



Directorate-General for Research and Documentation

RESEARCH NOTE

Scope of the principle of the legality of taxation, particularly in relation to value added tax

[...]

Subject: 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.

[...]

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[...]

SUMMARY

INTRODUCTION

1. This research note concerns the scope of the principle of legality of taxation, as it exists in the legal systems of the Member States, and the case-law of the European Court of Human Rights ('ECtHR') on that subject, particularly in relation to value added tax ('VAT') and in the context of the apportionment of input VAT between economic and non-economic transactions.
2. For the purposes of this study, 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.
3. This note has been prepared in two stages. In the first stage, a survey of almost all the Member States ¹ has been conducted, in order to provide an overview of the existence of the principle at issue or equivalent principles in the legal orders of the Member States. In the second stage, 11 representative legal orders and the case-law of the ECtHR have been the subject of an in-depth study. ²

I. SOURCES OF THE PRINCIPLE OF THE LEGALITY OF TAXATION

4. The sources of the principal of the legality of taxation may be found both at international level (part A.) and national level (part B.).

¹ With the exception of Croatia, Malta and Slovenia.

² Namely, the German, Bulgarian, Estonian, French, Greek, Netherlands, Polish, Portuguese, United Kingdom, Swedish and Czech legal orders.

A. ADDITIONAL PROTOCOL TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

5. At international level, the principle of the legality of taxation may be inferred from the case-law relating to Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms of 20 March 1952 ('the Additional Protocol to the ECHR'), ratified by all the Member States.
6. In that regard, Article 1 of the Protocol to the ECHR, entitled 'Protection of property', provides:

'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.'

7. According to the case-law of the ECtHR, it is apparent from that article that each interference by a State in the right to respect for property, inter alia in the field of taxation, must, as well as meeting other conditions, comply with the principle of legality.

B. MEMBER STATES

8. So far as concerns the Member States, the results of the research carried out in the first stage revealed that the principle of the legality of taxation is, in essence, recognised by all the legal orders covered by the survey.

9. In most of the Member States, that principle is enshrined directly in a constitutional act (**Belgium**,³ **Bulgaria**,⁴ **Cyprus**,⁵ **Denmark**,⁶ **Spain**,⁷ **Estonia**,⁸ **Finland**,⁹ **France**,¹⁰ **Greece**¹¹ **Ireland**,¹² **Italy**,¹³

³ Article 170(1) of the Belgian Constitution provides inter alia that ‘taxes for the benefit of the State can only be introduced by a law’.

⁴ Article 60(1) of the Bulgarian Constitution states that, citizens shall be required to pay taxes and fees, established by statute, according to their income and property. Under paragraph 2 of that article, only a specific law may establish tax reliefs and surcharges. Also, Article 84(3) of the Constitution provides that the National Assembly shall establish the taxes and determine the amount thereof.

⁵ Under Article 24(2) of the Constitution of Cyprus, ‘no such contribution by way of tax, duty or rate of any kind whatsoever shall be imposed save by or under the authority of a law’.

⁶ According to Article 43 of the Danish Constitution, ‘no taxes shall be imposed, altered or repealed except by statute’.

⁷ The Spanish Constitution states, in Article 31: ‘Personal or property contributions for public purposes may only be imposed in accordance with the law’. According to Article 133(1) and (3), under the heading ‘Economy and Finance’: ‘1. The primary power to raise taxes is vested exclusively in the State by law’, ‘3. Any fiscal benefit affecting State taxes must be established by virtue of law’.

⁸ Under Article 113 of the Estonian Constitution, ‘State taxes, duties, fees, fines and compulsory insurance payments shall be provided for by law’.

⁹ Under Section 81(1) of the Finnish Constitution, ‘The State tax is governed by an Act, which shall contain provisions on the grounds for tax liability and the amount of the tax, as well as on the legal remedies available to the persons or entities liable to taxation’.

