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Can the Single Tax Principle be Justified under the Rule of Law in an EU Context?

KATERINA PANTAZATOU

Abstract

This chapter commences by exploring the rule of law concept in EU law. It argues that while the term is used differently in different contexts and across different EU institutions, one can observe that several elements of the 'thick' concept of the rule of law can be found in EU law. If this is the case, the chapter investigates whether substantive equality and the ability to pay principle can be read in the 'EU rule of law' and if so, whether they mandate the so-called single tax principle. After analysing primary and secondary EU law as well as the EU Courts' case law, the chapter concludes that while the single tax principle finds some applications in EU law, it cannot be considered as an overarching principle that applies in a consistent and holistic manner.

Introduction

The rule of law is a principle fundamental for all liberal democracies but at the same time it is a concept, a term that can be over encompassing, that can be malleable or one that can be used for different political or ideological objectives. In this sense, the rule of law remains an elusive and highly contested concept. Despite the several interpretations as to its content it appears reasonable to assume that 'the rule of law necessarily involves a claim in principle about the centrality of law to the enterprise of living together – about law's title to rule, so to speak'.[1]

In Hayek's words the rule of law

> […] means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use

[1] G Palombella and N Walker (eds) *Relocating the Rule of Law* (Oxford: Hart Publishing, 2009) xi.

> its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.[2]

For Tamanaha, the minimal characteristics of the rule of law include that law must be set forth in advance (be prospective), be made public, be general, be clear, be stable and certain, and be applied to everyone according to its terms.[3]

Respect for the rule of law as enshrined in Article 2 Treaty on European Union (TEU), is one of the foundational values of the EU. Article 2 provides that

> [t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

The rule of law, thus, stands out as an EU value shared among Member States.

The Court of Justice of the European Union (CJEU) has been one of the forerunners in interpreting and enforcing rule of law and its constituent elements, in an EU law context.[4] To do so it has used several different tools that go beyond the mere reference to the rule of law in Article 2 TEU, but instead can be found in other provisions of primary law, including the fundamental freedoms and the non-discrimination principle (Article 18 Treaty on the Functioning of the European Union (TFEU)).[5]

The present chapter aims to explore the EU concept of the rule of law in a tax law context. It will commence by analysing the current inconsistent understanding of the rule of law in an EU context. It will then apply its 'thick', or broad understanding that is endorsed by part of the literature and some EU institutions to inquire whether the single tax principle can be read in such a stretched concept of the rule of law in the EU.[6]

The Rule of Law as an EU Concept?

Unsurprisingly, the rule of law forms one of the cornerstones of the European Union (EU) since its establishment. It is part of the values upon which the EU has been founded, as per Article 2 TEU, together with human dignity, freedom, democracy, equality and respect for human rights. It also figures in the context of the general provisions on the Union's external action (TEU Article 21).

The vague, at first sight, enumeration of the founding values of the EU in Article 2 TEU becomes much more meaningful in the context of Article 7 TEU, which provides

[2] FA Hayek, *The Political Idea of the Rule of Law* (Cairo: National Bank of Egypt 1955) 34.

[3] BZ Tamanaha, 'A Concise Guide to the Rule of Law' in G Palombella and N Walker (eds), *Relocating the Rule of Law* (Oxford: Hart Publishing, 2009) 3 and BZ Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004).

[4] FG Jacobs, 'The Lisbon Treaty, the Court of Justice and the Rule of Law' in N Nic Shuibhne and L Gormley (eds), *From Single Market to Economic Union: Essays in Memory of John A Usher* (Oxford: Oxford University Press, 2012) 377–78.

[5] See, for instance, CJEU judgment of 18 June 2020, *Commission v Hungary* (Transparency of associations), C-78/18, EU:C:2020:476 and CJEU judgment of 6 October 2020, *Commission v Hungary* (Higher education/ Soros Private University) C-66/18, EU:C:2020:792.

[6] For the distinction between 'thin' and 'thick' concepts of the rule of law, see Lindsay, Chapter 3 in this volume, as well as the section below.

that '[o]n a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 […]'. A breach of Article 2 may, thus, lead to an investigation against a Member State and, in exceptional circumstances, may lead to the suspension of its voting rights in the Council.

Although Article 7 TEU aims to establish a sanctions mechanism when a Member State seriously breaches one of the values enshrined in Article 2 TEU, it has been repeatedly criticised as an insufficient legal basis for a successful intervention by the Union, including the rule of law.[7] Several reasons can explain the lack of sanctions in the context of Article 7 TEU, including the political unwillingness and the bargaining behind the decision-making procedure and the institutional patterns of behaviour and interactions that it determines.[8] The limited use of Article 7 'in the most outrageous and acute factual constellations'[9] seems to suggest that there is a pressing need to look elsewhere for potential enforcers of the rule of law throughout the Union.

Despite the allegations that Article 7 TEU is an 'empty provision', the discussion on the rule of law (re-)gained prominence recently, following alleged breaches of judicial independence and the separation of powers by different Member States.[10] At the political level, the European Parliament issued a Resolution calling on the Council to determine, pursuant to Article 7(1) TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, most notably the rule of law.[11] As a result of the political developments in Hungary and Poland, on 16 December 2020, the European Parliament and the Council adopted a Regulation that establishes a general regime of conditionality for the protection of the Union budget in the case of breaches of the principles of the rule of law in a Member State.[12] In order to ensure all Member States' compliance with the rule of law *desiderata*, the Regulation allows the Council, on a proposal from the Commission, to adopt protective measures such as the suspension of payments to be made from the Union budget or the suspension of the approval of one or more programmes to be paid from that budget.[13]

[7] C Closa, D Kochenov and JHH Weiler, 'Reinforcing Rule of Law Oversight in the European Union', EUI Working Papers, RSCAS 2014/25, 7.

[8] C Closa, 'Institutional Logics and the EU's Limited Sanctioning Capacity under Article 7 TEU' (2020) *International Political Science Review* 1–15.

