

Article

The Principle of Legality of Taxation as a General Principle of EU Law: National and Supranational Differences of Interpretation and Potential Difficulties

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The principle of legality of taxation has gained a supranational status by means of its transplantation out of the national setting to a general principle of EU law by the Court of Justice of the European Union (CJEU). In this article the two cases in which the Court has given a first supranational interpretation of the principle are discussed, as well as the Research Note the Court published before rendering its judgment in these two cases. This European translation contains an uncertainty as to the representative democratic elements of the principle that are closely connected to its historical development in several national legal contexts of Member States. With the European principle being rooted in the national legal orders of the Member States, this current discrepancy stands at odds with the material scope in several Member States, which ascribes clear democratic elements to the principle. Thus, the main question addressed after taking a look at the national interpretations and the representative democratic elements contained therein in the Netherlands, France, Italy and Germany, is if the omission of these democratic elements can prove to become an obstacle for future harmonization or integration in taxation. The focus will lie on the current mode of norm-creation in above-state settings and the creation of 'genuine' own resources for the EU.

Keywords: principle of legality of taxation, legal transplantation, deliberative democracy, constitutionalism

1 INTRODUCTION

Arguably, for the European tax law *aficionados*, the most anticipated case of the past year was the Court of Justice of the European Union's ('CJEU or the Court') 'FIAT' judgment that came out in November 2022.¹ The case concerned specifically the Commissions' mobilization of the State aid provisions to target specific national regimes or ruling practices that in its eyes distort the functioning of the internal market, and thus are to be classified as State aid.² Without a hint of understatement, this 'saga' around the application of the State aid provisions to national tax practices or regimes has been stirring up discussion for roughly a decade, and although the *FIAT* case provided some clarity, there is still more in the pipeline.

This contribution is not primarily engaging with that discourse, although it is providing the background to the discussion here. The Court namely based its reasoning (partially) on the principle of legality of taxation to come to the conclusion that the arm's length principle could

not be deemed part of the reference framework that stood at the basis of the plead of the Commission,³ and reacknowledged the status of this principle as a general principle of EU law. Coming to such an elevation of a national principle from the common (constitutional) traditions of the Member States is as such an inference of a deemed common legal norm from twenty-seven different national legal system. The main questions are if essential elements have been omitted, forgotten, or remain unclear in the extrapolation of the Court,⁴ and thereby thus what discrepancies between the national and the supranational interpretation of the principle exist. What the potential consequences of any gaps in interpretation could be is the subsequent question to be answered. These three questions, not coincidentally corresponding to a dialectical form of analysis, form the three main sections that follow hereafter. Section two deals with the surfacing of the principle in the supranational setting, section three with the national context and specific

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¹ CJEU, judgment of the Court (Grand Chamber) of 8 Nov. 2022, Fiat Chrysler Finance Europe v. European Commission, joined cases C-885/19 P and C-898/19 P, ECLI:EU:C:2022:859. Here on after to be referred to as 'FIAT'.

² As the consequence of these distortions was deemed to be a selective advantage in the eyes of the Commission, and thereby incompatible with the internal market, it brought proceedings on the grounds of qualifying for the conditions of Art. 107 (1) TFEU. For limitation of scope those will not be at the forefront here.

³ *FIAT.*, *supra* n. 1, para. 97. Under reference to this first case in which the (Second Chamber of the) Court elevated this principle to a general principle of EU law: CJEU (Second Chamber), judgment of 8 May 2019, Związek Gmin Zagłębia Miedziowego, C-566/17, EU:C:2019:390 (here on after referred to as 'Związek').

⁴ Whereby strictly speaking the former is intentional, and the latter is not. This is not the place to dwell on the intentions behind these possible differences, as this would be a highly speculative exercise. Therefore, only where express mention is made of the intentions of the Court to (or to not) include specific elements found in the national definition these will be taken as deliberative. For the rest the latter category of 'remain unclear' will account for the differences that are to be found.

connotations to the principle given within that setting. Section four compares how some of these elements might be lacking from the current system of law-making and looks at resolves.⁵

Thereby, this inquiry takes a traditional methodological approach to the analysis of the legal transplant, whereby this term must be understood as the passing of a rule from one or multiple legal systems to another legal system.⁶ What is lost or gained in translation during that passage is to be critically assessed, and the practice must be approached with caution, especially when one is dealing with essential principles of the national legal order. That this is the case for the principle of legality of taxation is overly clear already on first appearance, given its special constitutional status and wide codification and taken together with its deep historic roots.

2 THE CONTEXT AND BUILD-UP TO THE ACKNOWLEDGEMENT OF THE PRINCIPLE OF LEGALITY OF TAXATION AS A GENERAL PRINCIPLE OF EU LAW

2.1 Introduction

Before dealing with the direct cause that triggered the writing of this contribution, namely the *FIAT* case itself, it is chosen here to deal with the surfacing of the principle of legality of taxation and the run-up to the acknowledgement of the Court of the principle as a general principle of EU law chronologically. Advocate Generals have cast the first stone in this respect, but the Court proved not receptive at the time. The Court itself paved the way for elevation to the supranational level by publishing its own research note on its website. The subsequent choice to use the principle in *Zwiqzek* must thus be deemed anticipated. The surfacing of the principle in *FIAT* has a different connotation to it, which will be dealt with before discussing the consequences of the elevation of this principle to the level of general principle of EU law.

The most important limitation of the scope of the discussion of the principle of legality can already be found in the formulation of the principle by the Court itself, by the addition of the words ‘of taxation’ to the commonplace principle of legality. The fact that this principle of legality was elevated by the Court from the national legal systems of the Member States in the field of criminal law, way before its codification in the Charter of Fundamental Rights of the European Union (CFREU),⁷ is in itself a good example of the

fragmentation within the application of this principle, and its many faces.⁸ It is therefore logical and good to restrict the review to the narrower field ‘of taxation’, however it must be mentioned that the first appearances of the principle in the reasoning of the Advocate Generals dealing with tax law cases was also sometimes in connection to a ‘criminal law’ context in the application of tax laws, which is something to be aware of in the subsequent paragraph. It is namely within the subsequent discussion of the principle of legality as firstly applied in tax law cases in the Opinions of the Advocate Generals (AGs) of the Court that this specific limitation to the principle ‘of taxation’ is not yet present, whilst it makes all the difference for its interpretation.

2.2 Earliest Mentions in Tax Cases in the Opinions of AGs of the Court

The previous paragraph already slightly disclosed the conclusion of this one by defining its function. The principle of legality first appeared namely in the reasoning of the AGs of the Court in relation to tax cases, but not as the principle of legality of taxation, with one exception that will feature at the end. How critical that later addition by the Court is for the understanding of the principle will be at the forefront in the subsequent.

Legal certainty for taxpayers, ‘certainly when the rights and obligations of taxable persons are involved’, made AG Geelhoed conclude that the principle of legality must be strictly adhered to. This was in a VAT case where the right of deduction was denied under reference to potential future legislation that would limit this right to deduct.⁹ This derogation from the VAT Directive was obtained by Germany, and was to have retroactive effect. It was after the validity of this retroactivity was already declared illegitimate by Geelhoed by reference to the principles of legal certainty and the protection of legitimate expectations,¹⁰ that he tied together these two principles in the principle of legality, applied to a VAT case.

Legal certainty and the protection of legitimate expectations for taxpayers are also at the forefront the other Opinions that deal with the principle, e.g., by AG Stix-Hackl in dealing with the (raising of a legitimate expectation by the authorities to be) falling under a VAT exemption.¹¹ Or by AG Ruiz-Jarabo Colomer when

⁷ Article 49, para. 1 CFREU.

⁸ See e.g., the generally well-known case *Kolpinghuis*, where the principle of legality is there manifesting itself by means of the principles of legal certainty and non-retroactivity, see CJEU, Judgments of the Court (Sixth Chamber) of 8 Oct. 1987, *Kolpinghuis Nijmegen BV*, Case C-80/86, ECLI:EU:C:1987:431, [1987], paras 12 & 13.

⁹ CJEU, Opinion of Advocate General Geelhoed delivered on 24 Oct. 2002, *Finanzamt Sulingen v. Walter Sudholz*, Case C-17/01, ECLI:EU:C:2002:613, para. 65.

¹⁰ *Ibid.*, paras 46–55.

¹¹ CJEU, Opinion of Advocate General Stix-Hackl delivered on 1 Dec. 2005, *Elmeka NE v. Ipourgios Ikonomikon*, Joined Cases C-181/04 to C-183/04, ECLI:EU:C:2005:730, paras 33–37.

⁵ Thereby adhering to the archetypical formulation of a dialectical analysis, namely by means of thesis, antithesis and synthesis.

