

Editorial

What Is Tax Fairness?

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In the last two decades, the term ‘fair taxation’ has become ubiquitous in the European public debate. From a political economy perspective this increased popularity is not difficult to understand: the term is sufficiently vague to cover different taxing preferences, appropriately simple to be intuitively understood by voters, and suitably pro-social to convey a compelling story. From a normative perspective, however, it is precisely this vagueness and simplicity that renders the term problematic. From both a theoretical and a policy perspectives, what is meant by fair taxation? What is the impact of taxation on inequalities, broadly construed, and to what extent should the tax system be used to redress them? To answer these questions, the European Association of Tax Law Professors (EATLP) embarked on a massive global research project on ‘Taxation and Inequalities’ in 2022. The overall aim of the project is to fill the scholarship gap and inform policy, by presenting a novel analytical and conceptual framework of taxation and inequalities, informed not solely by tax law, but also by human rights, constitutional and administrative law, as well as public economics, political economy, moral philosophy, and moral and social psychology. This Editorial introduces the core issues at stake, as discussed at the EATLP Congress, held at Antwerp University, in June 2024.

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In the last two decades, the term ‘fair taxation’ has become ubiquitous in the European public debate.¹ From a political economy perspective this increased popularity, primarily post-financial crisis,² is not difficult to understand: the term is sufficiently vague to cover different taxing preferences, appropriately simple to be intuitively understood by voters,³ and suitably pro-social to convey a compelling story.⁴ From a normative perspective, however, it is precisely this vagueness and simplicity that renders the term problematic.⁵ As

Murphy and Nagel famously stated, ‘everyone agrees that taxation should treat taxpayers equitably, but they don’t agree on what counts as equitable treatment’.⁶

The principles of equality and non-discrimination are at the heart of our legal systems, and equity is one of the key principles of taxation. There is also a long and well-established literature on the relationship between taxation and (domestic) income inequality, and the design of our tax systems often reflect these concerns, for example through progressive personal income taxes, tax credits for low-income individuals, or VAT exemptions. Recent research has also started shedding light on how taxation can impact other inequalities, such as gender and race,⁷ as well as how tax enforcement (administration) can impact, and be impacted by, various inequalities,

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¹ See inter alia, European Commission, *An Action Plan For Fair and Simple Taxation Supporting the Recovery Strategy*, Communication from the Commission to the European Parliament and the Council, COM(2020) 312 final, 15 Jul. 2020.

² On the impact of the crisis on tax policy, see generally R. C. Christensen & M. Hearson, *The New Politics of Global Tax Governance: Taking Stock a Decade After the Financial Crisis*, 26 Rev. Int’l Pol. Econ. 1068 (2019), doi: 10.1080/09692290.2019.1625802.

³ On the power of intuition in decision-making, see H. Mercier, *Not Born Yesterday – the Science of Who We Trust and What We Believe* (Princeton University Press 2020), and C. Sunstein, *Simpler: The Future of Government* (Simon & Schuster 2015).

⁴ On why we (humans) find fairness-centric narratives compelling, see W. Storr, *The Science of Storytelling* (William Collins 2019).

⁵ For opposing views on the normative usefulness of the term, see A. Christians, *Fair Taxation as a Basic Human Right*, 9 Int’l Rev. Constitutionalism 211 (2009); and P. Lamberts, *Fair Taxation:*

The Truth Is in the Eye of the Beholder, 45(11) Intertax 49–53 (2017).

⁶ L. Murphy & T. Nagel, *The Myth of Ownership: Taxes and Justice* 13 (Oxford University Press 2002).