¹⁰ 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 ‘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’. Also, Article 34 of the French Constitution of 4 October 1958 expressly reserves for the legislature ‘the, base, rates and methods of collection of all types of taxes’.

¹¹ Under Article 78(1) of the Greek Constitution, ‘no tax shall be levied without a statute enacted by Parliament, specifying the subject of taxation and the income, the type of property, the expenses and the transactions or categories thereof to which the tax pertains’. The first subparagraph of Article 78(4) states that ‘the object of taxation, the tax rate, the tax abatement and exemptions and the granting of pensions may not be subject to legislative delegation’.

¹² Articles 22.2.1° to 22.2.6° of the Irish Constitution provide for a specific legislative procedure applicable to the adoption of taxes (*‘money bills’*) from which it is possible to discern the principle that no tax can be introduced without the approval of Parliament.

¹³ Under Article 23 of the Italian Constitution, ‘no obligation of a personal or financial nature may be imposed on any person except by law’.

Lituania,¹⁴ **Luxembourg,**¹⁵ **the Netherlands,**¹⁶ **Poland,**¹⁷ **Portugal,**¹⁸
the Czech Republic,¹⁹ **Romania,**²⁰ **the United Kingdom,**²¹ **Slovakia**²² and
Sweden²³).²⁴

10. In some states, that principle is derived, by the case-law, from other constitutional principles, inter alia the principle of legality and the principle of the rule of law (**Germany, Austria**) or even from the fundamental right to free development of the personality (**Germany**).

¹⁴ The third paragraph of Article 127 of the Lithuanian Constitution provides that ‘taxes, other payments to the budgets, and levies shall be established by the laws of the Republic of Lithuania’. Also, under Article 67(15) of the Constitution, the Lithuanian Parliament ‘shall establish State taxes and other compulsory payments’.

¹⁵ Article 99 of the Luxembourg Constitution states inter alia that ‘a tax for the benefit of the State may only be established by a law’.

¹⁶ Under Article 104 of the Netherlands Constitution, ‘taxes imposed by the State shall be levied pursuant to Act of Parliament. Other levies imposed by the State shall be regulated by Act of Parliament’.

¹⁷ Article 84 of the Polish Constitution states: ‘Everyone shall comply with his responsibilities and public duties, including the payment of taxes, as specified by statute’. Article 217 provides: ‘The imposition of taxes, as well as other public levies, the specification of those subject to the tax and the rates of taxation, as well as the principles for granting tax reliefs and remissions, along with categories of taxpayers exempt from taxation, shall be by means of statute’.

¹⁸ Article 103(2) of the Portuguese Constitution states that, ‘taxes shall be created by laws, which shall lay down their applicability and rate, fiscal benefits and the guarantees accorded to taxpayers’. Paragraph 3 of that article states that ‘no one shall be obliged to pay taxes that are not created in accordance with the Constitution, are retroactive in nature, or are not charged and collected as laid down by law’.

¹⁹ Under Article 11(5) of the Charter of Fundamental Rights, ‘taxes and fees shall be levied only on the basis of law’.

²⁰ Article 56(3) of the Romanian Constitution provides: ‘Any other dues [meaning taxes] shall be prohibited, except those determined by law ...’. Article 139(1) of the Constitution, entitled ‘Taxes, duties and other contributions’, provides: ‘Taxes, duties and any other revenue of the State budget and State social security budget shall be established only by law’.

²¹ Under Article 4(1) of the Bill of Rights 1689, levying money, for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal.

²² Article 59(2) of the Slovak Constitution provides that ‘taxes and duties may be levied by a law or on the basis of a law’.

²³ Article 4 of Chapter 1 of the Regeringsformen (one of the four laws forming the Swedish Constitution) states that it is for the Swedish Parliament to determine State taxes. Under Article 2(2) of Chapter 8 of the Regeringsform, provisions must be adopted by means of an act of law if they are deemed to govern relations between individuals and the public institutions.

²⁴ Possible constitutional provisions concerning local taxes and duties have not been cited.