[9] Closa et al, above n 7.

[10] See for instance, CJEU, judgment of 24 June 2019, case C-619/18, *Commission v Poland* (Independence of the Supreme Court); CJEU, judgment of 5 November 2019, case C-192/18, *Commission v Poland* (Independence of ordinary courts).

[11] European Parliament Resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)), OJ C 433, 23.12.2019, 66–85. See also Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM/2017/0835 final – 2017/0360.

[12] Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget OJ L 433I, 22.12.2020, 1–10.

[13] Note that the Regulation was adopted based on, art 322(1) TFEU and was found to be compatible with the procedure laid down in art 7 TEU by the CJEU in Cases C-156/21 *Hungary v Parliament*, EU:C:2022:90 and Council and C-157/21 *Poland v Parliament and Council*, EU:C:2022:98.

In light of these developments, it comes as no surprise that in a CJEU context, the most contemporary and popular understanding of the rule of law deals with two constituents of the 'thin' understanding of the rule of law; the separation of powers and judicial independence. This focus draws from relatively recent CJEU case law that treated Article 19 TEU as giving concrete expression to the value of the rule of law of Article 2 TEU and as guaranteeing (more explicitly than the general Article 2) judicial independence at EU and national levels.[14] Additionally, the Court has ruled that '[t]he very existence of effective judicial review designed to ensure compliance with EU law is *of the essence of the rule of law*. In that regard, as provided for in the second subparagraph of Article 19(1) TEU, it is for the Member States to establish a system of legal remedies and procedures ensuring for individuals compliance with their right to effective judicial protection in the fields covered by EU law' (emphasis added).[15]

However, the CJEU has gone beyond the obvious and most expected expressions of the rule of law, like legality, legitimacy and accountability, and it has read in it also respect for certain fundamental rights. The Court, thus, is not only shaping the concept of the rule of law but is also unifying within it a set of common characteristics that should apply to all Member States. At the same time, the rule of law is applied and interpreted by all other EU institutions (for instance, the European Commission and the European Parliament) across all EU policies. Due to the different institutions that interpret and apply the rule of law, one may argue that multiple rule of law 'versions' exist within the Union.[16]

In its recent 'Rule of Law Report', the European Commission attempted to provide a definition of the rule of law:

> Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law.[17]

According to the Commission, equality before the law and respect for fundamental rights are constituents of the rule of law. On the other hand, equality – in its non-discrimination sense, as a general principle of EU law enshrined in Article 18 TFEU – is simultaneously a self-standing principle, a fundamental right and a fundamental constituent of the rule of law. This statement may seem odd from a classical understanding of the rule of law, especially compared to the formal approach of Raz[18]

[14] See indicatively, CJEU judgments of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393 [188].

[15] CJEU judgment of 11 May 2023, *Inspecția Judiciară* (C-817/21, EU:C:2023:391) [40].

[16] T Konstadinides, *The Rule of Law in the European Union – The Internal Dimension* (Oxford: Hart Publishing, 2020) 19.

[17] European Commission, Communication: 2020 Rule of Law Report, The rule of law situation in the European Union, COM(2020) 580 final (30.09.2020) (hereinafter the 'The first Rule of Law Report'), 1. See also European Commission, 'Communication: Further strengthening the Rule of Law within the Union State of play and possible next steps' COM (2019) 163 final (03.04.2019).

[18] J Raz, 'The Rule of Law and its Virtue', in *The Authority of Law* (Oxford: Oxford University Press, 1979), and subsequently, J Raz, 'The Law's Own Virtue' (2019) 39 *Oxford Journal of Legal Studies* 1.

or Fuller[19] who, in general, do not find substantive equality before the law among the constituents of the rule-of-law concept.[20]

Despite the fact that the principle of equality would not be recognised as part of a formalist theory of the rule of law,[21] several other voices attribute to the rule of law a more substantive content in that it (should) be 'imbued with certain norms, standards or principles' that would protect, inter alia, the individual citizen's autonomy.[22] This 'thick' concept suggests that the rule of law cannot coexist with unfairness and injustice.[23] In this view, the normative shortcomings of 'thin' theories are remedied by incorporating particular conceptions of human rights and other features of political morality into the concept of the rule of law.[24] In Craig's view, the principles undergoing the rule of law should 'embrace, in addition to its formal attributes, ideals of equality and rationality, proportionality and fairness, and [in particular] certain substantive rights'.[25]

At the same time, equality in the sense of non-discrimination may appear an unusual element of the rule of law also from a systematic reading of Article 2 TEU; equality is a separate value in the provision, standing next to the rule of law. Should this be understood as a separate value (or right), distinct from the rule of law? The 'conditionality' Regulation repeated the Commission's definition of the constituents of the rule of law. The preamble provides that '[t]he rule of law requires that all public powers act within the constraints set out by law, *in accordance with the values of democracy and the respect for fundamental rights* as stipulated in the Charter of Fundamental Rights of the European Union (the 'Charter') and other applicable instruments, and under the control of independent and impartial courts' (*emphasis added*).[26] An official document of the EU, thus, suggests that the rule of law requires all public powers (at national and supranational level) to act in compliance with fundamental rights, including the equality principle.

Similarly, the CJEU often relies on the rule of law to interpret and enforce procedural rights, like the right to a fair trial and an effective remedy. For instance, in the famous *Berlioz* case AG Wathelet observed that '[where] a person seeks to challenge a decision adversely affecting him, the applicability of Article 47 of the Charter appears to be the condition sine qua non of a Union subject to the rule of law. As I have observed above, a Union subject to the rule of law means that neither the Member States nor the institutions of the Union can avoid review of the conformity of their acts'.[27] Accordingly, a fundamental right as enshrined in the Charter constitutes a precondition for the application of the rule of law. This Opinion was followed by the Court that affirmed that an

[19] LL Fuller, *The Morality of Law* 2nd edn (New Haven CT: Yale University Press, 1969).