⁷ On gender: M. Coelho et al., *Gendered Taxes: The Interaction of Tax Policy With Gender Equality*, IMF Working Paper 2022/026 (2022); OECD, *Tax Policy and Gender Equality: A Stocktake of Country Approaches* (OECD Publishing 2022); Y. Lind & Å. Gunnarsson, *Gender Equality, Taxation, and the COVID-19 Recovery: A Study of Sweden and Denmark*, 101(5) Tax Notes Int’l 581–590 (2021), *Tax, Social Policy and Gender: Rethinking Equality and Efficiency* (M. Stewart ed., Australian National University Press 2017). On race: D. Brown, *The Whiteness of Wealth: How the Tax System Impoverishes Black Americans and How We Can Fix It* (Crown Publishing 2021); S. Dean, *Filing While Black: The Casual Racism of the Tax Law*, 81 Utah L. Rev. (2022); and A. Abreu, *Racial Issues in Tax Law: Identification, Redress, and a New Vision of Horizontal Equity*, in *A Research Agenda for Tax Law* (L. Parada ed., Edward Elgar Publishing 2021).

including income, race, disability, literacy or age.⁸ Yet, despite growing academic attention on the link between taxation and inequalities, not only is a broader theorization still lacking, but academic scholarly is often not reflected in the policy debate. From both a theoretical and a policy perspectives, what is meant by fair taxation? What is the impact of taxation on inequalities, broadly construed, and to what extent should the tax system be used to redress them?

To answer these questions, the European Association of Tax Law Professors (EATLP) embarked on a massive global research project on 'Taxation and Inequalities' in 2022. The overall aim of the project was to fill the scholarship gap and inform policy, by presenting a novel analytical and conceptual framework of taxation and inequalities, informed not solely by tax law, but also by human rights, constitutional and administrative law, as well as public economics, political economy, moral philosophy, and moral and social psychology. Both methodologically and thematically, this was an unusual research project for the EATLP: *methodologically*, this project was based on a multi-disciplinary, law and economics, and socio-legal approach, alongside the traditional comparative and doctrinal analysis; *thematically*, where previous ones tended to focus on one aspect of the tax system, or on one type of taxes, this project had a broader scope, focussing on one of the core elements of our tax systems – and by extension therefore of our societies – and thus traversing the entire tax system.

The project's proposed conceptual framework was predicated upon four central claims. *First*, that tax systems design has an impact upon inequalities, despite constitutional mandates on equality and non-discrimination, and in particular they can enhance them, decrease them, or (more often) both. *Second*, that addressing inequalities through the tax system, or even having a tax system that does not augment inequalities is not a pure aim, and it must be balanced against other tax and non-tax policy objectives. In particular, there are (1) trade-offs within inequalities, so that often the key tax policy design decision is not whether to address inequalities, but rather which inequality the tax system prioritize,⁹ (2) trade-offs within the tax system, so that addressing inequality must be balanced against other tax aims, such as efficiency,¹⁰ and (3) trade-offs outside the tax system, so that addressing inequality has to be balanced against non-tax policy aims, such environmental sustainability or labour supply.¹¹ *Third*, that fairness

perceptions, and on how to address them, can be influenced by non-rational, often unconscious, factors, such as behavioural biases, heuristics and other psychological and sociological effects. In particular, information asymmetries,¹² egocentric benchmarking, moral psychology imperatives,¹³ and family loyalty,¹⁴ can result in strong opposition to tax measures that would impact positively on inequalities, such as inheritance taxes. *Fourth*, and finally, that inequalities can be enhanced not solely from legal design (tax law), but also from law enforcement (tax administration). In particular the trends towards revenue maximization,¹⁵ and automation of tax administrations can result in an unequal and discriminatory application of tax law.¹⁶

To carry out such an ambitious project, the EATLP counted on the contribution of the biggest research team in its history: sixty-four academics, based in thirty-three countries – six of which non-European; working collectively on the preparation of thirty-three national reports and six thematic reports. The preliminary results of the project were presented at the EATLP Annual Congress, held in Antwerp, on 6–8 June 2024. The Congress' programme reflected some of the most important issues coming out of the project, but the presentations and discussions held therein did not represent the end of the matter, but rather the beginning of a bigger discussion. True to its core aim, the project provided a novel analytical and conceptual framework of taxation and inequalities, mapping out the core issues at stake, and highlighting outstanding eight questions, without necessarily prescribing definite answers.