⁶ Whereby one can speak of horizontal transplants, from one national system to the other, and vertical ones, from the national to the supranational or international. In this case it is the latter being dealt with.

confronted with a question on the calculation and establishment of excise duties, concluding that the principle of legality requires that these must be foreseeable.¹² Again, AG Ruiz-Jarabo Colomer, opened another string of thoughts on the combination of the principle and the idea of abuse of rights,¹³ a strand picked up by the Court in later case law.¹⁴

From the above it can already be concluded that AG Ruiz-Jarabo Colomer was the most preoccupied with the principle, and it was he who signalled in 2004 a wider scope that shed a new light on the principle, whilst also adhering to the specific principle of legality in taxation next to the other similar manifestation in criminal law. He stated that ‘the substantive scope of the principle of legality in taxation law, which, as in criminal law in relation to freedom, intends that the legislature, in which sovereignty resides, should be the only power with the authority to limit the patrimony of citizens’,¹⁵ whilst arguing that the analogical interpretation that was adopted by the Swedish government to extend the notion of subsidy in the VAT Directive cannot lead to a situation that is to the detriment of the taxpayer. This first expression of the principle of legality of taxation within European discourse is the first one that comes close to encompassing the elements that are connected, by codification, case law, or through historical materialization, to the specific demands that give the national expression of the same principle its distinct taste. The main question is obviously if the Court arrives at a similar (substantive and/or material) definition. Its earlier mentioned research note allows for a quite interesting look into the act of transplantation that occurred here and thus also the elements deemed necessary by the Court to include in the supranational interpretation.

2.3. The Research Note of the Court

It must first and foremost be reminded that the publication of a Research Note by the Court is a voluntary act, and not an obligation of whatever sort, and thus a

deliberate choice on behalf of the Court to give an insight into its comparative law methodology.¹⁶ The intention to publish research notes, as the website of the Court says, is to ‘enhance mutual knowledge of national laws’,¹⁷ but that is quite an understatement when looking at their signalling effect and concrete legal application. The example here is directly provided by the Research Note ‘on the scope of the principle of the legality of taxation, particularly in relation to value added tax’,¹⁸ which predates the Courts’ judgments that will be discussed later, and thereby gave a very good view of what was to come after its publication.

This holds especially true when considering the full title as contained in the document, which reads: ‘Scope of the principle of the legality of taxation, as it exists in certain legal systems of the Member States and as reflected in the case-law of the ECtHR on the right to property, enshrined in Article 1 of the Protocol to the European Convention on Human Rights, particularly in relation to value added tax’. From this full title, the word ‘certain’ already signals that not all national legal systems are being assessed in depth. The limitation in relation to the ECtHR case-law on the right to property is highly significant, especially for the national connotation to the principle, and especially its historic materialization into a key principle of tax law. The ECtHR interpretation is namely limited in its own respect too, and does not encompass the same elements as the national interpretation.

The definition that is given is the following: ‘the principle of the legality of taxation is defined as the rule according to which no tax can be levied on a person without that tax having been provided for by statute, that is to say by an act adopted by the legislative power’.¹⁹ This meaning is inferred from a survey of the national legal orders, and an analysis of the case law of the ECtHR.

¹² CJEU, Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 11 Jan. 2005, *Ottmar Hermann (receiver of Volkswirt Weinschänken GmbH) v. Stadt Frankfurt am Main*, Case C-491/03 ECLI:EU:C:2005:7, paras 25 & 29.

¹³ CJEU, Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 14 Mar. 2006, *Axel Kittel v. État Belge and État Belge v. Recolta Recycling SPRL*, Joined Cases C-439/04 and C-440/04, ECLI:EU:C:2006:174, para. 54).

¹⁴ See CJEU, Judgment of the Court (Third Chamber) of 10 Nov. 2011, *Commissioners for Her Majesty’s Revenue and Customs v. The Rank Group plc*, Joined Cases C-259/10 and C-260/10, ECLI:EU:C:2011:719, paras 62/63, of which the latter reads that from the principle of legality in combination with that on the abuse of law: ‘It follows that a taxable person cannot demand that a certain supply be given the same tax treatment as another supply, where such treatment does not comply with the relevant national legislation’.

¹⁵ CJEU, Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 23 Nov. 2004, *Hotel Scandic Gåsabäck AB v. Riksskatteverket*, Case C-412/03, ECLI:EU:C:2004:746, para. 42. Emphasis added by author.

¹⁶ On the publication of these research notes, the president of the Court, Koen Lenaerts, gave a very interesting insight into the choice to start publishing the research notes in 2016 in an interview with Daniel Sarmiento. He stated that the main motivation for publication was ‘that [...] the comparative law analysis [...] is made visible’. The idea was born after a discussion at an academic Congress. The podcast recording of the interview is available at EU Law Live, <https://eulawlive.com/podcast/a-conversation-with-koen-lenaerts-president-of-the-court-of-justice-of-the-european-union/> (accessed 14 Jun. 2023), ‘A conversation with Koen Lenaerts, President of the Court of Justice of the European Union’, specific quote, at 55:20–56:00.

¹⁷ See the Website of the Court where these research notes are available, https://curia.europa.eu/jcms/jcms/p1_2170124/en/ (accessed 14 Jun. 2023).

¹⁸ Directorate-General for Research and Documentation, *RESEARCH NOTE – Scope of the Principle of the Legality of Taxation, Particularly in Relation to Value Added Tax*, Curia Sep. 2018, https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-11/ndr-2018-005_neutralisee_synthese_en.pdf (accessed 14 Jun. 2023). This is the English summary, which is considerably shorter than the French original research note, to be found at, https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-11/ndr-2018-005_neutralisee-finale.pdf (accessed 14 Jun. 2023).

¹⁹ *Ibid.*, at 1, para. 2.

Within this latter manifestation, the principle is tied to Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms of 20 March 1952 that deals with the protection of property.²⁰ The Court concludes that interference with that right, such as is the case for taxation, should be accompanied by a law, as flows from the principle of legality of taxation. The main conclusion drawn from the case law of the ECtHR in the case note is that the principle is given a formal and normative interpretation.²¹ What is meant thereby, is that on the level of the law that imposes the tax, 'national provisions which serve as a legal basis for the interference by the state in the right to respect for property must be sufficiently accessible, precise and foreseeable'.²² This interpretation seems to be guiding the Court towards its conclusion in the subsequently to be discussed cases, most notably in *Związek*. It is also reflective of the earlier occurrence of the principle in the Opinions of the AGs, with the exception of the substantive scope of the principle that was mentioned by AG Ruiz-Jarabo Colomer. It is exactly here where the tension starts to arise with the national interpretation.

From the survey of national legal systems, the first conclusion to be drawn is that direct codification of the principle in a constitutional document is the norm.²³ In the Member States that do not work with the explicit codification of the principle for tax legislation, the principle is derived from other constitutional principles.²⁴ Again, the research note draws the conclusion that, in line with the earlier inferred criteria of accessibility, preciseness and foreseeability, also the national sphere contains the obligation 'to determine essential elements of taxation by law'.²⁵ This is not a wrong conclusion, but it contains an omission, again on this substantive scope of the principle. 'Omission' in this case refers to the earlier mentioned discrepancies between the interpretation of the principle by the Court and the interpretation in the national context from which this principle is derived.

²⁰ Which reads, in full: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties'.

²¹ One could even very-well argue that the choice for the emphasis on the protection of private property is a normative choice in itself, which is a highly interesting cultural discussion. However, as this choice is one that is consistent within European legal doctrine, it is outside the scope here to deal with this choice at length, but nevertheless good to signal.

²² See *supra* n. 18, at 5, para. 12.

²³ These are listed in the document, together with the relevant constitutional provision, see *supra* n. 18, at 3, para. 9. Some Member States do codify the principle, but not on the level of constitutional law. These are Hungary and Latvia.

²⁴ See *supra* n. 18, at 5, para. 10. The examples mentioned there are Germany and Austria.

²⁵ See *supra* n. 18, at 7, para. 17.

The condition of an act by the legislative power, a part that is acknowledged by the Court too, is namely also having a peculiar scope in the national interpretation, and as will be seen, contains a (potentially deliberative) democratic scope and thereby not only a connection to the principle of respect for private property but to the principle of democracy itself. This democratic element is parliamentary, and closely mirroring the substantive scope that AG Ruiz-Jarabo Colomer referred to when linking the legality of taxation to the democratic authority (by means of sovereignty) to the power to limit the patrimony of citizens. It requires adherence to the (normative) national choice on the exercise of power through representative parliamentary democracy, a choice made by the citizens that will be subjected to that (tax) law. The substantive here thus refers to the material, which has materialized through history and doctrine in distinct national settings. This substantive-material scope is not to be neglected. Before dealing with that context and the legal consequences of that context, it is however imperative to look at how the concrete application of the principle has acknowledged this principle as a general principle of EU law, and the interpretation given to that principle in the case law of the Court.