[20] For more on this see, Lindsay, above n 6 and Daly, above n 6.

[21] Lindsay, ibid.

[22] J Laws, *The Constitutional Balance* (Oxford: Hart Publishing, 2021), 19. Similarly, TRS Allan, *Law, Liberty, and Justice* (Oxford, Oxford University Press, 1993).

[23] On the distinction between the 'thin' and the 'thick' concept of the rule of law, see Lindsay, above n 6. For the 'thick' version's 'supporters' see T Bingham, *The Rule of Law* (Allen Lane, 2010); FA Hayek, *The Constitution of Liberty* (Chicago: The University of Chicago Press 1960).

[24] R Peerenboom, 'Human Rights and the Rule of Law: What's the Relationship? University of California, Public Law and Legal Theory Research Paper Series, Research Paper No 05–31, 1–152, 20–1. Available at: http://ssrn.com/abstract=816024.

[25] P Craig, 'Theory and Values in Public Law: A Response' in C Harlow, P Craig and R Rawlings (eds), *Law and Administration in Europe: Essays in Honour of Carol Harlow* (Oxford: Oxford University Press, 2003) 31.

[26] Regulation 2020/2092, Preamble, Recital 3.

[27] Opinion of Advocate General Wathelet 10 January 2017, C-682/15, *Berlioz Investment Fund*, EU:C:2017:2 [66].

intermediary (information holder) should have legal standing to require that the judiciary of the requested state checks that tax authorities have conducted mutual assistance in line with the rule of law.[28]

Therefore, in EU tax law, the rule of law appears to have been rendered to the 'the main umbrella principle applicable to tax procedures'.[29] Beyond procedural rights, however, the rule of law has also been understood – from a tax law perspective, in its substantive form, including the protection of taxpayers' rights to confidentiality, privacy and the right to participate in the exchange of information.[30]

All this shows that there is no one clear understanding or definition of the rule of law concept under EU law. Neither is a 'thin' or 'thick' version preferred at EU institutional level or case law. The CJEU has clearly articulated that the separation of powers and judicial independence are enshrined in the rule of law but beyond that, neither the judiciary nor the Commission or any other EU institution apply a consistent interpretation of this concept. There are cases where an EU institution clearly states the respect for fundamental rights (including equality) as constituents of the rule law[31] and there are also instances where the rule of law appears as separate from but strongly connected to human rights' protection.[32] Even in academic literature however, the rule of law has been linked to the value of justice itself – of which equality is an element, and the prevention of any arbitrary exercise of taxing powers.[33]

Having thus, in mind a 'thick' version of the rule of law, that encompasses equality as a substantive right, this contribution will attempt to understand whether the single tax principle can derive from the equality principle and if so, whether it can be read in EU law. To do so, it will commence by explaining the single tax principle as this was first developed in the international tax context. Then, the single tax principle will be connected to the non-discrimination (and the concomitant ability to pay) principle and finally, it will be reviewed in the context of relevant CJEU case law and secondary EU tax law.

Single Taxation: Origins and the International Discussion

Although the discussion on whether to address double taxation or tax evasion at international level, was already present at the League of Nations' discussions and reports,[34]

[28] CJEU judgment of 16 May 2017, *Berlioz Investment Fund*, case C-682/15, ECLI:EU:C:2017:373, see also, K Pantazatou, 'Luxembourg: Fundamental Rights in the Era of Information Exchange – The Berlioz Case (C-682/15)' in M Lang et al (eds), *CJEU – Recent Developments in Direct Taxation 2017* (Linde Verlag, 2018) 127–152.

[29] J Kokott and P Pistone, *Taxpayers in International Law: International Minimum Standards for the Protection of Taxpayers' Rights* (Oxford: Hart Publishing, 2022) 206.

[30] I Mosquera Valderrama, A Mazz, LE Schoueri, N Quiñones, J Roeleveld, P Pistone, and F Zimmer, 'The Rule of Law and the Effective Protection of Taxpayers' Rights in Developing Countries', WU International Taxation Research Paper Series no 10, (2017), ssrn.com/abstract=3034360.

[31] E.g. European Commission, the first Rule of Law Report (above, n 17).

[32] The text of TEU art 2 speaks in favour of this approach. See also Kokott and Pistone, above, n 29, who suggest that the protection of taxpayers' rights is a corollary of the rule of law, at 206 et seq. See also the *Berlioz* case, above n 28.

[33] See Kokott and Pistone, above n 29, 493.

[34] See, for instance, *Technical Experts to the Financial Committee of the League of Nations, 'Double Taxation and Tax Evasion: Report and Resolutions Submitted by the Technical Experts to the Financial Committee of the League of Nations* (1925).

the single taxation principle in its current formulation and understanding was first attributed to Reuven Avi-Yonah. Avi-Yonah argued that 'income from cross-border transactions should be subject to tax once', at a rate that corresponds to/is determined by the benefits principle.[35] This idea that, according to some, encompasses the foundations of the international tax regime,[36] has since then generated a lot of discussion,[37] which was revamped, especially after BEPS and the alleged transformation of international tax framework.[38]

Part of the discussions on the single taxation principle have focused on whether single taxation should be interpreted as a principle that requires the absence of double taxation or whether it (also) necessitates the absence of double non-taxation, that is, an effective taxation at some point and somewhere.[39] The question of the interpretation of the principle requires some contextual analysis in the realm of Double Tax Conventions (DTCs) that cover bilateral cross-border situations. Two questions arise in this regard; first, what should be the content of the principle, ie whether the emphasis should be put on the tax being levied once only, or whether the emphasis should (also) be put on the tax being levied (at least) once. The two possibilities are not mutually exclusive as, indeed, the objective of preventing double taxation has increasingly been connected to the objective of preventing double non-taxation.[40] However, regardless of whether one understands the single tax principle in its full scope (both no-double taxation but also no double non-taxation) or reads it in a narrower manner (only no-double taxation), a distributive rule is required to determine which state has the right to tax said income. In Avi-Yonah's mind, this distributive rule should derive from the benefits principle, and thus, active income should be taxed at the source state, whereas passive income should be taxed (primarily) at the residence state.

