EDITORIAL

Comparative Tax Law and the European Court of Justice Strategies

1 Is there a role for Comparative Tax Law?

Comparative Tax Law is a call for dialogue and plays a relevant role in tax interpretation and policy. In the tax field, international organizations have been active in using a comparative approach. For some decades, national tax legislation and regulations that proved to resolve similar problems affecting a variety of jurisdictions such as obstacles to effective fiscal supervision have been used by the OECD and other international instances to promote best practices. Some of those best practices have been upgraded to regional or international standards. This is the case of communication duties of tax planning schemes[1] and the current standard on the automatic exchange of information.[2]

Moreover, monitoring and adapting recommended tax regimes according to the development of the international context have continuously been conducted by the OECD.

Another manifestation of a comparative tax approach are legal transplants that are used in the drafting of national legislation by both external and internal experts.[3] Legal transplants have often been employed in the context of legal families and reflect primacy of one legal jurisdiction over others. This primacy is either due to major political influence, including ex-colonial ties, or to the fact that one legal system is more mature than others, and the legal solutions adopted by the former are critically or a-critically imported to the others.

Finally, legal pluralism is a more recent manifestation of the comparative approach. It tends to be more critical than the use of legal transplants as it is based on reciprocal recognition of different jurisdictions and is therefore friendly to a level-playing field approach. Legal pluralism can be used in tax policy, legal drafting, and legal interpretation.[4]

2 The role of scholars

Although Comparative Tax Law has been used as a methodology by international instances, it has been undervalued by tax scholarship. In her thesis titled *Comparative Tax Law: The Foundations of a Discipline and its Potential to Advance Knowledge,*[5] Kim Brooks demonstrates how comparative tax research would contribute to a more effective tax interpretation and policy.

She claims that contributions by some scholars engaging in Comparative Tax Law have not been granted enough attention and emphasizes the existing deficiencies: tax law comparatists work alone; each follows his own methodology and purpose; tax law comparatist research is disregarded in multiple journals that do not grant the necessary attention to comparative papers; and, moreover, edited books and published papers on multiple national tax regimes are mostly descriptive and explanatory.

In order to construct this framework, Brooks reviews the central questions that are the object of research by comparative law literature, specifically: what is comparative law; what unit of comparison (e.g. state *v.* sub-state level) is used; what is compared (e.g. legal institutions, legal structures, administrative practices, legal cultures, or actors); from what perspective is it undertaken (insiders or externals); and what process should be adopted to effect the comparison (the objective of the research).

She then organizes the existing doctrinal lines of thought: functionalism, cultural comparativism, structuralism, critical comparative studies, and socio-legal

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1 Council Directive (EU) 2018/822 of 25 May amending Directive 2011/16/EU regarding mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, OJ L 139/1 (5 June 2018); OECD, *Mandatory Disclosure Rules, Action 12 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project (OECD Publishing 2015), https://www.oecd-ilibrary.org/docserver/9789264241442-en.pdf?expires=1606431764&id=id&accname=guest&checksum=C804F3CD1A82C376242CD74EADD92E5F (accessed 27 Nov. 2020).

2 OECD, *Standard for Automatic Exchange of Financial Account Information in Tax Matters* (OECD Publishing 2017).

3 *See* e.g. K. Brooks, *Portrait of a Tax Transplant Artist*, 48(8/9) Intertax 698–707 (2020); I. J. Mosquera Valderrama, *The Study of the BEPS 4 Minimum Standards as A Legal Transplant: A Methodological Framework*, 48(8/9) Intertax 719–732 (2020).

4 A.P. Dourado, *Is This a Pipe? Validity of a Tax Reform for a Developing Country*, in *Tax, Law and Development* 127–158 (Y. Brauner & M. Stewart eds, Elgar 2013).

5 K. Brooks, *Comparative Tax Law: The Foundations of a Discipline and Its Potential to Advance Knowledge*, PhD thesis, The University of Western Australia (2020).

comparativism. She also examines the relationship between legal transplants literature and comparative law literature. Brooks appears to rely on critical socio-legal comparativism.

Comparative Tax Law, in Brooks' intellectual setting, means bilateral and multilateral dialogue that acknowledges reciprocal legitimate interests. She further believes that a more ethical tax law – comprising both interpretation and legal drafting – would result from the comparative dialogue and that tax judges have a special ethical duty to engage in a comparative approach.

Brooks' thesis illustrates that Comparative Tax Law would increase knowledge and contribute to a national and universal principled tax law and policy which are valid elements to tax law reform and principled judicial interpretation (common ethical and principled-oriented result). Furthermore, a comparative tax approach facilitates a better understanding of our own legal system. This is so even if there are individual limits to effectively learning other legal systems; limits to the correct use of legal transplants; and insufficiencies of comparative work when it is only based on legislation. There is also substantial research into Comparative Tax Law that must still be conducted in order to build a discipline.