First, whilst constitutional adherence to the principle of equality and non-discrimination is nearly universal, the scope of that constitutional mandate is less clear. Not only there are some discrepancies across jurisdictions on what type of inequalities are covered by that mandate – most notably as regards as regards ethnicity and sexual orientation – but perhaps even more crucially, it is unclear whether the mandate entails simply respect for formal equality, respect for substantive equality and non-discrimination, or whether it requires positive action to decrease inequalities. In some jurisdictions, there are domestic guidelines on this matter – whether in the constitution itself, or through judicial interpretation – but this does not appear to be the case in most jurisdictions;

⁸ S. Ranchordas & L. Scarcella, *Automated Government for Vulnerable Citizens: Intermediating Rights*, 30(2)William & Mary Bill Rts. J., 373–418 (2021); and J. Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73(1)Tax L. Rev. (2019).

⁹ T. Nagel, *Mortal Questions* 98 (Cambridge University Press 1979).

¹⁰ J. Repetti, *The Appropriate Roles for Equity and Efficiency in a Progressive Individual Income Tax*, 23 Fla. Tax Rev. 522 (2020), doi: 10.5744/itr.2020.2004.

¹¹ T. Nagel, *Mortal Questions* 107 (Cambridge University Press 1979).

¹² R. de la Feria & M. Walpole, *The Impact of Public Perceptions on General Consumption Taxes*, 67(5) Brit. Tax Rev. 637–669 (2020); and J. Alt, I. Preston & L. Sibiet, *The Political Economy of Tax Policy*, in *Dimensions of Taxation* (S. Adams et al. eds, Oxford: OUP 2010), Ch. 13.

¹³ K. Scheve & D. Stasavage, *Equal Treatment and the Inelasticity of Tax Policy to Rising Inequality*, 56(4) Comp. Pol. Stud. (2022). Moral psychology imperatives are also known in moral philosophy as 'dessert'.

¹⁴ S. Sheffrin, *Tax Fairness and Folk Justice* (CUP 2013).

¹⁵ R. de la Feria, *Tax Fraud and Selective Law Enforcement*, 47(2) J.L. & Soc'y 240–270 (2020).

¹⁶ S. Mayson, *Bias In, Bias Out*, 128 Yale L.J., 2218 (2019).

although human rights literature has consistently pointed towards (at least) the need to respect substantive equality, under both EU law and the European Convention on Human Rights.¹⁷

Second, in addition to the lack of clarity as regards the exact scope of the constitutional mandates on equality and non-discrimination, the benchmark for that mandate, insofar as taxation is concerned, is also unclear. In particular, there are in principle three possible benchmarks against which to assess equality, namely individual taxes, the overall tax system (tax mix), the tax and expenditure systems put together (public finance mix). Said in another way, can one individual tax enhance inequality, if the tax system overall – or alternatively, the welfare state, supported by tax revenues – decreases inequality? In some countries, the Constitutional mandate is clear on this regard, stipulating individual taxes as the benchmark for equality assessment on taxation. In many countries, however, this is less clear, and although individuals tend to judge fairness of each tax individually, this disaggregation bias is not in line with the predominant view in public economics literature, which tends to favour the public finance mix as the most appropriate benchmark for equality assessments.¹⁸