While, as already explained, Avi-Yonah understands the principle of single tax (or single taxation) as mandating that income from cross-border transactions should be subject to tax *once*, that is, *neither more nor less* than once, this understanding was not unanimously shared. Thus, in 2004 – long before BEPS, but much later than 1997 when Avi-Yonah pitched his idea, it was believed that it could not generally be assumed that DTCs aimed at preventing double non-taxation but they rather aimed to allocate taxing rights between the contracting states, without (necessarily) obliging them to actually exercise those rights.[41] An exception to this 'rule' could be found to some bilateral rules, which aimed at achieving single taxation insofar as they made the waiver of the right to tax provided for in the convention subject to the other contracting state actually

[35] RS Avi- Yonah, 'International Taxation of Electronic Commerce' (1997) 52 *Tax L Rev* 507, 517.

[36] See, for instance, Y Brauner, 'An International Tax Regime in Crystallization' (2003) 56 *Tax L Rev* 259, 264.

[37] RS Avi-Yonah has been considered in tax literature as the pioneer behind the discussions on the single tax principle. J Wheeler's edited book that is entirely devoted on 'Single taxation' makes extensive references to Avi-Yonah's research and understanding of the principle. RS Avi-Yonah, 'International Tax Law as International Law' (2004) 57 *Tax Law Review* 4; RS Avi-Yonah, 'Who Invented the Single Tax Principle? An Essay on the History of U.S. Treaty Policy' (2014/15) 59 *New York Law School Law Review* 306.

[38] See, for instance, R Mason, 'The Transformation of International Tax' (2020) 114 *Am J Int'l L* 353.

[39] Avi-Yonah, above n 35, 509.

[40] See also M Lang, *General Report: Double Non-taxation*, IFA Cahiers 89a (2004), 81.

[41] M Lang, ibid, suggesting specifically that '[t]he reporters were accordingly critical as they pointed out – each with a different emphasis – *that DTCs are by no means based on the idea of preventing double non-taxation* and that this is true only for certain cases at the most'.

exercising the right to tax assigned to it by the DTC.[42] The objective of double non-taxation was certainly not perceived by most as an interpretative guide when interpreting DTCs and the overall feeling at the time was that the DTCs based on the OECD MC did not intend to exclude double non-taxation.[43] Hence, the objective of preventing double non-taxation could be of significance only insofar as it was demonstrably expressed in the treaty provision to be interpreted.[44]

Post-BEPS, however, the focus has shifted from ensuring no double taxation through DTCs, to also dealing with abusive situations and cases of double non-taxation. Yet, as Parada notes 'contrary to a pure idea of single taxation, the prevention of double non-taxation is contingent on the fact that artificial (abusive) structures are used to achieve it'.[45] In the words of the BEPS report: '[n]o or low taxation is not per se a cause of concern, but it becomes so when it is associated with practices that artificially segregate taxable income from the activities that generate it'. Thus, if one assesses the single tax principle from a contextual and evolutionary perspective, has the single tax principle become about achieving a fair rate of taxation, rather than ensuring tax at least once through a proper allocation of taxing rights? In other words, does the single tax principle mandate *no under taxation* (however this is to be defined)? Such an interpretation would justify the recent policy developments, not only BEPS but also the Pillar 1 and Pillar 2 initiatives, but the role and the purpose of the principles is not necessarily to transform to be in line with their times.

Single Taxation in EU Law

The single tax principle in an EU law context can be understood as deriving from the equality principle which, often constitutes under EU law, the legal basis for the ability to pay principle.[46] The legal construction of the EU does not allow for much deference to DTCs and the 'international tax regime' (if such exists).[47] Thus, the single tax principle in the EU context, has to be analysed within its own legal framework and, therefore, neither its meaning nor its significance necessarily coincide with those presented before in the DTCs context.

In this context, thus, the question arises whether the single tax principle exists at all, and if so, in which form. In other words, in the assumption of the absence of a DTC

[42] ibid.
[43] ibid.
[44] ibid.
[45] L Parada, 'Full Taxation: The Single Tax Emperor's New Clothes' (2021) 24 *Flo Tax Rev* 729, 735. Parada cites the OECD BEPS Action Plan (2013) according to which '[n]o or low taxation is not per se a cause of concern, but it becomes so when it is associated with practices that artificially segregate taxable income from the activities that generate it'.
[46] On this see, G Bizioli and E Reimer, 'Equality, ability to pay and neutrality' in C HJI Panayi, W Haslehner, and E Traversa (eds), *Research Handbook on European Union Taxation Law* (Cheltenham: Edward Elgar, 2020) 51–74. The ability to pay principle is, itself, enshrined in some Member States' Constitutions.
[47] This holds true regarding the primacy of EU law over DTCs and the obligations that arise therefrom but certainly, not so much regarding the political context of the impact the international/OECD developments have had on the EU legal framework (see for instance the Anti-Tax Avoidance Directive, the GloBE Directive).

between Member States or under the premise of the primacy of EU law over DTCs,[48] is there an obligation to single taxation – to tax income at least/only once, and if so, where does this obligation derive from and how well is it applied?

As already stated, the only way the single tax principle could find its way into EU law is through the non-discrimination principle, which, arguably, encompasses the ability to pay principle, which, in turn, connects to the single tax principle. Several derivations need to be made in this case, in an area like direct taxation where harmonisation in the EU is quite limited, despite recent major steps in the opposite direction.[49] But in this case – if indeed, the only foundation in EU law to guarantee the single tax principle is the non-discrimination principle, then, only one of its elements can be fulfilled, that the taxpayer must pay tax only once (and not necessarily *at least* once).