2.4 The Acknowledgement of the Principle in the Case Law

As mentioned in the previous section, the research note of the Court paved the way for the subsequent application of the Courts' interpretation of the principle of the legality of taxation, whereby it up to this point has used this principle to come to a Judgment in two cases.

2.4.1 *Związek*

Związek Gmin Zagłębia Miedziowego, a local government association that carries out waste management and other functions had a mix of activities subjected and not subjected to VAT. The main concern was the calculation of the right to deduct VAT, wherefore a rule was absent in the national legal provisions. The referring Court asked whether it was correct to grant a full deduction right because of the absence of specifically clear rules for the determination of the exact amount. In the national build-up, the principle of legality of taxation that is enshrined in Article 217 of the Polish Constitution played a major role. The referring Court namely based the granting of a full right of deduction on the national (interpretation of this) principle.

The Court, in agreement with AG Sharpston,²⁶ gave a different interpretation to that same principle, namely that:

²⁶ See CJEU, Judgment of the Court (Second Chamber) of 8 May 2019, *Związek Gmin Zagłębia Miedziowego w Polkowicach v. Szef Krajowej Administracji Skarbowej*, Case C-566/17, ECLI:EU:C:2018:995, most notably para. 110.

all the essential elements defining the substantive features thereof must be provided for by law, that principle does not require every technical aspect of taxation to be regulated exhaustively, as long as the rules established by law enable a taxable person to foresee and calculate the amount of tax due and determine the point at which it becomes payable.²⁷

This European interpretation was firstly lifted up to the level of as a general principle of law of the EU legal order by the Court,²⁸ and thereafter used in its application to the harmonized system of VAT within this European interpretation.²⁹ Thereby, the question of which elements must be specified becomes a question of interpreting the European principle, which thus demands meeting the earlier mentioned criteria of a rule being established by law, with a foreseeability of the tax liability, sufficiently clear mode of calculation of the tax that will become due and possibility to determine when this tax will be due. The Court concludes that this does not entail the laying down of detailed technical rules, and that the absence of those technical rules thus does not infringe the interpretation of the principle as a general principle of EU law.

A few things stand out. First of all, and most importantly for the review in this paragraph, the Court observes the principle of conferral in the determination of the scope of the principle, by explicitly making the application of the EU interpretation dependent on the fact that one is dealing with a harmonized field of legislation. This is an important point in the context of the subsequently discussed *FIAT* case. Secondly, and logically following from the general functioning of EU law and the necessity of ensuring primacy of EU law, the supranational interpretation takes precedence over the national interpretation, a point that will feature more prominently in the final paragraph of this section. Finally, although the Court acknowledges the necessity of the tax rule to be established by law, it does not go into the procedure of coming to such a law. This is logical, as it was not asked to do so in this specific case. Therefore, in the case itself the Court had its hands tied, and any excursions into the earlier highlighted substantive scope of the principle would be out of line. However, also the research note did not deal with this substantive scope, and thus there seems to be a deliberate omission of the connection to the democratic elements that form part of the national interpretation. As will be shown later, this substantive scope is an essential

part of the principle in the national interpretation, as it embeds the main historic promise of a democratic process. The combination of the above three elements could provide problematic outcomes in the future, as will be the main talking point in the fourth section.

2.4.2 *FIAT*

In short, the *FIAT* case put before the Court the question if a tax ruling that was granted to the company constituted a form of State aid that was incompatible with the internal market, and thus in violation of Article 107 paragraph 1 TFEU. This ruling was granted by the Luxembourgish tax authorities to the company to determine the pricing between related entities for (intercompany) treasury-and finance-services. The General Court followed the Commissions in finding a case for application of the State aid rules,³⁰ and thereby followed the reference framework suggested by the Commission, which included the arm's length principle. This was not the product of reasoning along the lines of the principle of legality of taxation.³¹ Perhaps therefore, the *FIAT* case cannot bow on an earlier mention of the principle of legality of taxation in the Opinion of the AG such as was the case for *Zwiqzek*.

Be that as it may, the Court swooped it into its reasoning as a primary point, explanatorily formulated as the ground for denying the Commissions' reference framework application, after stating that the OECD transfer pricing guidelines and its commentary cannot be the grounds for assessing compliance with the arm's length principle; that can only be the national laws.³² Assuming a deviation of treatment of a taxpayer on those (international) standards that are not incorporated in the national tax laws was thus a mistake from the side of the Commission. Paragraph 97 of the Judgment is vital in this respect, as it gives a full formulation of the principle as seen by the Court:

the principle of legality of taxation, which forms part of the legal order of the European Union as a general principle of law, requiring that any obligation to pay a tax and all the essential elements defining the substantive features thereof must be provided for by law, the taxable person having to be in a position to foresee and calculate the amount of tax due and determine the point at which it becomes payable.

²⁷ CJEU, Judgment of the Court, *Zwiqzek*, *supra* n. 3, para. 39.

²⁸ *Ibid.*

²⁹ *Ibid.*, para. 41, which reads in full 'When it comes to an essential element of a tax that has been harmonized by the EU legislature, such as VAT, the question of which elements must be specified by law must be examined in the light of the principle of fiscal legality as a general principle of EU law and not on the basis of an interpretation of that principle in national law'.

³⁰ See CJEU, judgment of the General Court of the European Union of 24 Sep. 2019, Luxembourg and Fiat Chrysler Finance Europe v. Commission, joined Cases T-755/15 and T-759/15, EU: T:2019:670.

³¹ The General Court did explicate that there is no room for a general principle of equal treatment in taxation within the provision of Art. 107 (1) TFEU, as wrongly claimed by the defendant to have been assumed by the Commission. See *Ibid.*, paras 160 & 161.

³² Obviously this holds true only in the case that the national law does not very directly incorporate those guidelines and the commentary (or refers to it), and in the absence of a harmonized framework at the EU level.

Concerning the application of the principle, there is a difference to observe with the *Zwiqzek* case, in the fact that there is no harmonized field of law.³³ The Court is dealing with a question ‘outside the spheres in which EU tax law has been harmonised’,³⁴ which does however not mean that the State aid provisions find no application. The fact that there is no harmonized field means that the reference system is to be determined by the national laws. The essential elements must be provided by the Member State ‘by exercising its own competence in the matter of direct taxation and with due regard for its fiscal autonomy’.³⁵ This is a ‘conferral’³⁶ style reading of this principle of legality of taxation as a general principle of EU law. This means that the Court cannot, such as is the case for VAT, rule on all (legal) sources and its related interpretative sources that have given rise to the situation at hand and determine their interpretation, scope or applicability. It is highly likely that in a situation of harmonization the outcome would have been different, even if the harmonizing measures would not explicitly contain the codification of OECD documents.³⁷ This sheds a different light on the application, as it thus shows that for fields of law that have seen no harmonization, the principle of conferral demands that the national laws determine the essential elements of the tax measure in question, even when dealing with a question of interpretation of the (EU) State aid provisions. It is therefore that the Court concludes that the OECD transfer pricing guidelines and its commentary do not fall within the ambit of the reference framework. This conferral-type scope of the principle was not uncovered within the *Zwiqzek* case.

As a final point, it is good to notice that the literal definition of the principle itself that is given is similar to the one in *Zwiqzek*. Again, this is a recognition of the formal interpretation as adhered to by the Court:

2.4.3 *The Role of the Discretionary Powers of the Luxembourgish Tax Authorities and Its Relation to the Principle of Legality of Taxation*

The previous raises some more specific questions, of which perhaps the most obvious one is the relation between the principle of legality of taxation and the

validity of the ruling granted by the national authorities, which basically is the product of the discretionary power granted to the tax authorities under national law. The unease presents itself clearly in the fact that apparently this practice passes the national test of validity and thus also the principle of legality in the national context. But, the arm’s length principle and the explanation thereof in the OECD commentary and guidelines cannot be deemed part of the reference framework under Article 107 (1) TFEU for the Court, because of the principle of legality of taxation. There thus is another discrepancy to find here in the interpretation of the principle, with the Court choosing a more formal approach than adopted in the Member States. This discrepancy is most likely born in the connection between the principle of legality of taxation and the rule of law, whereby in the interpretation of the Commission of those discretionary powers of the tax authorities form part of the system of (the application of laws) that forms the reference framework, but the Court could not deem those facts present in the absence of a written law.

