DOI: 10.1007/s10272-019-0810-7

Ann Mumford and Åsa Gunnarsson*

Sustainability in EU Tax Law

As sustainability embeds concepts of economic prosperity and growth, the idea of pursuing it through law – and through lawyers, with their tendency to focus on rights, as opposed to what seems fiscally prudent, or, frankly, simply affordable – might seem risky. The risk may be that lawyers will proceed on the basis that all citizens have rights, for example, to a healthy environment, a productive economy and a good education, all at the same time, no matter what the cost. So, pursuing these things through legal concepts, as opposed, say, to targeted budgeting, might seem foolhardy. The problem, however, is that EU citizens do have rights to all of these things under the founding treaties. Therefore, the law will need to be involved.

What makes sustainability so important is what also makes it so difficult. Sustainability is not only about economic growth, but rather several other different goals. Of course, there is the risk that achieving one sustainable objective may threaten the other. If the aim is to achieve a number of different things at the same time, then legally enforceable commitments forged in a coordinated way present the surest chance of success. We will make this case, first, by introducing the five different dimensions of sustainability; and then arguing that it is important to use law in the pursuit of these objectives. In conclusion, we suggest that the moment for giving the EU more power to fund the pursuit of these objectives has arrived and the way to do this is clearly through taxation.

The five dimensions of sustainability: concept origins

In 1987, under the chair of Gro Harlem Brundtland, the World Commission on Environment and Development (WCED) produced a report stating that the future development of the planet would be considered sustainable if the present generation were able to satisfy its own needs without compromising the ability of future generations to do so as well.[1] Over the following decades, this objective has often been illustrated as a triangle, formed by people, planet and profit (sometimes replacing profit with prosperity).[2] Meanwhile, 'sustainability' has developed into a term which largely is understood from both environmental and social perspectives. 'Social' generally refers to inequalities in a number of ways: inequality of opportunity, of access to health care, of access to food, of wealth, etc. The conversation, thus, has evolved, but these five points – sometimes referred to as 'environmental, social, economic, temporal and developmental'[3] – have remained the touchstone of discussion.

The FairTax project

The FairTax project has, based on the key challenges to reaching Europe 2020, defined five dimensions of tax policies for sustainable tax systems in EU Member States. In order to include tax law into the process of ensuring a sustainable future for all citizens, the social, economic, institutional/cultural and equality perspectives need to be considered. From these perspectives, our research has identified sustainability gaps that point to the following structural problems regarding taxation:

- A prevailing focus on economic growth
- The absence of tax measures that tackle inequalities in income and wealth
- High and increasing weight of labour taxes
- A lack of EU level environmental taxation
- Decreasing importance of corrective Pigouvian taxes at the Member State level, particularly of environmental taxes
- Intense tax competition including profit shifting
- Tax compliance issues and tax fraud
- Decreasing progressivity of tax systems

Ann Mumford, King's College London, UK.

Åsa Gunnarsson, Umeå University, Sweden.

* The research leading to these results has received funding from the European Union's Horizon 2020 research and innovation programme 2014-2020, grant agreement No. FairTax 649439.

1 L. Seghezzo: The Five Dimensions of Sustainability, in: Environmental Politics, Vol. 18, No. 4, 2009, citing World Commission on Environment and Development (WCED): Strategic Imperatives: Report of the World Commission on Environment and Development: Our Common Future, 1987.

2 Ibid., p. 540.

3 J.M. Arnold et al.: Tax Policy for Economic Recovery and Growth, in: The Economic Journal, Vol. 121, No. 550, 2011, pp. F59-F80.

- Unused potential to use taxation at the EU level to promote sustainable growth and development in Europe
- Persisting intragenerational inequalities and lack of coordinated life course approaches in tax and social policies
- Persisting socio-economic inequalities between men and women and a lack of gender equality insights in national tax policies

The FairTax project proposes that policymakers address these sustainability gaps with a comprehensive perspective that takes into account all five aspects of sustainability. Tax bases are a particularly important focus.

Why taxation matters

The five dimensions of sustainability are all dependent on taxation – in order for Member States to be able to achieve them. Taxation, however, produces a disconnect between responsibilities: even though the EU has led the global charge for a commitment towards a sustainable future in a number of important ways (its leadership role in the Paris Agreement is but one example), it has remained limited in its power to fund its mission through targeted tax initiatives. Yet, the difficult reality is that sustainability in its five dimensions is a global ambition that will be achieved only through both widespread commitment at the local level and empowered transnational actors, such as the EU.

