encouraged to move to another Member State. The alternative would be to change your residence to a territory domiciled outside the European Union. But, such a decision entails far more serious consequences than simply redirecting within the territory of the EU, which may discourage the taxpayer from doing so.

5. Moreover, the purpose of minimizing distortions of competition and the fight against harmful tax competition in EU context tend to claim a rigorous typified selection of the exemptions the Member States can concede in the property taxation context. At the same time, it claims the normalization of tax rates applicable at the various forms of property taxation, by establishing upper and lower limits.
6. The absence of harmonised solutions of tax incidence in the different Member States can result in the insertion of the same factual reality under property taxes with very different settings. This fact is especially noticeable when we look at the different tax types that generally characterize the property taxation in the different Member States.
7. The harmonization of property taxation may be able to promote an approximation of the economic effort that is required from the Member States' citizens when they are called to pay taxes. Furthermore, it may also ensure higher levels of legal certainty for citizens. Facing the same tax scenarios in all Member States, European citizens will be more capable to anticipate and predict the legal and tax consequences resulting from their behaviours^[xxi].
8. In addition to the above mentioned, the establishment of a common base of property taxation between the various Member States can facilitate collaboration between them in the combat of tax evasion phenomenon.

Considering, on the one hand, the recent academic and political interest within the wealth taxation and, on the other hand, the abovementioned vantages of a process of tax harmonization in the field of wealth taxation, we believe that there are grounds to begin a serious debate on this subject.

[i] See EUROPEAN COMMISSION, *Cross-country Review of Taxes on Wealth and Transfers of Wealth*, 2014, pp. 6- 7; and CHATALOVA, Natalia, EVANS, Chris, *Too rich to rein in? The under-utilised wealth tax base*, at eJournal of Tax Research, Vol. 11, n.º 3, pp. 434-435.

[ii] Rudnick, Rebecca S., GORDON, Richard K., *Taxation of Wealth*, in Tax Law Design and Drafting, Volume 1, IMF, 1996, Victor Thuronyi, ed., pp. 3.

[iii] For this scenario contributes a certain misunderstanding of the type of relevant manifestations of ability to pay and a widespread sense of injustice that has been associated to the property taxation. Furthermore, property taxation, given the specificities that characterize it, tends to be treated on a non juridical, summoning knowledge from extra-legal fields as diverse as accounting, architecture and engineering, neglecting the juridical perspective that should guide both lawmaking and the application of the law. The described scenario results from the fact that the definition of tax obligations in this area demands a set of extra-legal technical judgments to determine the taxable value of the assets that will be subject to taxation. For an analysis on the unpopularity of wealth taxation, see MASSON, André, *Taxing More Post Mortem Family Bequest*, in European Commission, *Cross-country Review of Taxes on Wealth and Transfers of Wealth*, 2015, pp. 49.

[iv] Firstly, the income and consumption taxation are close to their reasonable limit. Secondly, the consumption taxation is indifferent to the wealth of the taxpayers. Finally, “for those with high wealth, wealth is a better indicator of the capacity to pay taxes than income” – see ZUCMAN, Gabriel, PIKETTY, THOMAS, *Rethinking Wealth Taxation*, in European Commission, *Cross-country Review of Taxes on Wealth and Transfers of Wealth*, 2015, pp. 23.

[v] See PIKETTY, Thomas, *O Capital no Século XXI*, Edição em Português, Temas e Debates, 2014; PIKETTY, Thomas, *Capital and Wealth Taxation in the 21st Century*, in National Tax Journal, June 2015, 68, pp. 449-458; and WÖHLBIER, Florian, *Lesson From the 2014 Report “Tax Reforms in EU Members States”*, in European Commission, *Cross-country Review of Taxes on Wealth and Transfers of Wealth*, 2015, pp. 14. For an analysis on the evolution of the inequality on the OECD

countries, see OECD, *Divided We Stand: Why Inequality Keeps Rising*, OECD Publishing, 2011, pp. 22-28.

[vi] See BRADBURY, David, *Background – the rise in global inequality*, in European Commission, *Cross-country Review of Taxes on Wealth and Transfers of Wealth*, 2015, pp. 26; EUROPEAN COMMISSION, *Tax reforms in EU Member States Tax policy challenges for economic growth and fiscal sustainability 2014 Report*, 2014, p. 24; and NORREGAARD, John, *Taxing Immovable Property, Revenue Potential and Implementation Challenges*, IMF Working Paper, WP/13/129, 2013, pp. 14-15.