This makes that the EU interpretation lets national practices of delegation intact and that the Court does not interpret the exercise of these delegated powers in the absence of a rule or principle codified in national law. However, with the differences in practice in Member States in relation to delegation, this makes that EU law and the scope of the principle of legality of taxation is different in application in different Member States, as there is another category of Member States that interpret the practice of delegation formally and that under the principle of legality of taxation does not allow for delegation of (broad) discretionary powers to the executive (authorities). This results in actually prescribing the room for discretion extensively by the law of delegation, with that law falling within the scope of the Courts’ interpretation of the principle of legality of taxation. With the formal interpretation of legality adhered to by the Court in the determination of the reference framework, this discrepancy in national practice between Member States, that is essentially born out of a rule of law rationale and constitutional history, thus might lead to a difference in application in the future. Another question that can be raised is if there is a different scope to the principle of legality to be observed in the assessment of the reference framework for the finding of State aid. This would then be the product of respect for the principle of conferral, which can be questioned from the fact that the Competition law competence is an exclusive EU law competence. Hence formal legality and respect for Member States’ sovereignty seem to be best guarded by this interpretation of the Court, but might lead to differences in application.

³³ Providing an example of the classic dichotomy between indirect and direct taxation in terms of harmonization achieved at the supranational level.

³⁴ *FIAT* judgment of the Court, para. 73.

³⁵ *Ibid.*

³⁶ See Arts 4 (1), 5 (1) & 5 (2) TEU.

³⁷ Making it an interpretative matter, on which the Court has been open to take inspiration from OECD documents that are related to secondary law, see CJEU, Judgment of the Court (Grand Chamber) of 16 May 2017, *Berlioz Investment Fund SA v. Directeur de l’administration des contributions directes*, Case C-682/15, ECLI:EU:C:2017:373.

2.5 The Consequence of the Principle of Legality of Taxation Having Become a General Principle of EU Law

General principles of EU law have constitutional status,³⁸ which places them at the apex of the supranational legal order, as acknowledged by both the Treaties and the Court.³⁹ The consequence of direct effect and primacy makes that the national systems undergo a ‘Europeanisation’, which can best be summarized with three words used by Tridimas: ‘hierarchical norm alignment’.⁴⁰ This norm alignment can be made possible by means of positive harmonization or can be judge-made, as is the case in the specific example discussed here. This setting is dialogical, as can be seen from the methodology used by the Court to come to such principles, which again has a law-making leg by means of codification, and a judge-made connotation by means of the earlier mentioned process of transplantation. It is here where the crux is to be found in relation to the consequences of this practice for the principle of legality of taxation.

With the transplantation, the Court lifts up the principle out of the national context, for it to be a point of reference and a guiding practice for the interpretation of supranational law. This latter notion embeds the limitation that stems from the principle of conferral that the Court encountered in *FIAT*. The scope of interpretation is namely naturally limited by being applicable (in its EU interpretation) to EU law, which was the reason for the exclusion of the OECD guidelines and commentary from the reference framework, as national law had not directly enshrined these norms in the national tax law. This is however not the main aspect of the earlier transplantation, but a mere sign of the application of the principle in line with the structural principles of the Union that guide the division of competences. It shows however one important consequence that is at the forefront of the next consideration; if a part of law is harmonized, that will mean that the Union principle is applicable and ruling on the scope and extent of the inclusion of interpretative sources that have a relationship to the matter at hand but are not codified. In other words: the CJEU will be able to rule on the interpretative value of e.g., OECD guidelines, and is not restricted in encompassing considerations

from that angle in its review. This is something it was not able to do in *FIAT* because it was not dealing with a piece of EU legislation (i.e., a non-harmonized field of tax law). Conversely, if the granting of rulings would have been harmonized at EU level, the Court would have been equipped to treat the OECD guidelines as interpretative and include them in the reference framework.

This brings with it the most important consequence of the uplifting of the principle from the national legal systems of the Member States to the Union level. As the principle has namely passed the Rubicon from national to supranational, so has the interpretation of that principle passed to the supranational adjudicator (in dealing with a question of EU law). This begs the obvious question if the interpretation can be deemed to be in line with the national interpretation, that can bow on a context that reaches into the deep tissue of the State and the constitutional order.

This is especially important when taking into account the general function of principles. This functionality commands an optimization.⁴¹ Next to that, a general principle of EU law has another important (related) functionality within the specific context of EU law. It namely has a ‘gap-filling’ function in order to fill voids left by the legislature,⁴² whereby the use of principles common to the Member States actually entail an expression of respect for that national setting and those national courts. However, that does require a transplantation that is respectful of all essential elements that are part of that principle in the national context. If that has been the case for the principle of legality of taxation is doubtful.

3 THE INTERPRETATION OF THE PRINCIPLE OF LEGALITY OF TAXATION IN THE NATIONAL CONTEXT

3.1 Introduction

From a supranational constitutional point of view, it is a false dichotomy to speak of a national and supranational or international context. Supranational law, for all Member States, is national law.⁴³ The same can be said of the ECHR, and thus the judgments of the ECtHR can colour national interpretations (of fundamental rights) as part of this national legal order that should not be

³⁸ See also T. Tridimas, *The General Principles of EU Law and the Europeanisation of National Laws*, 13(2) Rev. Euro. Admin. L. 5–31 (Jul. 2020), doi: 10.7590/187479820X15930701852193.

³⁹ In the Treaties the most clear example is Art. 6 (3) TEU for the field of fundamental rights. An example from the case law of the Court can be found in e.g.: CJEU, judgment of the Court (Grand Chamber) of 18 Dec. 2007, *Laval un Partneri Ltd tegen Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan en Svenska Elektrikerförbundet*, Case C-341/05, ECLI:EU:C:2007:809, where the Court lets the right to collective action prevail over the fundamental (economic) freedoms. Interestingly, but outside the scope of the discussion here, the Court assesses the two on equal footing.

⁴⁰ Tridimas, *supra* n. 38, specific quote at 7.

⁴¹ See R. Alexy, *On the Structure of Legal Principles*, 13(3) Ratio Juris 294–304 (2000), doi: 10.1111/1467-9337.00157.

⁴² See on this gap-filling function, and also more generally on the role of general principles of EU law in the supranational (and national) legal order: K. Lenaerts & J. A. Gutiérrez-Fons, *The Constitutional Allocation of Powers and General Principles of EU Law*, 47 CMLR 1629–1669 (2010), doi: 10.54648/COLA2010069.

⁴³ Which is also stressed by the dialogical nature of the exchange, which contains a clear top-down dimension as indicated before, but, as shown by Lenaerts and Gutiérrez-Fons (*see ibid.*), an equally important bottom-up process which logically gives a greater role to the national legal system.

treated substantially different because of its different source. This has already become clear in the elements that were extracted from the ECtHR case law by the Court in its research note; these have already fairly coloured the national interaction, most notably with the right to private property and the principle of legality of taxation. Despite this factor of influence that is shared by all Member States and is steering towards a common interpretation, the national roots of the constitutional point of view can be traced back much further than the start of the process of European integration,⁴⁴ and colour national interpretations of critical concepts of law up to this day.⁴⁵

Specifically on one point the national constitutional scope must be deemed much wider than in both the CJEU and ECtHR interpretation of the principle, and it is exactly this omission that encompasses this historical materialization of the principle. It is here where the interpretation thus also gets country-specific, and next to that embeds sensitivities that a national constitutional court might be willing to guard. This omission is that of the democratic or representative element that is embedded in the principle, as the idea that a tax should be provided *by law* does not solely mean that certain essential elements are to be inferred from that law by a taxpayer, but also contain an essential promise that a democratic process is at the heart of the making of the law. In other words; the state that is asking for a contribution, a sacrifice of private property, is doing so by means of the decision made by the majority, with respect for the fundamental rights of everyone (including the non-governing minority). It is the people themselves that determine the individual sacrifice to the common good by means of a democratic procedure.

The principle thus limits the decision-makers within this formulation of tax laws to the representatives of the people, as well as the procedures they are supposed to follow to those constitutionally entrenched. The principle materializes its inherent national scope in these two expressions. In its transplantation the Court has omitted these elements, perhaps intentionally, as they are so peculiar to the national setting. Nevertheless, this omission might provide difficulties in the future.

⁴⁴ Thereby referring not solely to the EU but also to various other integrative efforts that took hold, with different levels of success. Here, for the legal realm, the EU and ECHR are most relevant.

⁴⁵ A good historic example in relation to the right on private property and the diverging interpretation thereof at the hand of two influential thinkers in different but somewhat comparable situations, namely post-revolutionary France and the United States, is given by Ferguson. He points to the differences in the interpretation of this right between Locke and Rousseau, with the work of the former influencing the American tradition (and codification) of this right, and the work of the latter doing the same in France. See N. Ferguson, *Civilization: The West and the Rest*. 142–157 (London (UK), Penguin 2011).

