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**ENVIRONMENTAL TAXATION: A LEGAL  
PERSPECTIVE**

*Summary*

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The purpose of this research project is to analyse environmental taxation from a legal perspective, and, in particular, to understand how and why this form of taxation might violate legal principles and, consequently, to define some legal boundaries.

Accordingly, this dissertation is not aimed at analysing the advantages and disadvantages in terms of economic efficiency and environmental effectiveness of using environmental taxation.

However, broadly speaking, it is worth noting that there is a general consensus among scholars, EU institutions and OECD, on the effectiveness and efficiency of environmental taxation. Therefore, for the purposes of this study, we have taken this as a fact: environmental taxation is an efficient and effective environmental policy tool that governments can use in order to solve environmental issues.

This gives us the possibility to stress an important point. The field of environmental taxation is analysed from the point of view of different disciplines (such as economics, environmental law, human rights law, tax law, behavioural sciences, and moral philosophy) and the real – but very difficult – challenge is to take all of them into account.

Going into further details, the need to take the legal perspective of environmental taxation into account arises from the fact that, despite its important advantages, the introduction of environmental taxation can bring many juridical problems along.

Therefore, this project moves along two tracks that need to find a match point.

In particular, the first track is the awareness that we are facing an environmental crisis and, therefore, there is the need to boost environmental protection and to counter what we have called the enemies of our world: climate change, global warming, desertification, loss of biological diversity, deforestation, the depletion of the ozone layer.

The reason why environmental taxation is considered a fundamental tool to reach this purpose is that it “*embodies the concept of using the tax system to adjust*

*prices in a way that will influence behaviour in an environmentally positive manner”.*

(<sup>1</sup>)

In other words, environmental taxation is aimed at altering polluting human behaviour by imposing taxes and charges that can be avoided generating less of the substance being taxed and, therefore, through more environmentally friendly behaviours.

The second track, under which this project has been developed, however, tells us that things are much more complicated than it seems at first glance. In fact, even if environmental taxation is a form of taxation that is aimed at reaching important goals such as environmental protection, it is still a form of taxation.

What does this mean?

That it is not possible to think that the justification (or the goal) behind the introduction of taxes and charges can be a way to circumvent legal principles and constitutional constraints. If this premise should not be accepted, it would mean to give *carte blanche* to legislators and the risk is that they may take advantage of the so-called “fiscal illusion”. (<sup>2</sup>)

Therefore, if we want to use taxation in order to protect the environment we cannot overlook the key fact that, notwithstanding the fundamental role that environmental taxation can play in our mission to save the planet, taxes and charges shall always be analysed in their legal context. Therefore, it is necessary to define and analyse the legal framework in which environmental taxes may be introduced; and this constitutes the match point to be found.

Bearing this in mind, we have to underline another important consequence.

It seems quite evident that there is a permanent friction between environmental and fiscal goals. In fact, the increasing use of environment taxation is

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(<sup>1</sup>) J. E. MILNE, M. SKOU ANDERSEN, *Introduction to environmental taxation concepts and research*, in J. E. MILNE, M. SKOU ANDERSEN (eds.), *Handbook Of Research On Environmental Taxation, Cheltenham/Massachusetts*, 2012, p. 15.

(<sup>2</sup>) J. M. BUCHANAN, *Public Finance in Democratic Process: Fiscal Institutions and Individual Choice*, Berkeley, 1967, available at [http://www.uca.edu.sv/mcp/media/archivo/b45378\\_collectedworksofjamesbuchanan.pdf](http://www.uca.edu.sv/mcp/media/archivo/b45378_collectedworksofjamesbuchanan.pdf), pp. 125 et seqq..

driven by many factors apart from the search for more effective and efficient environmental policies. In particular, it is also influenced by the search for alternative sources of tax financing and by the search for increasing government revenue. <sup>(3)</sup> If this could be seen as an attempt to yield the so called “double dividend”, it cannot be underestimated that this friction could also cause a collision between these goals, especially in the long run, and the risk is that environmental goals are discarded as soon as they jeopardise other interests.