For initiatives at the local level to contribute actively towards a globally sustainable future, it will be crucial that a governance structure, such as the EU, that represents the interests of more than a single national government, provides leadership, monitoring and definitions. Sustainability will mean different things to different cultures and, as Seghezzo observed, it will be crucial to "understand local, regional and global processes".[4] The EU is uniquely qualified to achieve exactly this, whilst continuing to negotiate internationally on behalf of all Member States. For definitions and governance structures, one turns to the law.

Since 1987, to the extent that sustainability has been considered from the perspective of law, this generally has occurred from within the context of corporate social responsibility (CSR).[5] Classically, CSR has been understood as a challenge to the shareholder governance model (or 'stockholder theory') of the corporation under which the only acceptable goal of corporate governance is increasing the shareholder value.[6] CSR suggests that goals other than profit sometimes need to be pursued. In the classic example, a company should not always choose only the cheapest machinery, which leads (at least initially) to the greatest profit. It should also consider which equipment is least likely to pollute the local environment and has no harmful impact on other stakeholders who may include employees, the community and a potentially wide-reaching scope of persons with an interest in the choices this business may make.

CSR typically has provided a forum for scholars interested in accountability and has thus attracted accountants, lawyers and others interested in the legal framework under which businesses operate. Its concept was defined in the 2001 Green Paper on CSR as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis".[7] The 2004 final report of the European Multi-Stakeholder Forum on Corporate Social Responsibility reaffirmed this approach.[8] The word 'voluntary' is fairly key and signifies a tendency towards a 'pro-business stance' and movement away from 'the traditional regulatory approach'.[9] Accordingly, lawyers also drifted from the original stricter definition. The EU, however, through targeted disclosure frameworks, codes of conduct and wide-reaching strategies, has strengthened the voluntary nature of CSR into something that lawyers could no longer ignore. The same potential exists regarding the definition of sustainability.

The key difference between CSR and the five dimensions of sustainability is that CSR is conceived as addressing a binary choice: either the stakeholder or the shareholder model of corporate governance. Its starting point is that, sometimes, businesses will need to choose between profit and stakeholders. When pursuing the five dimensions of sustainability, however, what is intended as a five-part commitment sometimes has the tendency to resemble yet another binary choice: between economic growth and everything else. This is a 'win' which is sanctioned nowhere within the founding legislation of the EU – nowhere means, for example, that the environment should be protected only if it is possible to do so without decreasing profit – but profit, or growth, has been the victor, more times than not.[10]

4 L. Seghezzo, op cit., p. 552.
5 O. Delbard: CSR Legislation in France and the European Regulatory Paradox: An Analysis of EU CSR Policy and Sustainability Reporting Practice, in: Corporate Governance: The international journal of business in society, Vol. 8, No. 4, 2008, pp. 397-405.
6 J. Hendry: Missing the Target: Normative Stakeholder Theory and the Corporate Governance Debate, in: Business Ethics Quarterly, Vol. 11, No. 1, 2001, pp. 159-176.
7 O. Delbard, op. cit., p. 398.
8 Ibid.
9 Ibid., p. 399.
10 M. Eriksson, Å. Gunnarsson: Literature Review on Tax and Transfer Policies for a More Equal Distribution of Post-tax Incomes, forthcoming, available at http://cordis.europa.eu.

Taxation, particularly, is an attractive starting point for transforming the binary choice into a true multi-dimensional commitment. A literature review reveals that it is possible to design tax laws with an eye towards sustainability, where the objectives are clear and, frankly, where profit is not the main objective.[11] Taxation has always been capable of doing more than two things at once.

Taxation is capable of doing two things at once

For example, under the shareholder model of corporate governance, simply paying the least amount of tax possible will not necessarily lead to an increase in the value of shares. A very basic example is provided by Starbucks' experience with paying corporation tax in the UK, the latest development (in a relatively long running saga) is the criticism it received for only paying 2.8% tax in the UK in 2017.[12] The negative publicity from this has led to 'vocal criticism' in particular from the lobbying group Fair Tax Mark, which has created a sense of urgency for the introduction of country-by-country reporting in the EU.[13] Tax avoidance was bad for business and led to a feeling of moral opprobrium about the decision to carry the (previously ubiquitous) Starbucks cup whilst walking the streets. The same could be said about Apple. The Commission's decision to target the incentives that Ireland provided to this company meant that carrying a Macbook suddenly became equivalent to a cup of Starbucks coffee. Being seen as avoiding taxation attracts negative attention. Paying a 'fair' amount, thus, found a place within both shareholder and stakeholder models of the corporation (much as McBarnet had predicted, decades ago).[14]