3.2 The Principle of Legality of Taxation in the ECHR

To firstly remain within the sphere of commonalities, and thus within the ambit of deductive reasoning, the interpretation of the principle has been quite clearly shaped by the ECtHR in concrete cases in some states (with relevance for the others) in relation to one aspect, namely in its interaction with the fundamental right to property. The road to the ECtHR is open to national taxpayers, and it has mainly dealt with confiscatory taxation. For states with a monist doctrine, this becomes part of the national interpretation, for others it becomes part of the consideration before adoption of a law. The CJEU has taken a stronger view as to the scope of the principle as to be used under EU law, as the ECtHR does not formulate substantive requirements on the law itself,⁴⁶ but is much rather concerned with the confiscatory side. It also omits the democratic elements, with the exception of the obvious elements of separation of powers. The shaping force in the national setting thus is mostly to be found in these earlier mentioned confiscatory considerations, which is logical due to the need for the attachment to a fundamental right within the ECHR context. That the democratic elements are left to the national constitutional setting is thus also not surprising.

3.3 The Principle of Legality of Taxation in the Netherlands: History and Interpretation

To begin with the jurisdiction that the author is most acquainted with; the Dutch example is typical for problems that are also encountered in other jurisdictions, namely the problem that the principle of legality in the national interpretation contains a material scope that has deep historical ties that directly make a connection between the democratic process and the principle. After the discussion of these substantive scopes the difficulties that these might pose in the future will be discussed in the subsequent section.

3.3.1 *History and Constitutional Background of the Principle of Legality of Taxation*

The Dutch constitution works with a direct codification of the principle of legality of taxation, like most Member States. The Dutch Constitution in Article 104 reads: ‘taxes of the State are levied by means of a law. Other taxes of the State shall be regulated by law’.⁴⁷ This

⁴⁶ See ECHR Press Unit, *Taxation and the European Convention on Human Rights*, ECHR Factsheet (Nov. 2022), https://www.echr.coe.int/documents/fs_taxation_eng.pdf (accessed 28 May 2023).

⁴⁷ Translation by author, the original text is the following: ‘[b]elastingen van het Rijk worden geheven uit kracht van een wet. Andere heffingen van het Rijk worden bij de wet geregeld’. The second component refers to ‘other taxes’ which means that the levies not coming from the central government have to be (constitutionally) delegated to the local levels of state.

definition contains a dual function, whereby the first one mirrors the part that is also highlighted by the CJEU; the tax should be sufficiently clear and contain the essential elements to be a good law. However, there is also a second part to discern, namely the fact that a law is the basis of the exercise of a power to tax by the state. A law is a democratic instrument and as such the attachment to that instrument must be seen as an expression of the inextricable connection between the (normative) choice for government by means of representative democracy and the intended exercise of the powers by the political entity (the state) that represents the people. This is also explicitly laid down in Article 87 (1) of the Dutch Constitution, which requires the states General (the combined representative institutions of the First and Second Chamber)⁴⁸ to adopt the law.⁴⁹

Turning back to Article 104 of the Dutch Constitution itself, this provision has a long historical background. Its current form first appeared in the 1815 Constitution that was the product of the merging of the Southern and Northern Netherlands,⁵⁰ roughly corresponding to modern-day Belgium and the Netherlands. The article was still framed differently in the short-lived 1814 Constitution, and its reason for change was exactly this merger of the two countries and the demands coming from the Southern nobility to not be subjected to limitless rule of a 'Sovereign Ruler'.⁵¹ This is a direct break from absolutist conceptions of government by means of a democratic limitation on the Head of state. Obviously, this is a far from perfect democratic constellation, especially compared to contemporary standards,⁵² but it shows the early roots of the need to include representative institutions as a limitation on the exercise of powers in taxation. This connection is exemplary for the intrinsic bond between democracy and taxation.

⁴⁸ Whereby it must be noted that the First chamber is an indirect representative organ. The 75 Members are chosen by the members of the Provincial Councils and Electoral Colleges for the Caribbean part of the Netherlands. These members are directly chosen by the public, therefore, there is an indirect system in place.

⁴⁹ With subsequently the necessity for the King to sign the law to bring it into effect, which is a formality.

⁵⁰ Which then itself must be placed in the wider timeframe, with the defeat of Napoleon Bonaparte and the subsequent Congress of Vienna. The unification of the two countries was motivated mainly by the need for a stronger buffer-state to the north of France, and the explicit British wish to keep the port of Antwerp away from French control.

⁵¹ Article 117 of the Constitution of 1814, the forerunner of the provision in the 1815 Constitution, was indeed still speaking of a 'Souvereine Vorst', roughly translating as a sovereign ruler. Considering the events on the continent, culminating in the defeat of Napoleon and the congress of Vienna, the term of sovereign ruler in that sense was already tainted by current events at the time, especially for the Belgian (and in lesser form Dutch) nobility.

⁵² Because of the lack of universal suffrage, an accomplishment achieved only roughly a century later.

3.3.2 Legitimacy Concerns and the Wider Scope of the Principle

Fast forwards to today where a more concrete scope can be given to this substantive element with the inclusion of the additional democratic elements that colour the scope on the exercise of a power to tax. The making of a tax law namely requires a democratic process that embeds (full) representation, and thereby is meant to answer to the hard principle of legality of taxation as well as legitimacy as the softer derivative of that principle.⁵³ Legitimacy here is referring to the process of coming to such a tax law, and assesses the democratic credentials, which might prove to be in violation of the hard norm of the principle of legality. A sub-optimal legitimacy of a law is not directly in violation of the principle of legality, as can be inferred from the earlier discussion on delegation of broad powers to the executive authorities. This assessment can be made from multiple angles, whereby here the input side is most important, as the discussion is focussing on the production of tax laws. Input legitimacy is primarily engaged with the procedures of coming to law, and focusses on aspects of representation and accountability, with traditionally a strong emphasis on parliamentary involvement identifying this institution as the epitome of the democratic process that embeds these essential democratic elements.⁵⁴

Legitimacy is a political and thus softer benchmark as it is not a norm that translates to a legal rule or principle, simply because it lacks a codification as such or a constitutive doctrine in case law.⁵⁵ It can however serve as an excellent indicator for trouble ahead, as an early compromise on the side of legitimacy can become a legal problem later on along the road. Turning back to the Dutch constitutional context, it can only be agreed with Bruijsten who, under reference to Essers, points out

⁵³ With the idea of 'no taxation without representation' as an expression that is not always valid anymore, but tries to catch this spirit of the bond between representation and limitations on the patrimony of citizens, and has done so more effectively in previous (simpler) times.

⁵⁴ Especially the discourse on European governance and the democratic credential of the Union have provided fruitful grounds for debate on the scope of legitimacy. The definition above is the product of a study of the following works: F. W. Scharpf, *Demokratietheorie zwischen Utopie und Anpassung* (Konstanz: Universitätsverlag 1970); V. Schmidt, *Democracy and Legitimacy in the European Union Revisited: Input, Output and 'Throughput'*, 61 Pol. Stud. 10 (2012), doi: 10.1111/j.1467-9248.2012.00962.x & V. A. Schmit, *Conceptualizing Legitimacy: Input, Output, and Throughput*, in *Europe's Crisis of Legitimacy: Governing by Rules and Ruling by Numbers in the Eurozone* (Oxford 2020; online ed., Oxford Academic).

⁵⁵ Be reminded again of the work of Alexy, *supra* n. 41, at 294–304. Legitimacy in social sciences is defined as a perception that the basis of power or authority of a rule, institution, or leader has justly come into existence (and persists as such). EU legal discourse is heavily engaging with the question of legitimacy, but from this social sciences angle, adding the democratic taste. 'Juridification' of this discussion often takes place by means of a passage towards the principle of legality (which is sometimes disguised in e.g., *ultra vires* review).

that within this Dutch setting there is an inextricable link between representation, legitimacy and the principle of legality of taxation.⁵⁶ This link is established by the normative choice for representative democracy, in combination with the (historical) role of parliament to be part of and control the process of coming to (tax) laws, thus making it not solely an executive exercise. This is a link that should transpose to the process of coming to a law and embed the elements that characterize a procedure as democratic. The most critical elements that can be identified are the available options for the representative institutions present in the process of coming to a tax law to perform its representative functions and thereby establish their accountability to the citizens.

The representative function of parliament materializes not solely in the adoption of laws but also in debate, whereby the parliament becomes co-responsible with the executive as it has had the deliberative option to assess the laws it will be or will not be adopting. Also the right to propose amendments is a critical aspect of this idea of representation and accountability. Accountability in this context thus means that the representatives over which the (voting) people hold the democratic right to vote them in or out of parliament and thus hold accountable for their actions in the (next) election are part of the process of decision-making. The Dutch Constitutional doctrine is silent on the scope of the principle of legality of taxation and its possible reach to these deliberative elements of the democratic process, because it has never been confronted with the question head-on. Nevertheless, the historical roots of the principle and the clear democratic rationale of its constitutional codification could very likely encompass such a reading of the principle wherein the active parliamentary scope that is not part of the interpretation by the CJEU can be seen as a critical part of the principle itself.