That being said, it is worth noting that, this outline becomes even more complicated if we consider another element: environmental problems know no boundaries. In other words, we are dealing with cross border problems. This means that, being environmental issues a global concern, they cannot be addressed only at the national or local level, but there is the need to take also the supranational perspective into account.

This complication can be easily understood: analysing this topic only from a national perspective would be an enormous limitation and that is the reason why this research project tries to enlarge its reference frame and to make considerations that can be used in different contexts.

So far, we have defined the big picture from which our analysis has been started and in which our analysis has been carried out.

Going into further details, the first chapter of this dissertation has been aimed at analysing the steps on the road towards the awareness process of the need of an urgent intervention to protect the environment, both at the international and European level. In doing so, we have examined the principles behind environmental protection.

In particular, at the international level, a few fundamental points flow from our analysis. First, the exam – even if not comprehensive – of the most relevant UN Declarations and documents with reference to environmental issues has given us the certainty that environmental protection is a global concern.

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<sup>(3)</sup> G. MELIS, F. PITRONE, *Coordinating Tax Strategies at the EU Level as a Solution to the Economic and Financial Crisis*, *Intertax*, September 2011, pp. 377 et seqq.

Second, in the international context there are many legal instruments that can be used to face environmental issues. These go from rights to duties and obligations, via principles such as the “polluter pays” principle, the principle of sustainable development and the precautionary principle.

Third, most of these principles are enshrined in “soft” law. In particular, international law related to the protection of the environment is one of the areas in which “soft” law has emerged in predominant fashion. However, even if soft law is not legally binding, its indirect effects should not be underestimated in so far as it defines the best standards and provides for the guidelines in order to coordinate the policies of the States.

Fourth, exploring the linkage among human rights, duties and environmental protection, what we gather from our analysis is that the common law of environment includes a general obligation to protect and preserve the global environment – enshrined also in the sustainable development principle – that has to be implemented in a dimension of environmental solidarity. In particular, it can be recognized the need to consider a global environmental solidarity in the context of a moral and legal obligation to protect the rights of present and future generations that scratches and undermines also the traditional concept of sovereignty.

Most of the principles which are analysed at the international level can also be found at the European level. In fact, according to art. 191 TFEU, the European environmental policy is based on the precautionary principle, the principle of preventive action, the principle according to which environmental damage shall be rectified at source and the “polluter pays” principle.

In this context, the principle that is generally considered as the one that creates a bridge between environmental protection and environmental taxation is the “polluter pays” principle.<sup>(4)</sup>

However, we have underlined that – when referring to environmental taxation – analysing only this principle would be a significant limitation to be avoided.

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<sup>4</sup> Even if the concept of the “polluter pays” principle seems *prima facie* very easy to be defined the devil is in the details. In fact, this principle has been interpreted in various ways and it can be considered ambiguous and it is subject to criticism.

Therefore, in our opinion, it is important to consider also other principles such as the prevention principle, the precautionary principle, and, moreover, the duty to protect the environment and the principle of environmental solidarity behind it.

Before reaching a conclusion on this issue, in the second chapter we have deeply analysed what environmental taxes are. In fact, we have clearly stated that in order to use environmental taxation properly we should, first of all, stop calling environmental tax what it is not.

Transparency is needed if we really want to respect the “*solemn responsibility to protect and improve the environment for present and future generations*”.<sup>(5)</sup> Otherwise, the risk is that we are just trying to settle on the proper price to the right to pollute.<sup>(6)</sup>

In order to solve this issue there is the need to develop a common framework for defining environmental taxes and to avoid an improper use of this term.

To reach this goal, we have analysed the definitions which are given by Eurostat and OECD of both environmental taxes and of environmentally related taxes - that give relevance only to the polluting tax base - demonstrating that they are not overlapping concepts and that the definition of environmentally related taxes seems the one to be preferred.

However, this definition appears to have too many grey areas and loopholes and does not seem to consider the idea behind the introduction of environmental taxes: to discourage environmental damages and to serve as an incentive for behavioural changes.