Secondary EU tax law explicitly provides for the elimination of double taxation in at least two cases, the Parent Subsidiary Directive (PSD)[50] and the Interest and Royalty Directive (IRD)[51, 52] However, the scope of these directives in quite narrow and, thus, a general principle of single taxation cannot be deduced within these confines. In line with international developments, these directives were subsequently amended to include elements of the elimination of double non-taxation. Specifically, the PSD was amended in 2014 to include a provision to prevent situations of double non-taxation resulting in unintended benefits for groups of companies in different Member States compared to domestic groups.[53] A General Anti-Abuse Rule (GAAR) was added to the PSD in 2015.[54] The IRD also includes a provision to prevent situations of double non-taxation (but only partially through a 'subject-to-tax' requirement for permanent establishments).[55] However, given the very narrow scope of the application of these provisions, they could only be characterised as 'incidents' of single taxation.

In contrast, the CJEU case law is ample in analysing the non-discrimination principle in light of the fundamental freedoms in cross-border situations. A very usual situation is this of a resident in an EU Member Stater and a non-resident who are treated differently and thus, the non-resident's respective freedom (eg freedom of establishment, free movement of capital) is restricted. The most common restriction that arises from the different treatment is double taxation, and should the single taxation indeed derive from the non-discrimination principle then the EU judiciary should ensure that it is eliminated, unless it is justified and proportionate.

[48] In reality, bilateral DTCs exist between almost all pairs of Member States. However, the question posed here is not merely rhetorical as, in case of conflict, primary and secondary EU law has primacy over the DTCs (at least those that were concluded after the States' accession to the Union, as per art 351 TFEU).

[49] See, for instance, Council Directive 2016/1164 ('ATAD') and Council Directive (EU) 2022/2523 ('GloBE Directive'), both of which are considered to be the EU implementation of certain BEPS Actions.

[50] Council Directive 2011/96/EU ('Parent Subsidiary') (recast), OJ L 345, 29.12.2011, 8–16.

[51] Council Directive 2003/49/EC ('Interest and Royalty), OJ L 157, 26.6.2003, 49–54.

[52] I am not including here safeguards in other directives to avoid the double taxation that could arise because of these directives' implementation.

[53] See Parent Subsidiary Directive, art 4(1)(a) (Linking rule): Prevention of double non-taxation deriving from mismatches in the qualification of distributed income (equity – debt).

[54] Parent Subsidiary Directive, art 1(2).

[55] Interest and Royalty Directive, art 1(5)(b).

Single Taxation as Tax *Only Once*

While double taxation in cross-border situations is clearly an obstacle to individuals and corporations' freedom to move, there are several conceptual layers applied by the Court before eliminating double taxation. After all, such an exercise, as pointed out earlier, would entail allocating taxing rights between the involved Member States which goes not only beyond the Court's mandate, but also beyond the scope of EU law altogether. The underpinning in these cases is quite evident: in a purely domestic situation double taxation does not arise, or is relieved, whereas in a cross-border one, double taxation ensues.

There are three main caveats in the application of the single taxation in the EU, other than the obvious lack of a harmonised framework of allocation of (single) taxing rights. The first one relates to the comparability of the taxpayers – the test whether two taxpayers, usually a resident and non-resident, deserve to be in the same situation and be taxed in the same way. While there is no clear 'formula' in the application of this test, the Court departs from the (default) premise that residents and non-residents are not in a comparable situation. The comparability test has not been applied by the Court in a consistent manner, although one could say that the Court often looks at the purpose of the national legislation in question and whether this purpose is (also) satisfied in a cross-border scenario. In case of a positive answer, then, the situations would be comparable. But the Court has gone beyond a pure formalistic approach and has decided that residents and non-residents can be in a comparable situation under certain circumstances, especially in cases when the majority of the taxpayer's income is derived at the source state and no income is produced at residence,[56] or in cases of relief from economic double taxation domestically but not for cross-border situations.[57]

The second caveat in this case is the possibility of Member States attempting to justify, on public interest grounds, the different treatment of residents and non-residents (even if the two are in a comparable situation). The Court has accepted justifications relying, inter alia, on the 'balanced allocation of taxing rights' between Member States,[58] the need to combat tax avoidance,[59] and the coherence of the tax system(s).[60] Thus, a Member State may not be obliged to ensure single taxation when one of the aforementioned justifications is successfully invoked before the Court.

The last 'obstacle' in the application of the single tax principle emanates exactly from the interaction of the different tax systems within the EU and the absence of an EU-wide (or EU-generated) allocation of taxing rights among Member States, a *disparity* in the Court's words. Disparities do not, as a rule, fall within the ambit of the fundamental freedoms because they stem from the mere interaction of two taxing systems.[61]

[56] See the Schumacker line of case law, Case C-279/93 *Schumacker* [1995] ECR I-225.

[57] See eg, Case C-35/98 *Verkooijen* [2000] ECR I-4071 and Joined Cases C-436/08 and C-437/08 *Haribo Lakritzen Hans Riegel and Österreichische Salinen* [2011] ECR I–305.

[58] See especially loss relief cases eg, Case C-446/03, *Marks and Spencer* [2006] ECR I-2283.

[59] See especially abuse cases eg, Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995.

[60] See for instance cases relating to social security/pension contributions and corresponding deductions, eg Case C 204/90 *Bachmann* [1992] ECR I 249 and Case C 300/90 *Commission v Belgium* [1992] ECR I 305.

[61] See AG Geelhoed in Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673.

Consequently, in cases of juridical double taxation, for instance, whereby the residence state treats the income dividends in the same way as the domestic dividends (e.g. same tax rate), the Court has decided that it does not have to provide relief for the tax withheld at source. Instead, the Court has ruled that 'the adverse consequences which might arise from the application of an income tax system […] result from the exercise in parallel by two Member States of their fiscal sovereignty' and since EU law does not lay any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the Union, this burden of the 'apportionment of fiscal sovereignty' falls, inevitably, on the DTCs.[62] Accordingly, EU law cannot be relied upon to enforce single taxation in this case.