Unfortunately, the chance that this will be put to the test is considerably slim in the Dutch legal setting with the extremely monist attitude towards international and European norms. Next to that, the Dutch Constitution does not allow for constitutional testing of norms, thus the potentiality of a clash is relatively low in comparison with other Member States. This makes that the problem in the Dutch setting is perhaps mainly a political one, and thus embeds a message to executive and parliament to respect this national boundary even in the absence of a clash. That the scope of the principle of legality of taxation is much broader in the national context than in the interpretation taken by the CJEU for the supranational setting because of its attachment to parliamentarianism, is however abundantly clear.

⁵⁶ C. Bruijsten, *Waar ligt de democratische legitimatie van de VPB-grondslag?*, WFR 2019/262 (2019), at 3, under reference to Essers in fn 12: P. H. J. Essers, *No Taxation without Representation*, NTRF 2017/2169 (2017).

3.4 The Principle of Legality of Taxation in Other Member States: Brief Excurses into Different Constitutional Settings

The above Dutch context raises two questions in relation to the interpretation of the principle of legality in taxation. Firstly, it is imperative to uncover the attitudes towards the principle in other EU Member States to see if this is a problem confined to the Dutch setting. Secondly, a main question is if the legitimacy aspects could be consolidating into a hard boundary or norm in the future in other national constitutional settings. It has already been hinted at that the first should be answered in the affirmative, whilst the second proves more doubtful, and thus requires further exploration to take an educated guess as to the potential future clash that might occur.⁵⁷

AG Ruiz-Jarabo Colomer was the first and up to this point the only AG to point to the substantive scope of the principle.⁵⁸ In this section it is time to look at how this interpretation took shape and the role for (constitutional) history in the defining of that substantive scope, as it gives both an insight into the national context that is used for the defining of that scope as into the scope itself. To begin with the former, the AG uses Spanish history, and specifically medieval history and the formation of the various kingdoms. Critical in this respect, are the formation of ‘assemblies of representatives (“cortes”)',⁵⁹ thereby placing the principle in the same historical context of institutional control by a representative institution over the exercise of a taxing power. However, AG Ruiz-Jarabo Colomer does not tie this directly to the need for the involvement of representative institutions.⁶⁰ Next to that, the Spanish doctrine is not known for demanding an active controlling function of the European integration process, or coming to ultra vires decisions. Therefore, the subsequent three examples seem to have a higher chance of materializing.

3.4.1 *The French Principle of Legality of Taxation and Potential Inclusion of Deliberative/Legitimacy Elements*

The French constitutional context hints at a more concrete application, also due to the working with two constitutional documents. First of all, Article 14 of the *Déclaration des droits de l'homme et du citoyen de 1789* (DDHC) (Declaration of the Rights of Man and of the Citizen 1789) states that:

⁵⁷ Herein, the author of this piece is clearly limited by firstly the own capabilities to immerse in distinct national contexts for reasons of language and time. Therefore the scope has already been naturally limited.

⁵⁸ See CJEU, Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 23 Nov. 2004, *supra* n. 16.

⁵⁹ *Ibid.*, at fn 26 of the Opinion.

⁶⁰ Rather, the AG uses this argument to come to the conclusion that analogous reasoning stands uneasy with the principle of legality of taxation.

‘all citizens have the right to ascertain, by themselves or through their representatives, the need for a public tax, to consent to it freely, to know the uses to which it is put, and to determine its proportion, basis, collection and duration’.⁶¹

The connection between representation and the embedding of deliberative elements in those procedures, could hardly be clearer. However, as Barreau points out, this is an expression of the ‘*political consent to tax*’.⁶² As also pointed out by Barreau, this is not the expression of the principle of legality of taxation, which is contained in Article 34 of the French Constitution of 1958. This provision reads: ‘Statutes shall determine the rules concerning: ... Finance Act shall determine the revenue and expenditure of the state in the conditions and with the reservations provided for by an Institutional Act’.⁶³ The interplay between the two has been subjected to judicial review, whereby the outcome was that Article 14 of the DDHC is contained in the application of Article 34 of the Constitution.⁶⁴ If that is the case, one might suspect that deliberative parliamentary elements that are part of this legal consent to tax, and thus that legitimacy considerations could transpose to the legal principle embedded in that provision. The difficulty of the enclosing of those elements within the national interpretation of the principle lies in the fact that the decision-making on the formulation of supranational (and international) tax rules is not mirroring the national procedures in terms of the involvement of representative institutions.

3.4.2 *The Italian Interpretation of the Principle of Legality of Taxation: Direct Ties Between Representation and Taxation*

The Italian Constitution in Article 23 codifies the principle of legality of taxation directly: ‘No obligation of a personal or financial nature may be imposed on any person except by law’.⁶⁵ It is not in this legal text, but mainly the interpretation thereof that one can see the direct ties between taxation and representation. As

pointed out by Tesouro, the principle in the Italian constitutional context must be interpreted as entrenching the essential democratic idea that it is a representative democratic institution that is the only state organ that can come to a formulation of a (popular) general will (by means of this representation), and thus can legitimately make a claim to redistribution and impinge on the property rights of the individual due to this representative nature.⁶⁶ This is an expression of ‘self-imposition’; the people are the author the law that is imposed on them.⁶⁷ This is an expression of the consent to tax given by the parliament.⁶⁸

The Italian Constitutional Court has already indicated early on that the limitation of sovereignty in the context of the EU as laid down in Article 11 of the Italian Constitution prevents a clash with the principle of legality in Article 23 of that same constitution and supranational rule-making.⁶⁹ The obvious question is however how far that gap between self-imposition by means of representative institutions as part of the process of coming to a tax law and the delegation upwards of national sovereignty in that respect can be stretched.

Another aspect must be highlighted as well, in light of the foregoing analysis of the *FIAT* case.⁷⁰ Part of the formal Italian interpretation of the principle is that the delegation of powers (downwards) to the tax administration is so restricted, that the earlier mentioned application of the principle of legality of taxation as a European principle has a different scope in Member States because of the differences in national interpretation and practice. This is as mentioned a ‘sovereignty-friendly’ reading, and leaves intact this aspect of the national doctrine, which is also related to the rule of law, but can lead to a fragmented application of Union law and uncovers another uncertainty for the future.

3.4.3 *The German Doctrine on European Integration and Delegation of Powers Away from the National Parliament*

To begin with the German principle of legality of taxation itself, it is not codified such as is the case for the previous examples. Rather, it is derived from other

⁶¹ As taken from the Research Note of the Court itself, which is also done to show that the Court has had a look over this more substantive definition. See Research Note (2018), *supra* n. 18, here specifically footnote 10 of that document.

⁶² F. Barreau, *The Legitimacy of the EU’s Tax-Based Own Resources*, in *The Power to Tax in Europe* 37–58 (J. Lindholm & A. Hultqvist eds, Swedish Studies in European Law 2023), here specifically at 39.

⁶³ Translation taken from Barreau, *see ibid.*

⁶⁴ *See Ibid.*, fn 22, which reads: ‘C const déc no 2010–5 QPC DC du 18 Juin 2010, SNC Kimberly Clark: the French Constitutional Council considers that Article 14 of the Declaration of Human and Civic Rights is put in application by Article 34 of the French Constitution and cannot be invoked by the taxpayer’.

⁶⁵ Original text: ‘Nessuna prestazione personale o patrimoniale può essere imposta se non in base alla legge’. The translation is the official one, taken from the Parliamentary Information, Archives and Publications Office of the Senate Service for Official Reports and Communication.

⁶⁶ See F. Tesouro, *Istituzioni di Diritto Tributario – Vol. 1 Parte Generale* 13–14 (14th ed., UTET Giuridica, Wolters Kluwer Italia 2020). Referring to the ‘long’ history of the principle of ‘no taxation without representation’ and the Magna Carta of 1215 to highlight the deep historical ties.

⁶⁷ The term ‘self-imposition’ is borrowed from Guidara, who uses the Italian ‘autoimposizione’ in: A. Guidara, *Riserva di Legge e Indisponibilità del Tributo*, Centro di documentazione europea – Università di Catania – Online WorkingPaper 2012/n. 44, at 13 (2012), para. 15. *See also* the literature cited in fn 35 there for the historical ties to the democratic state.

⁶⁸ See P. Pistone, *Diritto tributario internazionale* 99–104 (III ed., Giappichelli, Turin 2021).

⁶⁹ *See more extensively* Tesouro, *supra* n. 67, at 15, under reference to the case: ‘Corte cost., 27 dicembre 1973, n. 183, in Foro it., 1974, I, 314’.