[vii] “The essential characteristic of a capital or wealth tax is that, in principle, it relates to the whole range or genus of assets, whether tangible or intangible: cash and bank balances; real property such as houses; personal property such as jewellery, pictures, furniture, cars and boats; stocks and shares; and business assets. All these assets, taken together, comprise the tax base of any form of wealth tax, unless expressly excluded” – see CHATALOVA, Natalia, EVANS, Chris, *Too rich to rein in? The under-utilised wealth tax base*, at eJournal of Tax Research, Vol. 11, n.º 3, pp. 436.

[viii] Assuming this dichotomy, see BOADWAY, Robin, CHAMBERLAIN, Emma, EMMERSON, Carl, *Taxation of Wealth and Wealth Transfers*, in *Dimensions of Tax Design*, Oxford University Press, IFS, 2010, pp. 776

[ix] For an analysis on taxes on wealth transfers, see MIRRLEES, James, ADAM, Stuart, BESLEY, Tim, BLUNDELL, Richard, BOND, Stephen, CHOTE, Robert, GAMMIE, Malcolm, JOHNSON, Paul, MYLES, Gareth Myles, POTERBA, James M., *Taxes on Wealth Transfers*, in *Tax by Design*, Oxford University Press, 2011, pp. 347-367.

[x] Commonly, these taxes are characterized in the following terms: the competent authority is the local government; taxpayer is the buyer of the immovable; and the tax base is a special tax value (usually the fair market value) or the cadastral value. See EUROPEAN COMMISSION, *Cross-country Review of Taxes on Wealth and Transfers of Wealth*, October, 2014, pp. 8. See also, RUDNICK, Rebecca S., GORDON, Richard K., *Taxation of Wealth*, in *Tax Law Design and Drafting*, Volume 1, IMF, Victor Thuronyi, ed., 1996, pp. 2.

[xi] Commonly, these taxes are characterized in the following terms: the taxpayer is the heir or the beneficiary; the taxes are levied on the fair market value of the assets, which is established through specific evaluation models; and the close relatives generally are treated more favourably than third parties, benefiting from lower rates or exemptions. See EUROPEAN COMMISSION, *Cross-country Review of Taxes on Wealth and Transfers of Wealth*, October, 2014, pp. 7. About the arguments in favour of and against taxing inheritances/bequests, see – ZUCMAN, Gabriel, PIKETTY, Thomas, *Rethinking Wealth Taxation*, in European Commission, *Cross-country Review of Taxes on Wealth and Transfers of Wealth*, 2015, pp. 23.

[xii] If not included in the income tax base, the taxes on the capital gains can be considered in this category. About this question, see BOADWAY, Robin, CHAMBERLAIN, Emma, EMMERSON, Carl, *Taxation of Wealth and Wealth Transfers*, in *Dimensions of Tax Design*, Oxford University Press, IFS, 2010, pp. 776; and EUROPEAN COMMISSION, *Cross-country Review of Taxes on Wealth and Transfers of Wealth*, October, 2014, pp. 11.

[xiii] Commonly, these taxes are characterized in the following terms: the competent authority is the local government; taxpayer is the owner or the holder of the immovable; and the tax base is a special tax value (usually the fair market value) or the transaction value. See EUROPEAN COMMISSION, *Cross-country Review of Taxes on Wealth and Transfers of Wealth*, October, 2014, pp. 8.

[xiv] Commonly, these taxes are characterized in the following terms: the tax base is the net-wealth, usually when it's above a set amount; business assets are usually exempt from the tax base. See EUROPEAN COMMISSION, *Cross-country Review of Taxes on Wealth and Transfers of Wealth*, October, 2014, pp. 9. For an analysis on this kind of taxation in France, see PICHET, Eric, *Towards a Reform of France's ISF Wealth Tax and General Regime for The Taxation of Personal Estates*, *La Revue fiscale du patrimoine* N°4, April, 2016. For an analysis on this kind of taxation in Spain, see ORTIZ, Ángel García, PÉREZ, Ana María López, BARCELÓ, Rafaela Pizarro, *La imposición patrimonial en España: estudio de futuras reformas y sus repercusiones tributarias en el Impuesto sobre el Patrimonio y en el Impuesto sobre Sucesiones y Donaciones*, in *Encuentro de derecho financiero y tributario. La reforma del sistema tributario español* / coord. por Cristina García-Herrera Blanco, Instituto de Estudios

Fiscales, 2015, pp. 23-31; and SÁNCHEZ, César Martínez, *Razones y sinrazones en torno al Impuesto sobre el Patrimonio*, Encuentro de derecho financiero y tributario. La reforma del sistema tributario español / coord. por Cristina García-Herrera Blanco, Instituto de Estudios Fiscales, 2015, pp. 33-44.