The CJEU has followed the same approach in cases of a higher tax burden in a cross-border situation due to the different tax rates between the two Member States. The Court, for example, ruled in the *Gilly* case that the higher tax burden the taxpayer had to incur due to his cross-border activity (and the provision of a credit by the residence state that did not result in full relief) was only the consequence of a disparity between the systems of the two states. Thus, in absence of relevant EU law, it remained within the sovereignty of the Member States to determine their own policies in respect of rates.[63] In this context, the Court also provided an interesting understanding of the single tax principle in the DTC context. It specifically held that 'the object of a convention such as that in issue *is simply to prevent the same income from being taxed in each of the two States*. It is not to ensure that the tax to which the taxpayer is subject in one State is no higher than that to which he or she would be subject in the other' (emphasis added).[64]

Accordingly, the CJEU does not appear to vest the non-discrimination principle with the right to single taxation (even in cases that are decided to be comparable) and, consequently, it does not give the taxpayers an enforceable right not to be subject to double taxation,[65] except in cases where the aforementioned conditions are fulfilled (comparability, absence of successful justifications, discriminatory treatment/restriction and *not* disparity but discrimination instead). In essence, in the Court's case law, the conditions for the entitlement of the taxpayer to single taxation, in the sense of the elimination of double taxation in cases where (i) the residence state eliminates economic double taxation domestically and thus, on the basis of the non-discrimination principle and the relevant applicable freedom it has to provide 'equal treatment' to incoming dividends; (ii) the source state imposes a withholding tax to income but does not impose such a tax domestically; on the basis of the non-discrimination principle and the relevant applicable freedom, it has to eliminate the withholding tax that applies only in a cross-border situation. It is doubtful whether the Court's case law that has invented the 'always somewhere principle' that ensures that negative income must be taken into account somewhere is of relevance in the context of single taxation. The same question applies regarding the obligation (or the lack of it, thereof) to provide full relief or partial relief.

[62] See eg, Case C-513/04 *Kerckhaert and Morres* [2006] ECR I-1096.
[63] See Case C-336/96, *Gilly* [1998] ECR I-2793.
[64] ibid, para 46.
[65] J Wheeler, 'Do Taxpayers Have a Right to DTR?' in J Wheeler (ed) *Single Taxation* (Amsterdam: IBFD, 2018) 165.

These questions obviously depend on the concept of the single tax principle itself and the question whether single taxation intends to completely eliminate cases of double taxation or if it aims to *reduce* the double taxation that may arise. In the latter scenario it is questionable whether the principle would be satisfied because of the persisting higher tax burden in a cross-border situation (as opposed to a purely domestic one). The understanding of the Court that found no discriminatory treatment in a *Gilly*-type scenario,[66] is compatible with a 'narrower' understanding of the single tax principle that leaves outside its scope the fairness (and results) of different tax rates. This is understandable also from a certainty and administrability perspective as otherwise the principle would risk becoming too vague,[67] too partitioned and in need of granularisation.

Single Taxation as Tax *at Least Once*

The principle of single taxation in the sense of subjection to tax *at least once* has never been expressly accepted by the Court as a justification of the prevention of base erosion, or as a justification of national anti-abuse measures. The Court specifically argued in *Eisenstadt*, that

> in several cases … in which a Member state has attempted to counterbalance its inability to impose tax on another taxpayer … the Court considered … the argument that national legislation was intended to issue single taxation of certain income in the Member State. In none of these cases, however, did the Court recognise the principle of single taxation as a

Indeed, as Vanistendael argued, if the Court accepted the single tax principle (in its 'at least once' sense) as a justification for anti-abuse, it would, effectively, render the principle into a budgetary safeguard to ensure that the tax base of the invoking Member State is not eroded, and, by implication, that the corresponding revenue is not lost.[68] However, the Court has traditionally rejected justifications based on a Member States' loss of revenue.[69]

In contrast, however, to this rejection the Court has repeatedly accepted national CFC rules when they target *wholly artificial arrangements* and upon the fulfilment of certain other conditions (including the lack of a general presumption of tax avoidance and the actual demonstration of the lack of substance/artificiality of the CFC). Under these circumstances, the Court agrees that freedom of establishment allows a Member State to apply its CFC rules to prevent abuse and tax avoidance. In this sense, as opposed to the previous scenario, the Court does not impose tax at least once, but, instead, it imposes a *certain level of tax* at *least once.* Whether this can be linked to the single tax principle is a question of interpretation and pertains to whether the single tax principle covers indeed (fair) tax rates and whether it can be 'partitioned' to allow for some/more/less tax.

[66] A scenario where the residence state gives a credit for the tax paid at source, which however, due to the different tax rates between source (higher) and residence (lower), does not completely eliminate double taxation.

[67] E CM Kemmeren and F De Lillo, 'International Single Taxation: A Misguiding Notion' in Wheeler (n 67).

[68] F Vanistendael, 'A Single Tax Principle for a Single Market?' in Wheeler (n 67) 192.

[69] See eg, CJEU judgment of 16 July 1998, ICI, C-264/96, EU:C:1998:370.

In the context of fundamental freedoms, thus, the application of the single tax principle in its 'at least once' sense can only apply indirectly (if at all) and assessed on an *ad hoc* basis (is there indeed a wholly artificial arrangement? How does the national CFC rule apply and what will the top up tax be)? Accordingly, it would be very difficult to fit this top up liability into the single tax principle that would require a certain degree of generality and abstraction.