⁷⁰ Most notably para. 2.4.3.

constitution principles. However, in this section, the attention is not on the national historical doctrinal development of the principle and the question of the embedding of deliberative representative elements therein, but rather on the emergence of those demands that have come up in other critical passages of European integration in the case law of the German Federal Constitutional Court (FCC). These namely can be shared within the epitome of the question here, the earlier identified problem of the distance between the decision-making and rule-formulation in taxation and the national parliament that seems to be widening over the years.⁷¹

The FCC is one of the most active observers of the conferral of competences to the European level,⁷² thus the transfer of sovereign powers by the German legislature to the supranational, and the exercise of those competences within the limits that are laid down therefore in the Treaties by the Union institutions; the so-called *ultra vires* review. It might seem that in a discussion of the *intra* or *ultra vires* exercise of competences the idea of legality is distant, however, in essence, an *ultra vires* review is a review of legality: it namely is a review that assesses the exercise of a competence within its limits (as accorded by a democratic procedure).⁷³ The main question here in relation to taxation and the principle of legality of taxation, is if this earlier uncovered substantive scope that attributes significance to the (deliberative) democratic elements encompassed in national procedures, can be surrendered in the conferral of a competence to the supranational level within the field of tax law.

The heads-on confrontation is once again lacking in the tax context, and thus has not (yet) materialized in that setting, but in other case law the FCC dealt directly with national parliamentary prerogatives and the connection between state finances and democracy. The European Stability Mechanism (ESM) survived the FCC's review in 2012 because of the retention of the budgetary autonomy of the parliament with the help of a veto power by the German board member of the ESM (in critical decisions).⁷⁴ However, within the same decision a more general warning was given: '[t]he decision on

public revenue and public expenditure is a fundamental part of the ability of a constitutional state to democratically shape itself (see BVerfGE 123, 267 <359>). The German Bundestag must therefore make decisions on revenue and expenditure with responsibility to the people'.⁷⁵ This budgetary autonomy is thus directly tied to the democratic prerogatives of the parliament to exercise control. As this also encompasses the revenue side, one can assume that the essential democratic nexus between decision-making in financial matters and parliamentary representation can only be broken under very strict conditions, as confirmed in the same judgment and later case law.⁷⁶

In the much-discussed Public Sector Purchasing Programme (*PSPP II*) case the FCC did not only issue a warning anymore,⁷⁷ but went beyond that warning by declaring an ECB scheme (the *PSPP*) *ultra vires* because of the lack of a sufficient proportionality check.⁷⁸ The FCC put the emphasis on the necessary 'democratic legitimation by the people of public authority exercised in Germany', which in its scope logically also encompasses the European sphere, with EU law being part of national law. A first limit that this poses is that no 'Kompetenz-Kompetenz' can be transferred to the supranational level.⁷⁹ One key passage in that same judgment, that again takes a holistic view as to the overall setup of public finances, makes this relationship between democracy (as part of legality in an *ultra vires* formulation) very clear:

[i]t is for the German Bundestag, as the organ directly accountable to the people, to take all essential decisions on revenue and expenditure; this prerogative forms part of the core of Art. 20 (1) and (2) GG, which is beyond the reach of constitutional amendment [...]. It falls to the Bundestag to determine the overall financial burden imposed on citizens and to decide on essential expenditure of the state.

The main question is if this is an application of the principle of legality of taxation in the international

⁷¹ Not in the least by the new governance path that has developed for international tax harmonization via the OECD, whereby the supranational framework takes up the role of implementing framework (which in itself can be questioned from a legality and legitimacy perspective if one adheres to a strict reading of the Treaties, but that is a question outside the scope of the discussion here).

⁷² See in general and perhaps most strongly in connection to the general characteristics of the Union and its legal order, as well as the connection to democracy: BVerfG 89, 155 – *Maastricht*, Bundesverfassungsgericht Urteil 12. Oktober 1993 & BVerfG, 2009. *Lissabon*, vol. 123, 267, 2 BvE 2/08 of 30 Jun. 2009.

⁷³ Thus containing a double notion, as it is an assessment of the national legislature in its delegation or attribution of sovereign power to the supranational level and the assessment of the exercise of that power by the supranational legislature.

⁷⁴ See BVerfG, Judgment of the Second Senate of 12 Sep. 2012–2 BvR 1390/12, paras 1–215.

⁷⁵ *Ibid.*, para. 106.

⁷⁶ *Ibid.*, paras 107–111, & BVerfG, Urteil des Zweiten Senats vom 06. Dezember 2022–2 BvR 547/21 – ORD, Rn. 1–43 (only fully available in German). For an excellent and brief summary in English see T. Nguyen & M. van den Brink, *An early Christmas Gift from Karlsruhe?: The Bundesverfassungsgericht's NextGenerationEU Ruling*, VerfBlog, 09 Dec. 2022, <https://verfassungsblog.de/an-early-christ-mas-gift-from-karlsruhe/> (accessed 22 Jun. 2023).

⁷⁷ The first initial judgment was: BVerfG, Order of the Second Senate of 18 Jul. 2017–2 BvR 859/15 – *PSPP*, paras 1–137. But the one relevant here is: BVerfG, Judgment of the Second Senate of 5 May 2020–2 BvR 859/15 – *PSPP II*, paras 1–237. Technically speaking, the main dig was taken at the national parliament that conferred this competence.

⁷⁸ Thereby also putting the earlier judgment of the CJEU itself aside. See for the CJEU decision: CJEU, Judgment of the Court (Grand Chamber) of 11 Dec. 2018, Proceedings brought by Heinrich Weiss and Others, Case C-493/17, ECLI:EU:C:2018:1000.

⁷⁹ Meaning no competence that lets the Union decide on the scope of its own competence. See *PSPP II*, para. 102.

setting, thus within the transfer of competences, and that within that setting the democratic aspects as not encompassed within the definition given to the principle by the CJEU are a vital component thereof in the German interpretation. The previous seems to hint at that very strongly, especially now the FCC goes beyond the scope of the spending side of the budget to encompass the revenue considerations within its *ultra vires* (i.e., legality) review.

Taken together with the Dutch historical context, the (potential) reading of the French principle as encompassing deliberative elements as parts of the legal manifestation of legality of taxation and this German warning-sign, it is clear that there is more to the principle of legality of taxation than that has to this point been uncovered in the case law of the CJEU. The question then is obviously if and how this can prove troublesome in future tax integration.

4 THE CONNECTION WITH DEMOCRACY AND REPRESENTATION AS A POTENTIAL BOTTLENECK ON THE SUPRANATIONAL LEVEL

4.1 Introduction

The differences in interpretation and the scope of the principle of legality of taxation in the EU and the national setting could provide a difficult obstacle to overcome in the future. If that will become a problem that materializes is something that is highly depending on the process of integration itself. However, the developments of the past decades, and especially the last few years, sees an increase in the implementation of international norms that are formulated in an international setting and put before a national parliament as a take-it-or-leave-it deal through the supranational constitutional framework. Next to that the constant push for own resources in the form of ‘genuine’ EU taxes should also take notice of these considerations. With the pre-emptive working of Union law, the question of legality becomes one to be decided by the CJEU, which means the national interpretation, with the historically entrenched representative democratic elements, is put aside. From the perspective of determining the scope of the principle of legality of taxation, and especially its democratic elements, it is paradoxically perhaps such a clash of interpretations that will eventually show the true delimitation of that principle for both contexts.

4.2 The Problem from the Perspective of Deliberative Democracy

A few aspects of the current mode of decision-making, especially in relation to the implementation of the OECD-made agenda spring out from the earlier introduced deliberative perspective. Turning to the ideas of the intellectual father of the (supranational) deliberative

democracy, Habermas, one can see that the sphere of democracy is one of constant dialogue and confrontation. In other words, democracy requires an open platform for citizens to construct political and social life.⁸⁰ This ability to shape political life is coupled by Habermas to procedure: specifically the democratic procedure, a materialization of which should be found in the making of law.⁸¹ The main critique of the mode of decision-making could be rephrased by paraphrasing Habermas, and asking if the addressee of the law is still the author of the law.⁸² The distance between parliament, as the epitome of representation and the forum for the working-out of disagreements and the formulation of norms, is increasingly growing with the delegation of essential powers to the executive in the formulation of tax laws. What comes to being is a double indirect system of representation, with firstly unelected officials brokering a deal in the OECD, and thereafter executive decision-making in the supranational setting. This places national parliaments at a significant distance, especially from the deliberative democratic perspective.

To take a brief sidestep to the earlier discussed German FCC’s case law, what can be derived from those warning signs in the elevation of budgetary powers to the supranational level, is that there can be no final surrender of the power, and that also partial surrender can only go as far as it is not substantially influencing the financial burden on citizens.⁸³ The question is if and when this is going to be the case, with several integrative efforts underway that could revolutionize the field of tax law. One should only think of the revision of the own resources system and the ubiquitous exploration of ‘genuine’ EU taxes in that regard, or when the targeting of the groups that still manages to escape paying its ‘fair share’ by the OECD extends its efforts to individuals.