[xv] See, EUROPEAN COMMISSION, *Cross-country Review of Taxes on Wealth and Transfers of Wealth*, October, 2014, pp. 12.

[xvi] See Collet, Martin, *Droit fiscal*, Thémis droit, 2007, p. 55; Nabais, José Casalta, *Direito Fiscal*, Almedina, Coimbra, 2012, p. 178; Sampaio, Carlos de Almeida, *A Harmonização Fiscal nas Comunidades Europeias, O IVA e o Modelo Económico Português*, CCTF, n.º 131, Lisboa.

[xvii] See Vasques, Sérgio, *Manual de Direito Fiscal*, Almedina, Coimbra, 2011, p.113-114; Cunha, Patrícia Noiret, *A Tributação Direta na Jurisprudência do Tribunal de Justiça da União Europeia*, Coimbra, 2006; Wathelet, Melchior, *Refus d'harmonisation fiscale et condamnations de la Cour de Justice: cohabitation diabolique?*, *Revue de Jurisprudence Fiscale*, n.º 5, 2005, p. 469-482; Bizioli, Gianluigi, *Balancing the Fundamental Freedoms and Tax Sovereignty: Some Thoughts on Recent ECJ case Law on Direct Taxation*, ET, 2008, Vol. 48, n.º 3, p. 133-140; Metzler, Vanessa, *The Relevance of the Fundamental Freedoms for Direct Taxation*, in *Introduction to European Tax Law: Direct Taxation*, p. 35-64; RICHARD, Lyal, *Non-Discrimination and Direct Tax in Community Law*, ECTR, 2003, Vol. 12, n.º 2, p. 68-74.

[xviii] As it happens with the Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States; the Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States; the Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments; and the Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States. In this context, we should also take in consideration the Commission Proposal for a Council Directive (COM/2011/0121), on a Common Consolidated Corporate Tax Base.

[xix] See, for example, Judgment of the Court of 21 September 1999 – Case C-307/97; Judgment of the Court (Third Chamber) of 5 May 2011 – Case C-384/09; Judgment of the Court of 9 October 2014 – Case C-522/13; Judgment of the Court of 20 March 2014 – Case C-139/12.

[xx] “*In order for wealth taxation to be successful, a country’s legislation needs to ensure that taxpayers disclose their wealth and cannot enter into simple and cost effective schemes to optically reduce the overall value of that wealth. The problem of disclosure is obvious – it is very easy to hide or export many forms of wealth, whether in the form of physical assets like diamonds or fungible assets like bank balances. Compliance becomes a real problem; hence inequities begin to arise between honest and dishonest taxpayers; and revenue authorities introduce compromises (such as exempting household articles) which inevitably undermine the efficiency, equity and integrity of the tax*”. See CHATALOVA, Natalia, EVANS, Chris, *Too rich to rein in? The under-utilised wealth tax base*, at eJournal of Tax Research, Vol. 11, n.º 3, pp. 440. About the difficulties associated to the fiscal competition when implementing wealth taxes, see BRADBURY, David, *Background – the rise in global inequality*, in European Commission, *Cross-country Review of Taxes on Wealth and Transfers of Wealth*, 2015, pp. 28; and TRANNOY, Alain, *Much to Do About Nothing: The solidary Tax on Wealth (ISF) in France*, in European Commission, *Cross-country Review of Taxes on Wealth and Transfers of Wealth*, 2015, pp. 34-37.

[xxi] The relevance that tax harmonization (in our case, in the property taxation context) may have on the confidence deposited by the taxpayers in the fiscal results of their actions, is of undeniable importance. That is visible on the cases when their actions are considered relevant for taxation purposes in a Member State different from the one in which they usually operate.