Therefore, in order to find a common perspective on the concept of environmental taxes and charges, we have proposed an alternative approach.

First of all, we have stressed the need to distinguish between taxes and charges or fees. In fact, the legal definition of taxes - that may differ among countries - has an influence on how these can be used for environmental protection.

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<sup>(5)</sup> UNITED NATIONS, *Declaration of the United Nations Conference on the Human Environment*, Stockholm, 16 June 1972, Principle 1.

<sup>(6)</sup> M. J. SANDEL, *It's immoral to buy the right to pollute*, New York Times, December 17, 1997, p. A29.

Therefore, if it is our intention to refer to a general term that covers all fiscal compulsory payments, we should use the terms *levies* or *compulsory contribution*. These general labels, however, should not include penalties or fines for violation of legal limits or compensatory damages. In fact, the term *levies* covers all those payments which are related to activities that are not forbidden, and that most of the time are expressly authorized by governments or authorities.

Moreover, the term *levies* does not cover the deposit-refund system. In fact, this system is different from a fiscal measure because, in this case, the government collects a charge on a certain product or material, but refunds that payment once the product is returned or properly disposed of. In the latter case, the payment is not definitive and, therefore, it cannot be covered by the term *levies*.

Lastly, the EU ETS cannot be considered a form of taxation and, therefore, it is not covered by the general category of environmental levies or environmental compulsory contributions.

Secondly, our idea is that there are no environmental taxes but only taxes that have (potential) environmental effects. This means that in using the term *environmental taxes* we should refer to taxes that have, generally speaking, environmental effects and, specifically, that induce a behavioural change to promote environmentally friendly behaviours and that discourage environmental damages and/or a reduction in the use of natural resources.

Therefore, the polluting tax base which is considered fundamental by both OECD and Eurostat, is only one of the elements that can be considered in order to design environmental taxes which are aimed at changing the behaviour of polluters, but it does not grant an attempt to alter the behaviour *per se*.

What we consider more important - if we really want to pursue the goal of changing human behaviours - is to implement informational strategies together with environmental taxation and to introduce environmental taxes as a part of an environmental tax reform.

As we have already mentioned, the polluter pays principle is not the only principle to be considered while dealing with environmental taxation. The reason

behind this statement is that, as underlined in the third chapter, taxes *stricto sensu* are not the best way to implement the polluter pays principle.

In fact, it is quite evident that the “polluter pays” principle can be implemented through different legal instruments and that taxation is one of them.

However, the polluter pays principle seems to be oriented only towards the restoration and compensation of damage to nature which is caused by the polluter. Moreover, according to this principle, the polluters exclude others from the duty to pay, meaning that the costs of the environmental pollution should not be imposed on the society but on the polluter. For this reason, there is not a principle of common solidarity behind the PPP, but, on the contrary, the polluter pays principle has to be understood as expressing the concept that “*the cost of environmental impairment, damage and clean up should not be borne via taxes by society but that the person who caused the pollution should bear those costs*”. <sup>(7)</sup> Therefore, the PPP is a principle that excludes that the costs of pollution must be covered by public budgets.

This means that – if we use the polluter pays principle as a guiding principle – taxes *stricto sensu* are not the best instrument to be introduced for environmental protection. On the contrary, the best way to implement the PPP is to use and introduce charges or fees.

Bearing this in mind, even if the PPP takes the form of a charge or a fee, the latter should be implemented as incentive charges or fees aimed at altering behaviour, not at raising revenues.

In this context, the polluter pays principle could be used as another rational distribution criterion – beside the *Kostendeckungsprinzip* and the *Äquivalenzprinzip* – in order to justify charges and fees and to define their amount.

Accordingly, if fees or charges are designed by governments in line with the PPP taking the full internalization of pollution costs into account, they can be implemented in a way that covers all social values, also including environmental costs, and they can really provide incentive for polluters to change their behaviour.

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<sup>(7)</sup> L. KRÄMER, *EC Environmental Law*, London, 2007, pp. 26 et seqq..