Country-by-country reporting provides an excellent illustration of the fallacies of the 'binary choice' model in action. When tax reporting requirements were introduced for EU financial institutions in 2013, this 'surprise' development was opposed in European Parliament on the grounds that it was up to citizens to determine whether or not a corporation was paying its fair share; and, thus, such an obligation somehow violated this right.[15] Despite the protests, later studies revealed little to no impact on investor response – business more or less continued as usual.[16] Thus, an initiative that was presented as bad for business, at least thus far, has proved not to be. The key point here is that when the binary is presented as a choice between the introduction of a right which is enforceable under law and against encouraging profit/prosperity, it is often taken as read that the latter will suffer although that need not necessarily be the case.

As research presented within the FairTax project has established, the introduction of the Common Consolidated Corporate Tax Base (CCCTB) is an important step towards a sustainable future for funding the EU.[17] The potential of linking the CCCTB to 'smart, sustainable' growth presents a vital opportunity. Additionally, the CCCTB will assist in efforts to combat tax evasion in a harmonised and effective way.[18]

Taxation is also capable of doing five things at once

The EU has taken a number of valuable steps in responsible taxation in the last few years and country-by-country reporting and the Apple / Ireland case are but two examples of this. Supported by civil society in its mission to make the EU a less habitable environment for tax avoidance, this task has been driven by what Picciotto has described as an evolution in Adam Smith's canons of good taxation. The public, he suggests, now believe that these canons are "far from being met" when taxpayers such as Apple and Starbucks are not perceived to be paying their fair share of tax.[19] Avoidance has become part of the modern sustainability agenda. Voters are 'sensitive' to the perception that tax systems include an 'opt out' for wealthy and powerful taxpayers. Tax is also one of the

11 Ibid., p. 51; also see, inter alia, S. Bautista et al.: A System Dynamics Approach for Sustainability Assessment of Biodiesel Production in Colombia. Baseline Simulation, in: Journal of Cleaner Production, Vol. 213, 2019; M.A. Kilgore et al.: State Property Tax Programs Promoting Sustainable Forests in the United States: A Review of Program Structure and Administration, in: Journal of Forestry, Vol. 116, No. 3, 2018; S.M.G. de Mattos, M.J. Wojciechowski: Existing Institutional and Legal Framework and Its Implications for Small-Scale Fisheries Development in Brazil, in: S. Salas, M. Barragán-Paladines, R. Chuenpagdee (eds): Viability and Sustainability of Small-Scale Fisheries in Latin America and The Caribbean, MARE Publication Series, Vol. 19, Cham 2019, Springer.

12 Starbucks' European unit paid 2.8% UK tax last year, Financial Times, 19 September 2018, available at https://www.ft.com/content/4d85c99c-bb44-11e8-8274-55b72926558f.

13 Ibid.

14 D. McBarnet: Law, Policy, and Legal Avoidance: Can Law Effectively Implement Egalitarian Policies?, in: Journal of and Society, Vol. 15, No. 1, 1988.

15 V.K. Dutt, C.A. Ludwig, K. Nicolay, H. Vay, J. Voget: Increasing Tax Transparency: Investor Reactions to the Country-by-Country Reporting Requirement for EU Financial Institutions, ZEW Discussion Paper No. 18-019, Mannheim 2018, ZEW – Leibniz Centre for European Economic Research, available at http://ftp.zew.de/pub/zew-docs/dp/dp18019.pdf.

16 Ibid.

17 M. Schratzenstaller, A. Krenek, D. Nerudová, M. Dobranschi: EU Taxes as a Genuine Own Resource to Finance the EU Budget: Pros, Cons and Sustainability-Criteria to Evaluate Potential Tax Candidates, FairTax Working Paper No. 3, Umeå 2016, Umeå Universitet, 2016.

18 D. Nerudová, V. Solilová: Report on behavioural model for measurement of the impacts of tax sharing mechanism under C(C)CTB, FairTax Working Paper No. 12, Umeå 2017, Umeå Universitet.