11. By way of exception, some Member States expressly provide for the principle of the legality of taxation only in their organic laws (**Hungary**) or their ordinary laws (**Latvia**).

II. SCOPE OF THE PRINCIPLE OF THE LEGALITY OF TAXATION IN GENERAL

A. CASE-LAW OF THE ECtHR

12. The principle of the legality of taxation as discerned from Article 1 of the Protocol to the ECHR is given a mainly formal and normative interpretation by the ECtHR. In that respect, in accordance with the case-law of that court, 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. As a matter of fact, the ECtHR only states that the legal basis concerned must be compatible with the principle of the rule of law and provide adequate guarantees, inter alia procedural guarantees, against arbitrary interference by the public authorities. However, the ECtHR does not indicate which ‘technical’ elements should be contained in such a fiscal law, leaving that function to the discretion of the States. Referring to the greater insight which national authorities have into the needs of their societies, the ECtHR recognises that the States have a wide margin of discretion in tax matters.
13. In its review of compliance with the requirement of legality, the ECtHR acknowledges that the notion of law has an autonomous meaning. A ‘law’ is not only a law in a formal sense. It can also include another statute (e.g. subordinate legislation), Constitution, international treaties to which the State concerned is a party, as well as EU law. In one judgment, the ECtHR has stated that the term ‘law’ in Article 1 of the Protocol refers to the same concept as that provided by the ECHR, which includes statute as well as case-law. That notion also imposes

certain qualitative conditions, such as accessibility and foreseeability. As well as being a legal source within the legal order concerned, the legislation on the basis of which the State limits the right to respect for property must also afford ‘appropriate procedural safeguards so as to ensure protection against arbitrary action’.

B. MEMBER STATES

14. At the level of the 11 Member States which are the subject of an in-depth study, the scope of the principle of the legality of taxation derives from the provisions of the various constitutional acts which enshrine it and in the case-law, particularly of the supreme and constitutional courts.
15. As regards the former, a distinction may be drawn between the relevant constitutional provisions enshrining the principle of the legality of taxation in a very general way, the legislature merely establishing a general obligation to regulate taxation in a law (such is the case in **Estonia**, the **Netherlands**, the **Czech Republic**, the **United Kingdom** and **Sweden**), and the more detailed constitutional provisions. With regard to these, different Constitutions and equivalent acts specify matters which are to be regulated by law. In that regard the following may be given as examples: tax relief or increases (**Bulgaria**), tax base, rate and methods for collection of taxes of all kinds (**France**), the person subject to tax and the income, type of assets, expenditure and transactions, to which the tax applies (**Greece**), assessment, determination of subjects and objects in tax matters, tax rates, the rules for granting rebates and for cancelling obligations, and the categories of persons who are exempted from paying taxes (**Poland**), the tax base, rates, tax benefits and safeguards for taxpayers, calculation and collection (**Portugal**).
16. Whatever the level of detail of a constitutional provision, the exact scope of the principle of the legality of taxation is really specified by the case-law of the supreme and constitutional courts. That shows, as a general rule,

that all the essential elements for creating a tax are to be provided for in a law.

17. Thus, it seems that there is usually an obligation to determine essential elements of taxation by law. In that regard, a law which adequately determines the subject of the tax (the taxable person), the object of the tax, the tax base and the tax rate as well as the safeguards for taxpayers can satisfy the requirements of the principle of the legality of taxation (**Germany, Bulgaria, Estonia, France, Greece, the Netherlands, Poland and Portugal**). Moreover, the recipient of the tax and also the payment procedure and the date on which the tax is due must be established by law (**Estonia**). In addition, the rules governing the grant of rebates and cancellation and categories of persons exempt from tax are regarded as essential elements (**Greece, Poland**). Finally, the calculation and collection of taxes and the definition of criminal and non-criminal tax penalties are also subject to the principle of legality of taxation (**Portugal**).
18. It seems to be widely agreed in the Member States that it is not objectively possible to contain all tax rules in one law. Thus, in German law, it is considered that a tax provision must enable the taxpayer to foresee and calculate the tax burden for which he is liable. However, it is not required that he should be able to calculate the tax with arithmetical accuracy. A minimum degree of foreseeability of the tax burden making it possible to adapt behaviour is sufficient. Similarly, in **Portugal**, it does not follow from the constitutional principle of the legality of taxation that there is a strict requirement for the tax law to enable the taxpayer to calculate, with no room for doubt, the precise amount of his tax burden. It is required, however, that the content, purpose, meaning and scope of the tax law be adequately determined, so that the tax burden is quantifiable and, to some extent, foreseeable and calculable.
19. In that context, the question arises as to whether the determination of the more technical or more specific elements of a tax, in so far as they are imposed