3 The European Court of Justice strategies

Legal pluralism, as a dimension of Comparative Tax Law, has assumed specific contours and relevance in the courts' jurisprudence. National courts often use legal arguments and cite the case law of their peers in other jurisdictions when interpreting similar facts and rules (known as external pluralism).[6]

In the context of the European Union, legal pluralism identifies not only plurality of constitutional sources but also, and in general, plurality of legal orders: multiple legal orders co-exist and are sometimes organized in a hierarchical relationship or in coordination (internal pluralism).[7]

The Court of Justice of the European Union (CJEU) has addressed national courts and instances by either asserting the principles of primacy and direct effect of EU law or by acknowledging the authority of Member States' legal systems. The Court fosters the internal market and downgrades national interests in collecting taxes to a second plan when it claims primacy and the direct effect of the EU fundamental freedoms over states' tax rules that discriminate against residents in other Member States, restricts exit or decides about state aid cases involving selective taxes that grant advantages to targeted taxpayers. In other cases, the Court is more tolerant to national regimes and interests, leaving the construction of the internal market to a second plan.

Differently from other courts, though, when the CJEU refers the cases back to the national jurisdictions by either accepting their interpretation of standards and vague concepts or by being more tolerant in the analysis of national tax legislation considering the fundamental freedoms, it is using two strategies. It is adopting a vertical legal pluralistic approach, accepting that the Member States' legal systems prevail in the concrete case over EU law and the internal market. It is also granting a greater margin of freedom to national institutions as decision-makers by using an institutional approach.

In general, when the CJEU addresses EU law issues, it must select a decision maker among the EU and states' institutions, including itself.[8] The Dzodzi[9] line of cases is one example in which the Court had to decide whether community provisions were applicable to a purely internal situation. In the J&S case,[10] the Court will again have to decide on its jurisdiction limits. In its request for a preliminary ruling, the German Federal Administrative Court asked the CJEU to interpret Article 23 (1) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data. Article 23(1) has been made applicable to the situation before the referring court solely by virtue of a *renvoi* by the national legislation.

Using a parallel with strategies in constitutional law, an institutional approach taken by the CJEU implies that it considers the strengths and weaknesses of the institutions that are involved depending on the social issue that is to be addressed.

The strategies used by Member States' courts consider Member States' constitutional law, measure capacities of parliaments, governments, and courts in solving substantive issues. Differently, the CJEU measures its capacity vis-à-vis the Member States' capacities for solving such issues. In both cases, the strengths and weaknesses of the EU versus the national legal systems depend on the social

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6 M. Poiares Maduro, *Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism*, in *Ruling the World?: Constitutionalism, International Law, and Global Governance* 356–380, at 356–379 (J. L. Dunoff & J. P. Trachtman eds, Cambridge University Press 2009).

7 *Ibid.*, at 356–361.

8 Analysing these issues in a constitutional law perspective, N. K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51(2) U. Chic. L. Rev. 366 et seq. (1984).

9 ECJ 18 Oct. 1990, Joined Cases C-297/88 and C-197/89, *Massam Dzodzi v. the Belgian State*, ECLI:EU:C:1990:360.

10 Opinion of Advocate General Bobek 3 Sept. 2020, Case C-620/19, *Land Nordrhein-Westfalen v. D.-H.T.,* ECLI:EU:C:2020:649 acting as insolvency administrator in relation to the assets of J&S Service UG.

and political reality. The same applies to the General Court when interpreting state aid cases.

Recent cases judged by the CJEU have simultaneously granted more leeway to national courts and to discriminatory/restrictive national tax legislation and possibly opened the door for compatibility of national or harmonized digital services taxes with the fundamental freedoms in the event that they are only applicable to companies reaching a minimum threshold amount.

In the Vodafone and Tesco-Global joint cases C-75/18 and C-323/18,[11] the Grand Chamber of the CJEU held that the special taxes levied in Hungary on the turnover of telecommunications operators and of undertakings active in the retail trade sector were compatible with Treaty on the Functioning of the European Union (TFEU). Those special taxes are steeply progressive and mainly borne by undertakings owed by persons of the other Member State which, according to the court, only reflects the economic reality of the Hungarian markets and does not constitute discrimination against those undertakings.