19 S. Picciotto: Constructing Compliance: Another Look at Game-Playing in International Taxation, paper presented at the Centre for Tax System Integrity workshop on 'Tax Havens: Too Easy For Whom?', Canberra, 8 March 2004, p. 22.

areas which is 'least harmonised' within the EU,[20] risking the impression that the European institutions are perhaps least concerned with the welfare of its citizens in this area. The integration of tax avoidance within the sustainability agenda has been slow; but the results of the FairTax project suggest several points of entry, of which two are highlighted here.

First, the EU's ability to promote all five dimensions of the sustainability agenda will be enhanced through greater financial resources. The introduction of EU level taxes, following the period of Brexit uncertainty, is now more politically feasible than ever before. Historic efforts to introduce, for example, a financial transaction tax may have failed, but this need not determine the EU's future. Taxes represent both (1) a fundamental point of recognition between citizens and government, and (2) according to some, the very definition of governance. On the first point, this moment of recognition is perhaps clearer than ever before: a carbon tax, a flight ticket tax, a financial transaction tax – all of these initiatives could serve as examples for the benefits of EU membership; or, in language of legal scholars, as elements of the social contract. On the second point, the connection between statehood and the capacity to tax (first acknowledged by Schumpeter, one hundred years ago) is perhaps the primary reason why the introduction of EU taxes has not yet succeeded.[21] The benefits of EU membership and the stability it affords are, perhaps now more than before Brexit, clear. Membership in the EU means greater protection for citizens and a truly sustainable future. When Schumpeter acknowledged the key role of taxation in the transition from feudal to nation states, the point was that he acknowledged a change. The introduction of EU taxes could provide the basis for another transition – to another form of governance.

The taxes should be approached boldly. Unanimity is not the only procedure by which democracy occurs. Indeed, the ultimate test of a democratic process is not whether an agreement has been reached unanimously, but the moral content of the decision should also be assessed. The impetus for doing so is clear: by restricting the unanimity requirement of taxation and not extending it to other elements of legal decision-making surrounding the five dimensions of sustainability, profit/prosperity inevitably takes priority. 'Growth' defeats sustainability. The time has come for a new approach to taxation, a new kind of Schumpeterian transformation.

The FairTax project's specific contribution to the debate on this is presented in the exploration of sustainability-oriented options for tax-based own resources which are able to support sustainable growth and development in the EU. Based on a concept of sustainability-oriented taxation in the context of own resources for the EU, we propose sustainability-oriented evaluation criteria to assess the suitability of specific candidates for tax-based own resources.[22]

Second, the new approach to taxation will need to be written into law – or, in the EU context, will need to confront the domestic law of at least 27 nation states within the principle of subsidiarity. The prospects for EU taxes can seem bleak against this background, and, perhaps particularly so, if law (and lawyers) are perceived only as barriers. It is tempting to ask, 'Is law a barrier here? Is there a way around it?' The traditional role of lawyers, however, is to take procedural obligations and crystallise them into rights. EU citizens are guaranteed the rights to many elements of the five dimensions of sustainability within the founding treaties.[23] If EU taxes provide the clearest path for enforcing these rights, then refusing to introduce them on the grounds of perceived contested public policy is tantamount to denying citizens their rights. We submit that the potential for sustainability through taxation is here.

Conclusion

The results of the FairTax project demonstrate the importance of enhancing the EU's own resources through the introduction of EU taxes.[24] Taxation provides a forum for the enforcement of rights which otherwise might be subsumed within 'bureaucratic' or 'growth' narratives and thus provide an ideal opportunity for the EU to define the shape of its future in perhaps the next iteration of a Schumpeterian transformation of the state. Adopting a 'juste retour' approach to taxation risks, in many ways, to misunderstand the role of taxes in the social contract. Given the global importance of ensuring a sustainable future, a bold approach to taxation, and indeed to the rights of citizens, is perhaps now more urgent than ever before.

20 D. Nerudová, V. Solilová, op. cit.

21 J.A. Schumpeter: Die Krise Des Steuerstaates, Graz-Leipzig 1918, Leuschner & Lubensky; reprinted as J.A. Schumpeter: Aufsätze Zur Soziologie, English translation by W.F. Stolper, R.A. Musgrave, in: International Economic Papers, London 1954, Macmillan, pp. 1-71.

22 M. Schratzenstaller et al., op. cit.

23 For example, Treaty on the Functioning of the European Union (TFEU), Art. 191(2) defining environmental principles; see U. Spangenberg, A. Mumford, S. Daly: Navigating Taxation Towards Sustainability, in: Columbia Journal of European Law, forthcoming, 2019.

24 M. Schratzenstaller et al., op. cit.