

HANDOUT

Case Study : “Crisis Taxes”

1: Introduction

“Permacrisis”¹ has had, in many cases, an adverse effect on state revenue. It created the need for additional tax revenue on behalf of the states. This, in turn, led to the increase of already existing taxes but also to the introduction of additional taxes that, due to the fact that they were introduced to provide for revenue that was required to allow states to deal with a crisis, have been described as “crisis taxes”.

Although the specific name, form, design and structure of such taxes varies significantly from state to state, they do share some common features. In most cases they were introduced as temporary measures, in order to deal with the sharp increase in the needs of the state or to cover for a sharp decrease in the tax revenue. In some cases the tax rates that applied were extremely high, in order to provide for a disincentive. In other cases they were targeted only to some categories of income or categories of taxpayers.

➤ Can you provide an example of such a tax that was introduced in your country? Please describe its main features.

2: Issues

Various issues arose from the imposition of such “crisis taxes”. The aim of this case study is to explore two particular issues

- (i) First : whether and to what extent such taxes can be compatible with the fundamental rights protected under the European Convention of Human Rights (ECHR) and the EU Charter of Fundamental Rights (EUCFR), as the case may be.
- (ii) Second : whether and to what extent such taxes are or are not covered by the scope of application of double tax treaties concluded between states for the avoidance of double taxation on income and on capital.

¹ A word describing the feeling of living through a period of war, inflation, and political instability; it has been chosen as Collins Dictionary's word of the year 2022; see <https://www.bbc.com/news/entertainment-arts-63458467>

3: A preliminary issue: the application of the ECHR and the EU CFR to tax matters; the interplay between the two instruments

As a preliminary issue, we will deal with the application of the ECHR and the EU CFR to tax matters. The ECHR, concluded in the 1950s, mentions “tax” only once, and the aim of such reference is to limit the protection of the ECHR.

- How has the European Court of Human Rights (ECtHR) brought tax cases under its scrutiny? How has the case law of the ECtHR developed in tax matters? Where do we stand now?

The EU Charter of Fundamental Rights codified in a single instrument rights and principles that were already applicable in the EU. However, under Article 51§1 of the Charter, its provisions are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. On the other hand the field of direct taxation is not directly governed by European union rules.²

- What are the conditions for the application of the EU CFR on tax matters?

And a general issue:

- What is the relationship between the ECHR and the EU CFR?

4: Excessive taxation and retrospective taxation and the right to property

- **Case 1**
- In 2010 a new tax on certain payments for employees of the public sector whose employment was terminated was introduced. Severance pay and other payments related to the termination of employment (such as compensation for unused leave of absence) exceeding a certain threshold became subject to a 98% tax. The Act entered into force on 1 October 2010; however, the tax was to be applied to the relevant revenues as from 1 January 2010.
- A taxpayer who was dismissed in July 2011 complained that the levying of tax at a rate of 98% on part of her severance pay had amounted to a deprivation of property which was unjustified.
- What are the arguments in favor and against such a tax, under Article 1 of Protocol 1 to the ECHR?

- **Case 2**

² See a brief overview <https://www.europarl.europa.eu/factsheets/en/sheet/80/direct-taxation-personal-and-company-taxation>

- In 2012 a state introduced, as a temporary measure, a “crisis levy” on wages higher than 150,000 euros (EUR) per annum and on especially generous “golden handshakes”. A temporary surcharge of 16% was exacted from employers on wages (including bonuses) paid in 2012 in so far as these exceed a sum of EUR 150,000. The calculation of this employers’ levy will be based on the employee’s wages in the year 2012 so as to put the surcharge into effect in the year 2013. Although the high wages tax surcharge was intended to be a once-only measure, it was prolonged for the year 2014.
- The taxpayers (employers hit by the levy) complained under Article 1 of Protocol No. 1 to the Convention that they had been subjected to a tax with retrospective effect. They also complained under this Article that the high wages tax surcharge had been imposed without regard for possible individual hardship, had been targeted at an unaccountably small group of employers and had been disproportionate in relation to the tax revenue actually raised.
- The taxpayers also complained under Article 14 of the Convention taken together with Article 1 of Protocol No. 1 that the high wages tax surcharge had been applied arbitrarily to only a small proportion of taxpayers.
- What are the arguments in favor and against such a tax, under Article 1 of Protocol 1 to the ECHR and under Article 14 ECHR?

5: Double Tax Conventions (DTCs) and crisis taxes

Bilateral double tax conventions are concluded between state in order to eliminate international double taxation on income and on capital and to allow competent authorities to cooperate with a view to address tax avoidance and tax evasion in cross-border cases. Bilateral double tax treaties are modelled after the OECD Model tax Convention (the most recent version was published in 2017)³ or the UN Model Tax Convention (the most recent version was published in 2021).⁴ Under Article 2§4 of the Models (and the treaties that follow the models) a DTC shall apply also to any identical or substantially similar taxes which are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes.

- Under what conditions may temporary, additional crisis levies classify as “substantially similar taxes”?

6: Conclusions

Following the analysis and discussion we will draw conclusions on the flexibility that states have when introducing “crisis taxes”.

³ <https://www.oecd.org/ctp/treaties/model-tax-convention-on-income-and-on-capital-condensed-version-20745419.htm>

⁴ <https://financing.desa.un.org/what-we-do/ECOSOC/tax-committee/thematic-areas/UN-model-convention>

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