The CJEU did not examine the substantive question on whether the distinction between low turnover and high turnover enterprises constitutes state aid granted to low-turnover enterprises. In this respect, the CJEU recalled that 'taxes do not fall within the scope of state aid rules unless they constitute the method of financing an aid measure'. The CJEU contended that 'the special taxes are not being specifically allocated to the funding of a tax advantage, for which a particular category of persons qualify' and did not proceed to investigate the existence of an advantage and selectivity of the measure.[12] It could have done otherwise since the purpose of state aid rules is to eliminate distortions of competition within the internal market, and reimbursement and recovery are appropriate tools to restore the competitive position.[13] Furthermore, the Court did not take into account intentional discrimination that had been relevant in the Gibraltar case.[14]

The CJEU did not apply the indirect discrimination test according to the disadvantageous outcome of the national measures. It simply performed a formal analysis of the test by arguing that the special tax on certain sectors makes no distinction between undertakings according to their registered office.[15] The Court leaves the decision on progressive taxation concerning turnover taxes to the Member States.[16]

In the Apple case, [17] the General Court simultaneously accepted the interpretive value of the OECD Guidelines in order to apply EU state aid rules (specifically, Article 107 (1) TFEU) as well as the Member State's interpretation rules and interpretation of those guidelines. In its legal pluralistic approach, the General Court granted a margin of freedom to the Member State, making it prevail over the European Commission's interpretation.

The General Court had to assess the Irish tax rulings granted to certain entities in the Apple Group, including ASI and AOE, regarding the chargeable profits allocated to the Irish branches of ASI and AOE considering Article 107 (1) TFEU. The European Commission had opened the formal investigation procedure concerning the contested rules on the grounds that they could constitute state aid for the purposes of the aforementioned provision.

The General Court accepted that the European Commission relied on the 'Authorized OECD approach' in its primary line of reasoning but held that the Commission's analysis was inconsistent with the afore-mentioned approach by not focusing on the functions actually performed by the taxpayer.[18] Its 'alternative line of reasoning was insufficient to establish the existence of State aid'.[19]

4 Concluding remarks

The CJEU and the General Court's self-restraint in some important recent cases accommodates the deadlock faced by EU integration. According to Ackerman, the difficulty in finding a common path forward in the EU may be considered as a cultural problem and may be justified by the three different paths to constitutionalism in different

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[11] CJEU 3 Mar. 2020, Case C-75/18, *Vodafone Magyarország Mobil Távközlési Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, ECLI:EU:C:2020:139; CJEU 3 Mar. 2020, Case C-323/18, *Tesco- Global Áruházak Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, ECLI:EU:C:2020:140.

[12] *Vodafone Magyarország Mobil Távközlési Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága* (C-75/18), *supra* n. 11, paras 18–31; *Tesco-Global Áruházak Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága* (C-323/18), *supra* n. 11, paras 30–44.

[13] *See* R. Szudoczky & B. Károlyi, *To Admit, or Not to Admit, That Is the Question – The CJEU's Controversial Stance on the Admissibility of State Aid Questions in Preliminary Ruling Procedures*, Kluwer International Tax Blog (31 Mar. 2020), http://kluwertaxblog.com/2020/03/31/to-admit-or-not-to-admit-that-is-the-question-the-cjeus-controversial-stance-on-the-admissibility-of-state-aid-questions-in-preliminary-ruling-procedures/ (accessed 26 Nov. 2020); R. Mason & L. Parada, *Company Size Matters*, 5 Brit. Tax Rev. 627–631 (2019).

[14] CJEU 15 Nov. 2011, Joined Cases C-106/09 P and C-107/09 P, *European Commission and Kingdom of Spain v. Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland (Gibraltar)*, ECLI:EU:C:2011:732; Mason & Parada, *supra* n. 13, at 620–622.

[15] *Vodafone Magyarország Mobil Távközlési Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága* (C-75/18), *supra* n. 11, para. 49; *Tesco-Global Áruházak Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága* (C-323/18), *supra* n. 11, para. 64.

[16] *Vodafone Magyarország Mobil Távközlési Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága* (C-75/18), *supra* n. 11, paras 48–51; *Tesco-Global Áruházak Zrt. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága* (C-323/18), *supra* n. 11, paras 69–72.

[17] GC EU 15 July 2020, Joined Cases T-778/16 and T-892/16, *Apple,* ECLI:EU:T:2020:338; A. M. Jiménez, *The Apple Case: Who Wins? What's Next?*, 48(11) Intertax 953–955 (2020).

[18] Apple (T-778/16 and T-892/16), *supra* n. 17, paras 226 et seq., 233–250, 310–314.

[19] Apple (T-778/16 and T-892/16), *supra* n. 17, para. 494.

Member States[20]: revolutionary outsiders, insider constitutionalism, and elite constructions.[21] They explain how power is legitimated in each Member State and why it is difficult to find a common path in the European Union.

Recent trends by the Court of Justice/General Court granting more leeway to national institutions as decision makers is the way found by the CJEU to accommodate these different paths. Integration is dynamic. Better times for the internal market will arrive.

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[20] B. Ackerman, *Three Paths to Constitutionalism – and the Crisis of the European Union*, 45 Brit. J. Pol. Sci. 705–714 (2015).

[21] *Ibid.*, at 706–711.