Third, outwards inequality trade-offs and the extent to which the constitutional mandate of respect for equality and non-discrimination should take priority over other constitutional policy mandates or policy aims, must be considered. In a few countries this outwards policy trade-off has already been contemplated upon by the Constitutional Courts, particularly in the context of wealth taxes, and the need to balance tax policy designed to decrease income and wealth inequality, on the one hand, and the right to property, on the other hand. Yet, various other potential conflicts are subjacent to existing tax policy in various countries. This is the case, for example, with the proliferation of preferential personal income tax regimes designed to attract investment, or high-skill labour. More than not decreasing inequalities, it can be argued that these regimes violate formal equality – or in tax terms, horizontal equity. Is this violation acceptable in the context of other policy aims, such as ensuring adequate labour supply or promoting economic growth? Another example would be carbon taxes – or excises taxes – designed to regulate behaviour so as to address environmental concerns. Here too, more than not decreasing inequalities, it can be argued that these taxes increase income inequality: they are known to be regressive.¹⁹ Thus, whilst the term fair taxation is often used alongside sustainability – as in ‘fair and

sustainability taxation’ – the two aims can be said to be often contradictory: sustainable tax policy will often not be fair, and fair taxation will often not be sustainable.

Fourth, although there is often a tendency to concentrate on income (or wealth) inequality, there are many types of inequalities – gender, race, age, etc. Moreover, the concept of intersectionality of inequality must be taken into consideration: social categories, such as race, class, or gender are interconnected, and thus can create overlapping and interdependent systems of discrimination or inequalities.²⁰ Addressing one inequality via the tax system may therefore result in enhancing another, and the key question as regards the exercise of the constitutional mandate on equality will often be one of inwards inequality trade-offs: what inequality should the tax system give priority to? These inwards inequality trade-offs are often evident in measures designed to address gender inequality. For example, several European countries have adopted tax policy measures to address gender inequality, and increase women’s access to the workforce, such as childcare or housework tax credits; these credits, however, will by nature tend to benefit more women on higher incomes, and have negative distributional effects. These credits, purposively or not, will therefore often de facto prioritize gender inequality over income inequality. More recently, the preferential tax treatment of the elderly, particularly – although not exclusively – in the form of lower personal income effective tax for pensions, has come to the fore of discussions on inwards inequality trade-offs. Many countries have traditionally applied these preferential treatments with the aim of addressing age inequality, and protecting the elderly as a vulnerable group. Yet, as the elderly progressive become wealthier than other age groups – a global phenomenon often linked to property values – discussions on inter-generational inequality are becoming more common. Should the tax system give priority to age inequality over growing wealth inequality?

Fifth, when it comes to addressing inequalities through the tax system, the political economy of tax policy is a critical – and often underestimated – consideration; the best tax policy, which delivers on the constitutional mandate for equality in a perfectly balanced equilibrium of trade-offs, means very little if it lacks the public support that enables it to become law. This role of political economy in determining taxation policy has been increasingly acknowledged as a response to an easily observable gap in traditional tax policy analysis; namely that policy outcomes are often sub-optimal, and

¹⁷ See inter alia, C. Barnard & B. Hepple, *Substantive Equality*, 59(3) Cambridge L.J. 562–585 (2000), doi: 10.1017/S0008197300000246.

¹⁸ E. McCaffery & J. Baron, *The Humpty Dumpty Blues: Disaggregation Bias in the Evaluation of Tax Systems*, 91 Organizational Behaviour & Human Dec. Processes 230–242 (2003), doi: 10.1016/S0749-5978(03)00026-8.

¹⁹ J. Linden, C. O’Donoghue & D. Sologon, *The Many Faces of Carbon Regressivity – Why Carbon Taxes Are Not Always Regressive for the Same Reason*, 192 Energy Pol’y 114210 (2024), doi: 10.1016/j.enpol.2024.114210.

²⁰ S. Atrey, *Intersectional Discrimination* (OUP 2019); and M. Campbell, *The Austerity of Lone Motherhood: Discrimination Law and Benefit Reform*, 41(4) Oxford J. Legal Stud. 1197 (2024), doi: 10.1093/ojls/gqab018.