However, if one looks at Article 7 of the ATAD, a more concrete obligation 'to tax' arises, in the sense that Member States are since the implementation of the ATAD under the obligation to apply CFC rules if the tax rate in the Member State of the CFC is less than half of the tax rate in the Member State of the parent company. Accordingly, this means that for certain categories of (passive) income, there is now a minimum tax rate above zero in every Member State and that these specific categories of income to which Article 7 of the ATAD applies are now subject to a variable minimum tax that will be due in the state in which the headquarters of a permanent establishment or the parent of a subsidiary are located. The same result, combatting double non-taxation with regard to a certain type of income is achieved through the ATAD's anti-hybrid rules. This comes as no surprise as the ATAD effectively transposes the BEPS Action Plan in EU law.[70]

Similarly, the ATAD imposes an obligation to Member States to levy an exit tax in case the taxpayer transfers their residence or business or assets to another Member State or third country.[71] This exit tax shall be levied on the difference between the market value of the transferred assets and the value of the assets for tax purposes. While Article 5(5) of the ATAD provides a mandatory step-up in order to avoid double taxation of the unrealised capital gains, the exit tax provision should be considered as a provision that aims to ensure that these capital gains are taxed at least (and only) once. While the discriminatory nature of such a tax is obvious as the exit tax only arises in cross-border scenarios, both the directive and the CJEU case law have developed a framework to make these taxes compatible with primary EU law.[72]

While, hence, secondary legislation appears to agree, *under specific conditions*, with the single tax principle in its no double non-taxation sense, the CJEU has not explicitly recognised the need for income to be subject to tax at least once in its case law. It has to be acknowledged, however that the fundamental freedoms case law does touch upon Specific Anti-Avoidance Rules (SAARs), such as domestic CFC rules and thin capitalisation rules, to ensure that a certain *degree* of taxation applies, under conditions.[73] This requirement, however, does not seem to fit within the meaning of the single tax principle because the Court, in the context of the CFC rules has effectively allowed that only in cases of abuse can a Member State overcome the nexus requirement (as with CFC rules in general) and impose a top-up tax which, only in very specific cases, would amount to a tax on said income for the first time ('at least once').

[70] See Parada, above n 45.

[71] ATAD, art 5.

[72] See eg, CJEU judgment of 29 November 2011, C-371/10, *National Grid Indus*, EU:C:2011:785; CJEU judgment of 11 March 2004.

[73] For example, one requirement in settled CJEU law case law is that the national rule at issue does not generally presume tax avoidance. See CJEU judgments of 4 March 2004 in *Commission v France* (C-334/02, EU:C:2004:129) [27] and 12 September 2006 in *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544) [50]–[51].

Despite the explicit rejection by the Court of the no double non-taxation element of the single tax principle, the advent of the GloBE directive could force the Court to reassess this view, especially in light of the compatibility of the Directive with freedom of establishment. A first indication towards this direction could be identified in the Opinion of AG Kokott who connected the prevention of non-taxation to the efficiency of the collection of taxes.[74] The case concerned the compatibility with fundamental freedoms of the taxation by Portugal of a 'foreign' fund (UCITS) in comparison to a domestic fund that was exempted from tax but subject to a 'stamp duty'. AG Kokott opined in this context that 'the application of a deduction at source as a taxation technique to non-resident taxpayers – while resident taxpayers are not subject to such a deduction at source – can be justified by the need to ensure the efficiency of the collection of the tax. *The avoidance of non-taxation ultimately also serves the efficiency of the collection of the tax*' (emphasis added).[75]

The Court, however, did not follow AG Kokott's line of thought that tried to link the avoidance of non-taxation to the collection of taxes. Instead, it relied on its settled case law to rule that as long as Portugal has chosen not to tax the resident shareholders of the dividends originating from the domestic UCITS, it cannot rely on the need to ensure a balanced allocation of taxing rights to justify the taxation of a foreign UCITS and its beneficiaries, not even under the pretense of the danger of the dividends escaping taxation altogether.[76] It is true that this argumentation is consistent with existing CJEU case law and that AG Kokott's link of the avoidance of non-taxation to the efficiency of the collection of tax alludes to the potential base erosion and the concomitant loss of revenue that has been repeatedly rejected by the Court. It is also possible that this obiter dictum serves as a nudge to the Court by AG Kokott to re-consider the single tax principle in its 'taxation at least once' aspect.

Relevance of State Aid Rules?

For the sake of completeness, it must be considered whether the state aid provision (Article 107 TFEU) and the burgeoning case law in fiscal aids could allude to a recognition by the General Court (GC) and/or the CJEU of the 'taxation at least once' principle. Article 107 contains a general prohibition of financial assistance that would favour certain undertakings over others. Articles 107(2) and 107(3) TFEU provide the conditions under which aid may be compatible with the internal market. One obvious expression of the rule of law in state aid matters is the prohibition of the recovery of the aid already paid, if the principle of legal certainty has not been met, that is when the legal effects of state aid law were considered unforeseeable.[77] Beyond that, however, it is doubtful whether the EU Courts' interpretation of Article 107 TFEU could signify or even mandate the single tax principle.

[74] Opinion AG Kokott of 6 May 2021, *Allianzgi-Fonds*, Case C-545/19, ECLI:EU:C:2021:372.
[75] ibid at [91].
[76] CJEU judgment of 17 March 2022, *Allianzgi-Fonds*, Case C-545/19 at [83].
[77] See Regulation 2015/1589, art 16(1) 'the Commission shall not require recovery of the aid if this would be contrary to a general principle of Union Law'.

In the Court's case law, state aid includes measures that 'mitigate the charges which are normally included in the budget of an undertaking'.[78] Several steps in the assessment of the existence of state aid, especially the finding of selectivity, make this a difficult task for the Court. The measures applicable to the domestic undertakings (or to a category of these undertakings) must derogate from the so-called 'reference framework', to be found selective, and to not be justified by the nature or general scheme of the system. The idea behind this system is to identify whether 'foreign' undertakings are discriminated against 'domestic' ones.