on taxpayers with binding force, requires the adoption of rules of lower status than the law and whether those rules must have a legal basis in a law.

20. In principle, even though in the legal orders examined the principle that tax law *derives from the dictum of the legislature* is recognised, it is considered admissible for the executive power to determine the specific and technical elements of a tax.²⁵
21. In that regard, some Member states implement a system under which the executive is entrusted with the task of detailing the tax obligations by means of acts of lower status than the law, on the basis of an express delegation contained in a law (**Germany, Estonia, Greece, Poland, the Czech Republic and the United Kingdom**). The acts thus adopted are binding in nature. In this scheme, a significant part of the national case-law on the principle of the legality of taxation addresses the question of the limits to such delegation for the executive power. In principle, it is considered that the acts of the executive power may contain only rules supplementing what has been ruled by law, and only if the important elements in the creation of a tax provided for in that law are not altered.²⁶ Therefore, the executive power cannot create or reinvent new taxes and the tax cannot be based on customary law.
22. In other Member states, these specific and technical elements of a tax are often determined by the executive by means of non-binding advice in the form of opinions and recommendations (the **Netherlands, Sweden**).

²⁵ Outside the scope of this issue are the acts adopted by the executive power on the basis of a special authorisation granted by the Parliament to adopt measures which are usually within the domain of the law, as in the case of the enabling act in French law (see the French contribution, paragraph 7, footnote 9).

²⁶ That applies to **France**, except that that legal order does not lay down the requirement relating to the express delegation in a tax law for adopting acts implementing or specifying the tax obligations.

The above-mentioned limitations also apply to such acts. The tax authority, the taxpayers and the tax courts generally comply with those acts (that is the case, in particular, in **Sweden**). That method consisting of the exercise of part of the legislative power by the executive may, of course, raise concerns regarding the principle of the legality of taxation. Such a practice involves a certain transfer of the legislative power, with the consequence that the acts issued in particular by the Ministry of Finance or by the tax authority encroach on the sphere of the principle of the legality of taxation.

23. In any event, it must be pointed out that, when the legality or constitutionality of a fiscal obligation is being verified, whether its source is the law or an act of lower status, the principle of the legality of taxation is often only one of the verification criteria. It must be stated that underlying a decision deeming a practice or a regulation to be unconstitutional there is, indeed, the principle of the legality of taxation, but in combination with other intrinsically linked principles, in particular that of the rule of law and legal certainty.
24. Consequently, the principle of the legality of taxation thus applied entails a number of more specific obligations for the legislative power; compliance with those obligations is a condition for the legality of a public charge, and underlying them is the principle of the legality of taxation. They include inter alia the clarity and precision of the tax provisions. Then, when those provisions are applied, other specific obligations arise under those principles, in particular the prohibition of the application of a tax burden by analogy or the obligation to interpret doubts in favour of the taxpayer (*in dubio pro tributario*) (for example **Bulgaria, Greece, Poland, the Czech Republic and Sweden**).
25. As regards the consequences of applying the principle of the legality of taxation to situations characterised by the absence of technical rules or specific methods concerning compliance with a tax obligation, the

searches of the case-law of the supreme courts of the 11 States which have been the subject of the in-depth study have not served to identify other situations comparable to that which is the subject of the presentation in part III of the summary.