To come back to the idea of the procedure as the essential place for the (deliberative) democratic scope of the principle of legality of taxation to take shape, one can identify a few critical parts of the democratic procedure that are compromised. The elevation of decision-making out of the national parliament compromises the debate that takes place within that parliament, and the deliberation on the proposals that float around. The representative institutions only come into play at the end of the process when a take-it-or-leave-it deal is presented. A relegation to a ‘rubber-stamping’ institution is the gravest

⁸⁰ See for a good introduction to this point: K. Olson, *Deliberative Democracy*, in Jürgen Habermas: *Key Concepts* 140–155 (B. Fultner ed., Acumen Publishing 2011).

⁸¹ J. Habermas, *Faktizität und Geltung, Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* 192–194 (Suhrkamp Verlag, Berlin 1992).

⁸² J. Habermas & M. Pensky, *The Postnational Constellation: Political Essays* 58–112 (Cambridge Polity Press 2001), here specifically the considerations on at 62–65.

⁸³ Whereby one could argue that harmonization has already achieved that, which is quite an interesting question but outside the scope here.

danger. A second critical aspect that vanishes with this way of law-making is the right to propose amendments to the legislation that is proposed, which is a harder legal expression of these deliberative elements. A third element is the inability to unilaterally revoke legislation, or to alter this legislation by the representative institution that is validating its national application. This is a consequence of these supranational and international commitments, and break the bond between the accountability of a parliament and its successors' opportunity to be elected by contrasting the positions taken by its predecessor.⁸⁴

The relegation to a validation or rubber-stamping parliament is at unease with the principle of democracy in general, and thereby also with the democratic aspects of the principle of legality of taxation. It is however clear that from the perspective of deliberative democratic theory this is unacceptable, the question is if a highest court of law in a Member State would think this is the case too and includes these aspects within its interpretation of the principle of legality of taxation.

4.3 Potential Remedies and the Differences Between the Legal Systems and Procedures

The above might sound as a confrontational attack with the system of international decision-making, and a repudiation of its processes. This is not the aim. Rather, it is aimed to highlight these critical issues before they can become real and direct confrontations between the dual constitutional order of the Union, and provide concrete problems in the progression of tax integration. It must be remembered that the two systems are essentially dialogical and support each other's democratic infrastructure. However, in agreement with Bizioli, 'it is methodologically incorrect to acritically extend the [national] democratic standards of taxation to the European Union'.⁸⁵ It is also incorrect to identify this problem as one that is solely to be solved in the supranational setting, as this would compromise this dialogical nature of the merged dual legal supranational order. Remedying the situation of representative distance to decision-making in tax law is not facile, as the process of effectively coming to international norms requires leniency and surrender of some parts of these national parliamentary prerogatives.

As the problem is created or has the potential to materialize in the national setting, it is good to firstly see what can be done within that setting to remedy it. It is within the context of the rule of law that a combination can be made with the exercise of powers in a

democratically accorded way. Delegation of decision-making powers to the executive, which is the crux of the procedure here, is usually guarded and observed from a rule of law perspective, and the enabling clause for delegation could be modified to embed stronger ex ante control by representative institutions by e.g., requiring the adoption of a parliamentary position on the room for manoeuvre for the executive when engaging in these above-national frameworks, and requiring reporting ex post.

To assess the supranational side, it is firstly imperative to begin with reiterating that there does not seem to be an illegal situation created up to date from the national perspective. That the path of European integration up to date is not compromising fundamental democratic principles is easily proven by counterfactual reasoning: the whole edifice of for example the common system for VAT would come down as it essentially functions on similar constitutional rules as the ones being used for the adoption of OECD norms now.⁸⁶ The same can be said for the system of own resources, which has not encompassed the transfer of a 'Kompetenz-Kompetenz'.⁸⁷ The adoption of new own resources that could be deemed 'genuine' EU taxes should thus be predated by a discussion if this requires a transfer of this Kompetenz-Kompetenz, and the legality of such a transfer.

To return to the point made by Bizioli, one should be cautious in making direct comparisons with the national setting,⁸⁸ but democracy remains at the core values of the Union,⁸⁹ and more specifically representative democracy.⁹⁰ There is no one formula for the embedding of representative institutions in law-making, a point perhaps best proven by the wide variety of the concrete democratic framework as embedded in the electoral processes and parliamentary compositions as found in the Member States. However, the complete absence of European representative institutions in the current framework of decision-making in most fields of tax law is certainly not helping. If this could be the reason for the omission of the democratic elements in the definition of the principle of legality of taxation as interpreted by the Court is just guessing, nevertheless, it seems clear that

⁸⁴ Thereby being an inherently dialogical (deliberative) expression of the democratic process.

⁸⁵ G. Bizioli, *EU Taxes and 'No Taxation Without Representation', in History and Taxation: The Dialectical Relationship Between Taxation and the Political Balance of Power: 2021 EATLP Congress Antwerp 135–143* (P. Essers ed., IBFD Amsterdam 3–4 Jun. 2021), here specifically at 136.

⁸⁶ Thereby referring to the legal basis, which for VAT harmonization is Art. 113 TFEU, which has a (roughly) similar scope as Art. 115 TFEU (something that could be disputed but has never been brought before the Court), but most importantly from the national perspective these procedures embed unanimity and follow the same law-making procedures.

⁸⁷ It must also be reminded that the procedure of coming to own resources as contained in Art. 311 TFEU is essentially a procedure that births primary Union law, as also expressed in the need for accordance with national constitutional procedures of ratification.

⁸⁸ As also pointed out by Lenaerts, see K. Lenaerts, *The Principle of Democracy in the Case Law of the European Court of Justice*, 62 ICLQ 271 (2013), doi: 10.1017/S0020589313000080, here specifically at 280.

⁸⁹ See Art. 2 TEU.

⁹⁰ Article 10 (1) TEU.

the inclusion of the European Parliament in the decision-making in taxation would provide an extra safeguard on the supranational level in terms of representation. If that is enough for the national highest courts in the Member States is something to be seen.⁹¹

5 BRIEF CONCLUSIONS

The main concern expressed in the last paragraphs, the concern over the ever-growing distance between rule-formulation in tax law in international and supranational settings and the influence of democratic and thus representative institutions in those processes, is not a new observation. However, the limits to the stretching of that discrepancy have hopefully gained a more concrete dimension by the assessment of the differences in interpretation of the principle of legality of taxation in the supranational and the national setting. What the scope is of the principle of conferral within this setting will have to become clear within the future, but a first reading has been provided in this article.

The omission of the democratic elements in the CJEU's definition is a game of Schrödinger's cat in tax law: one does not know if these elements are there until the Court is asked if they are.⁹² However, the research note that provides the reasoning for the extrapolation of this principle does not speak of these democratic elements that are strongly connected to the national interpretations and manifestations of the principle. If these representative democratic elements are then also to be interpreted as deliberative democratic elements within national constitutional doctrine, thus under the

national principle, a clash seems unavoidable. The German FCC made very clear that any 'essential' decision on public finances must find its roots in the national parliament within its ultra vires review doctrine. With this similarly being a legality review, the question is it is willing to make or forced to make the same argument from a legality of taxation perspective in future tax harmonization that does not live up to the democratic elements enclosed in the national interpretation of the principle of legality of taxation. The same concern can be expressed from the perspective of other Member States.

The dossiers of norm formulation outside national parliaments in international tax law and the EU own resources seem most fit for the development of this potential clash in the eyes of the author, and those make up a substantial part of the discussion on the future tax architecture that could take shape through international and supranational cooperation. The potential answer does not solely lie in the platforms for norm-formulation per se, but must also be sought in the national setting and the control exercised over executive delegation. However, a stronger embedding of democratic elements in the European procedures would also not harm the democratic credentials of a future tax agenda.

The main take-away is perhaps that this age-old and essential principle of legality of taxation was highly relevant in the struggle for the democratization of the exercise of power, and might continue to remain being so within a context far away from its first (national) historical emergence.

⁹¹ Also, because most basically the FCC rejected the mode of representation of the European Parliament in its earlier case law. See *supra* n. 72.

⁹² This is a reference to the famous thought experiment of Erwin Schrödinger, in which a hypothetical cat can be deemed both dead and alive at the same time, as it is placed in a box with a Geiger counter which would trigger the opening of a flask of poison once detecting radioactive material, i.e., the decay of a particle. Until the point of looking into the box, the cat is both dead and alive, a situation which can only turn into dead or alive upon looking into the box. The main rationale of the metaphor here is that the democratic elements can or cannot be part of the European definition, a situation only to be resolved upon looking (by being part of a case before the CJEU, or in the lesser preferred case of a confrontation between a national highest court and the CJEU).