It is true that in certain cases the CJEU (or the GC) have found the non-taxation or the lower taxation, or the conditional 'beneficial taxation' of certain undertakings as incompatible with Article 107 TFEU.[79] The result of such a finding is that the aid provided to these undertakings must be recovered and the particular scheme at issue must be discontinued. It is true that such a result could fit within the imposition of 'taxation at least once'. However, that would be a very bold statement to make. The particular cases brought by the Commission before the Court and the very specific facts at hand (tax system at issue, undertakings affected, material and geographical scope and policy objectives) prevent any possible identification of such a pattern that could form the basis of the single tax principle.

Issues of double non-taxation may, however, also arise in the context of hybrid mismatches between Member States. In these cases, Member States treat transactions in an inconsistent manner that may result in 'double non-taxation'. In a state aid context, the Commission and the Court have confirmed that measures to avoid double taxation are regularly justified by the nature of tax systems, but the relief measures cannot go beyond what is necessary (proportionality test). If so, they may result in unjustified advantages for certain undertakings. While, as already stated, the ATAD includes specific rules to address hybrid mismatches, it remains questionable whether state aid rules also prevent cross-border hybrid mismatch arrangements. The Commission's negative decision in the *McDonald's* case suggests that state aid rules are not the appropriate tools to tackle hybrid mismatches relating to permanent establishments.[80] The same result was later confirmed by the CJEU in its *Engie* case where the GC and upon appeal, the CJEU were called to answer whether Luxembourg may have been infringing the EU State aid rules by not preventing, through its anti-abuse rules, the effects of cross-border hybrid mismatch arrangements.[81] In fact, the Court found that the General Court erred in interpreting the Luxembourg provision in an over-expansive way, as including that the relevant income should be taxed at least once.[82] Accordingly in both the general line

[78] See eg, CJEU judgment of 14 January 2015, *Eventech*, C-518/13, EU:C:2015:9 [33].

[79] See eg, CJEU, Judgment of 21 December 2016, *World Duty Free*, Joined Cases C-20/15 P and C-21/15 P, ECLI:EU:C:2016:981.

[80] Commission Decision (EU) 2019/1252 of 19 September 2018 on tax rulings SA.38945 (2015/C) (ex 2015/NN) (ex 2014/CP) granted by Luxembourg in favour of McDonald's Europe [2019] OJ L 195/20.

[81] CJEU, Judgment of 5 December 2005, *Engie*, Joined Cases C-451/21 P and C-454/21 P, ECLI:EU:C:2023:948. Note that the transactions at issue and the facts of the case took place before the adoption of the ATAD.

[82] *Engie* case, ibid, [60]: 'The General Court, in the first place, while recognising that Article 166 of the LIR does not make the grant of the exemption of income from participations at the level of a parent company formally dependent on the prior taxation of distributed profit at the level of its subsidiary, nonetheless held that the grant of such an exemption could be contemplated only if the income distributed by a subsidiary had been taxed beforehand, short of there being double non-taxation of profit in a purely internal situation.'

of fiscal aid case law and the tax rulings case law, the specific facts and the Courts' assessment at issue make it impossible to deduce a certain degree of abstraction that could confirm by the judiciary a consistent application of the no double non-taxation principle.

Conclusion

A 'thick' reading of the rule of law would consider equality principle in its substantive form as a constituent of it. The purpose of this chapter has been to examine whether the single tax principle, in both its 'taxation *only once*' and 'taxation *at least once*' aspects, has been understood by the CJEU as being part of the equality principle and, subsequently, of the rule of law.

As this chapter has shown, the case law of the CJEU and EU secondary law provide *segments* of both facets of the single tax principle. The case law of the CJEU appears to apply consistently the no double taxation element, under specific conditions. The same applies in secondary EU law that is aimed at eliminating double taxation (directly or indirectly). However, one cannot ignore that *instances* of double taxation (both economic and juridical) continue to exist in EU law and are considered acceptable restrictions in the free movement of persons and capital.

The requirement to tax at least once is less expressed in EU law. As argued above, the subjection to some degree of taxation has been evinced in EU law in the anti-abuse doctrine, as this is developed in the CJEU case law and. in secondary EU law, like the CFC rules, the anti-hybrid rules and the exit taxes in the ATAD. However, again, if the income escapes taxation altogether, this does not pose a problem from a fundamental freedoms' perspective. While this may appear at odds considering the recent, post-BEPS anti-tax avoidance wave, AG Kokott's subtle reference to the need to avoid non-taxation may be perceived as a nudge to the CJEU to follow an 'evolutionary' approach with regard to the single tax principle, that would be compatible with BEPS and Pillar 2.

This chapter suggests that the single tax principle cannot be found in EU law in a consistent and comprehensive manner. This is partly because EU direct tax law remains largely unharmonised and there is no EU rule to allocate taxing rights among Member States. The development of the single tax principle as a concept in the DTC framework that encompasses such distributive rules explains this difference. The analysis above shows that the existence of such distributive rules is a prerequisite for the single tax principle (in its most rudimentary form) to work. At the same time, the single tax principle itself may suffer from a certain degree of abstraction and generality, the so-called indeterminism, that may make it hard to apply in practice. As Ruth Mason has observed,

> […] the concepts of full taxation and double taxation are indeterminate – there is no way to specify the tax base or rate that would satisfy them. Although commentators using terms like "double non-taxation" may have in mind an approximate tax base (perhaps financial accounting income with adjustments for tax) and an approximate tax rate (something like

> the OECD average rate), such vague notions are too imprecise to generate clear policy prescriptions.[83]

Accordingly, the single tax principle cannot be considered part of the EU law framework in either of its facets. This may be paradoxical considering both that the ability to pay principle is often perceived as part of the equality principle enshrined in the TFEU; and that in the context of Pillar 2, the EU may require a minimum tax when the conditions of the GloBE directive are met, while it does not have in place a rule or a principle to guarantee a/some tax in general.

[83] Mason, above n 38, 385.