III. APPLICATION OF THE PRINCIPLE OF THE LEGALITY OF TAXATION IN THE ABSENCE OF RULES FOR APPORTIONING INPUT VAT BETWEEN ECONOMIC AND NON-ECONOMIC ACTIVITIES

26. One area in which the problem of the application of the principle of the legality of taxation arises is the determination of the methods and criteria for apportioning input VAT between economic and non-economic activities. According to the Court's case-law (see, inter alia, the judgment in *Securenta*, C-437/06, EU:C:2008:166), the determination of the methods and criteria for apportioning input VAT between economic and non-economic activities within the meaning of the Sixth VAT Directive,²⁷ is in the discretion of the Member States which, when exercising that discretion, must have regard to the aims and broad logic of that directive and, on that basis, provide for a method of calculation which objectively reflects the part of the input expenditure actually to be attributed, respectively, to those two types of activity.
27. In that regard, it should first of all be noted that among the 11 States which are the subject of the in-depth study, three groups of States may be distinguished: first, the Member States in which the relevant provisions have been expressly laid down by law (**Bulgaria** from 1 January 2017,

²⁷ Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ L 145, p. 1).

Estonia, France, Greece until 2000,²⁸ **Poland from 1 January 2016**, and **Portugal**), second, the Member States in which the provisions are found in an act adopted by the executive power with no express delegation provided for by law (the **Netherlands, Sweden**²⁹), and third, the States which have no rules in that regard (**Germany, Bulgaria** before 1 January 2017, **Greece** since 2000, **Poland** before 1 January 2016, the **Czech Republic** and the **United Kingdom**).

28. Although for the States in the *first group*, the problem of the infringement of the principle of the legality of taxation in the matter arises less, owing to the existence of the relevant legislative provisions, it is indeed an issue for the States in the *second group*, since the determination of the methods and criteria for apportioning input VAT between economic activities and non-economic activities has no source in a law, but in an act of the executive.
29. In that regard, it should be noted that it is not apparent from the research carried out that the constitutionality of those provisions has been verified by the competent supreme courts. However, that state of affairs has given rise to some debate among academic lawyers, in particular from the point of view of the principle of the legality of taxation (**Sweden**).
30. In so far as concerns the *third group* of States, unlike the second group, in the legal orders concerned there is no rule, whatever its origin, on the basis of which a taxable person is able to determine the scope of his fiscal rights and obligations.

²⁸ More specifically, Greek law provided at the time that transactions outside the scope of VAT were taken into consideration for the purpose of calculating the pro rata of the rights to deduct.

²⁹ As regards Sweden, that act in the form of an ‘opinion’ refers to the provision of the Swedish law on VAT which transposes Articles 173 to 175 of Directive 2006/112/EC, without that provision expressly mentioning the apportionment concerned.

31. In that situation, the tax authority often requires the taxable person himself to attribute certain parts of mixed expenditure to the economic activity or non-economic activity. That seems to raise doubts not only with regard to the principle of the legality of taxation, but also with regard to other constitutional principles, in particular the rule of law.
32. In any event, it seems that that situation has been examined by the case-law in the light of the principle of the legality of taxation only in **Poland** and the **Czech Republic**. The supreme administrative courts of those two countries have nevertheless reached opposing conclusions.
33. According to the case-law of the **Polish** supreme administrative court, a taxable person's obligation to make an apportionment between economic and non-economic transactions, as required by the tax authority, which has no legal basis is inadmissible in the light of the principle of the legality of taxation. According to that case-law, taxpayers cannot be required to determine a proportion themselves without there being unambiguous criteria in that respect provided for in law. That would undermine the principle of legal certainty in respect of public contribution law. Consequently, according to that case-law, in so far as it is not possible to set certain expenditure against only one of those activities, the taxable person is entitled to deduct all the input VAT.³⁰
34. However, in a 2016 case, the **Czech** supreme administrative court seems to have reached³¹ entirely different conclusions. Having found that it is for the taxable person to make an apportionment between the economic and non-economic activities, it rejected the plea put forward by the applicant

³⁰ It appears that that conclusion may also be shared by the **Greek** tax authority. However, in the absence of case-law on that question, it is impossible to say whether that is the consequence of applying the principle of the legality of taxation.