thus hard to understand without also appreciating political dynamics.²¹ Yet, traditional political economy studies are often based on assumptions of (a majority) rational voters, exercising their voting right based on rational self-interest – and assumption which does not easily explain many of the observable tax preferences.²² In reality, there is growing awareness that the political economy of taxation is often dependent on non-rational, often unconscious, psychological and sociological phenomena. This is particularly evident on debates regarding taxation and inequalities. For example, whilst there is reportedly a growing concern in many European countries as regards rising wealth inequality, there is also strong opposition to inheritance taxes, which are arguably one of our most effective tax instruments to address that inequality. This opposition seems to be particularly strong insofar as these taxes apply to inheritances between close family members – namely decedents and spouses – leading several countries that still have inheritance taxes – they have been abolished in several countries – to provide broad scope exemptions or reductions to inheritances between those family members. What explains this apparent contradiction in tax preferences? As it turns out, it can be at least partially explained by various sociological principles, not least what has been designated as the principle of family unit – the recognition of the family as a group unit – which inheritance taxes are perceived to violate.²³ Recognition of the importance of this phenomena does not necessarily mean acquiescing to tax intuition, rather than tax reason, but in order to ensure public buy-in for tax policy that fulfils the constitutional mandates on equality, consideration must be given to these phenomena.

Sixth, and finally, not just legal design, but law enforcement must also respect the constitutional mandate on equality and non-discrimination. Yet, procedural law and administrative practice can have a very significant impact on inequalities – even if this is often unacknowledged, and done by accident rather than

design. The intention is almost always to maximize tax revenues and/or combat non-compliance, which in itself can have a negative impact on equity.²⁴ The question is then, to what extent do those ends justify the means? Tax amnesties are a paradigmatic example. A common practice in many European countries, often approved during fiscal stress periods with the aim of rapidly increasing revenue intakes, they raise significant concerns from an equality perspective.²⁵ Indeed, similarly to preferential personal income tax regimes, more than not decreasing inequalities, it can be argued that amnesties violate formal equality – or in tax terms, horizontal equity. Similarly with the process of digitalization of tax administrations, and the use of Artificial Intelligence (AI) as a compliance-enhancing tool by many European tax administrations. There are many advantages to this process, the biggest of which – although by no means, only advantage – is its effectiveness. Yet, there are also significant concerns over their impact on enhancing existing inequalities as regards protected categories, such as ethnic minorities and the disabled.²⁶

These are fundamental questions to which we, tax law academics, are in an ideal position to help answer. It will not be an easy or simple discussion – but make no mistake about it, the policy focus on ‘fair taxation’ will not go away, and if we do not contribute to the debate that vacuum will be filled by those with less expertise, or by those with simply a different type of expertise (economics, political science, etc.), whose contributions and concerns will, by nature and training, be different from our own. Our continent is at a cross-roads. Of course, the debate on the future of Europe is not just about taxation, but rather much wider and multi-faceted; yet, tax policy has a fundamental role to play in that debate. The European public may not be fully conscious of the implications that it has for our future, and that of every citizen living in our continent. But we are – so if not us, then who?

²¹ J. Alt, I. Preston & L. Sibiet, *The Political Economy of Tax Policy*, in *Dimensions of Taxation* (S. Adams et al. eds, Oxford: OUP 2010), Ch. 13.

²² R. de la Feria & M. Walpole, *The Impact of Public Perceptions on General Consumption Taxes*, 67(5) *Brit. Tax Rev.* 637–669 (2020).

²³ J. Becker, *Why Is the Estate Tax So Controversial?*, 45 *Soc'y* 521–528 (2008), doi: 10.1007/s12115-008-9145-x.

²⁴ R. de la Feria, *Tax Fraud and Selective Law Enforcement*, 47(2) *J.L. & Soc'y* 240–270 (2020).

²⁵ Even if the empirical evidence on their effectiveness is at best mixed, see E. Le Borgne & K. Baer, *Tax Amnesties: Theory, Trends, and Some Alternatives* (Washington DC: International Monetary Fund 2008).

²⁶ R. de la Feria & A. Grau Ruiz, *The Robotisation of Tax Administration*, in *Interactive Robotics: Legal, Ethical, Social and Economic Aspects* (A. Grau ed., Springer Nature 2022), Chs 20, 115–123.