³¹ The lack of a more detailed justification for the reasoning behind the decision rejecting the applicant's plea presented in this paragraph explains the reservation in presenting the case in question.

who had claimed that tax obligations should be imposed only on the basis of the law and that, therefore, in the absence of provisions establishing a mechanism for restricting the right of deduction of input VAT,³² that right of deduction could not be limited.

35. The imposition of such an obligation on the taxable person is also considered permissible in **Netherlands, United Kingdom and Swedish law**. Those legal orders provide that, initially, it is for the taxable person to adopt a method of apportionment, his decision then being subject to review by the tax authority. In that regard, the taxable person is expected to use the most relevant allocation method, giving the fairest and most accurate result. If several methods meet those requirements (the **Netherlands, Sweden**), priority may be given to that preferred by the taxable person (**Sweden**).
36. In **German law**, the national courts have held that the problem of determining the methods and criteria for apportioning amounts of input VAT between economic activities and non-economic activities must be resolved by the application by analogy of Article 15(4) of the Law on turnover tax applicable to cases in which goods and services are used by a taxable person to carry out both economic transactions that give rise to a right of deduction and economic transactions which do not do so.

CONCLUSION

37. The principal of the legality of taxation is recognised at both international and national level.

³² This appears to be the restriction of the right of deduction as a consequence of apportionment between the economic and non-economic activity within the meaning of this research note..

38. At international level, the principle of the legality of taxation may be inferred from Article 1 of the Protocol to the ECHR, ratified by all the Member States. The ECtHR has held that national provisions which serve as a legal basis for the interference found in the right to respect for property must be sufficiently accessible, precise and foreseeable.
39. At national level, the principle of the legality of taxation is recognised by all the Member States examined in connection with this research note. In the vast majority of the legal orders studied, that principle has its source in the Constitutions of those States. In some States, that principle is derived, by the case-law, from other principles enshrined in a constitutional act, inter alia from the principle of legality and the principle of the rule of law or even the fundamental right to free development of the personality. There are also some legal orders in which the principle of the legality of taxation is expressly provided for in their organic or ordinary laws.
40. As regards the scope of the principle of the legality of taxation at Member State level, it is generally considered that all the essential elements of a tax should be established by law. Under that principle, in combination with other fundamental principles, that law must comply in particular with the requirements of a tax law with regard to clarity and precision.
41. In the light of the case-law of the highest courts of the Member States, it is possible to identify a consensus on the question of whether it is not objectively possible to contain all the rules relating to a tax in a single law. The determination of the more technical or more specific elements of a tax will therefore require the adoption of an act deriving from the law, specifying the methods and techniques for establishing the tax correctly. Even if those rules must have a legal basis, the Member States rely on different solutions; some of them rely on the power delegated to the executive bodies which will then issue binding acts, while other Member States have recourse to recommendations or advice, which are not binding but are often

followed in the main by the courts and the taxpayers.

42. The searches made in the case-law of the supreme courts of 11 Member States have not made it possible to present the consequences of applying the principle of the legality of taxation to situations characterised by the absence of technical rules or special procedures concerning compliance with a tax obligation, except in the particular case of the absence of rules for apportioning input VAT.
43. In that regard, the apportionment of input tax between an economic activity and a non-economic activity does not appear, with a few rare exceptions, to have been analysed from the perspective of an absence of relevant national legislation and in the light of its constitutionality. The fact of the matter is that the absence of relevant rules or the fact that they have been adopted in acts of lower status than laws has not given rise to procedures for verification in the light of the principle of the legality of taxation, with a single exception — **Poland**.

[...]