However we should be aware of the fact that levying charges requires the existence of a public service providing benefits for users and, therefore, they cannot be used in order to cover every situation.

Therefore, charges and fees – even if they can be considered as the best instrument to implement the polluter pays principle – cannot be the only fiscal measure to be introduced in order to protect the environment.

On the contrary, we should also introduce taxes. In fact, environmental taxes should take the costs of pollution prevention, and, generally speaking, of the improvement and protection of the environment into account. Therefore, this form of taxation is aimed at reaching two different and fundamental goals. First of all, it seeks to avoid pollution, to protect and to improve the environment. Secondly, these taxes pre-pay for possible environmental disasters. This second aim would solve the situations where there is a systemic crisis caused by negative externalities and it would be too late to apply the polluter pays principle, because the polluters would not be able to pay anymore.

However, we think that this does not imply that environmental taxes should be introduced in the light of the polluter pays principle. On the contrary, environmental taxes have to be introduced in the light of some different grounds.

In particular, according to our analysis, these taxes have to be based on the duty to protect the environment and on both the prevention principle and the precautionary principle. The former element (the duty to protect the environment) indicates the tool to be used: taxes. The latter elements (the prevention principle and the precautionary principle) indicate how to design this tool.

With reference to the first element, in fact, the best way to implement this duty to protect the environment (also linked to the “sustainable development”) in a dimension of environmental solidarity is by introducing taxes, being the latter “*the citizen’s contribution to the common good by reason of solidarity among the members of a society*”.<sup>(8)</sup>

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<sup>(8)</sup> W. SCHÖN, *International tax coordination for a second-best world (Part I)*, *World Tax Journal*, Vol. 1, No. 1, October 2009, p. 71.

Moreover, if we really want to protect the environment, we need to design these taxes as prevention or precautionary measures in order to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. <sup>(9)</sup>

In this context, the precautionary principle seems the best principle to be applied because it gives us the possibility to take measures without waiting until all the necessary scientific knowledge is available. Furthermore, according to this principle, it is important that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. Environmental taxes, as we have already said, are considered one of the most cost-effective instruments in order to protect the environment. <sup>(10)</sup>

Therefore, according to the precautionary principle and to the duty to protect the environment in a dimension of environmental solidarity, we can implement environmental taxes that can prevent the causes of climate change and mitigating its adverse effects.

Lastly, we have analysed, the inherently problematic interplay between the introduction of emission taxes and the “ability to pay” principle, which is enshrined in many national constitutions, and we have underlined how this problem can be solved taking, specifically, the Italian perspective into account.

To put it simply, the problem is related to the fact that according to the “*qualified ability to pay*” theory, all taxes must be based on a clear manifestation of wealth (i.e. income, overall wealth, or consumption) belonging to the taxpayers, and the tax legislator must abstain from taxing acts that do not constitute a manifestation of wealth. <sup>(11)</sup> Accordingly, emission taxes would be unconstitutional because it would be impossible to measure the ability to pay of the taxpayer.

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<sup>(9)</sup> Moreover, with reference to the costs related to the improvement of the environment we can introduce earmarked environmental taxes.

<sup>(10)</sup> OECD, *Carbon taxes and emissions trading are cheapest ways of reducing CO<sub>2</sub>*, OECD says, November 2013, available at <http://www.oecd.org/newsroom/carbon-taxes-and-emissions-trading-are-cheapest-ways-of-reducing-co2.htm>

<sup>(11)</sup> G. FALSITTA, *Il doppio concetto di capacità contributiva*, in G. FALSITTA, *Giustizia tributaria e tirannia fiscale*, Milano, 2008, pp. 153 et seqq..

In this context, the proposed solutions are two. The first one is linked with the acknowledgement of the duty to protect the environment in a dimension of solidarity as a fundamental principle of the Italian constitution. In particular, we have seen that the duty to protect the environment in a dimension of environmental solidarity can be found under art. 2 of the Italian Constitution. Being this article a fundamental principle of the Italian Constitution, it can constitute a limit to – or, at least, a principle that we have to balance with – the ability to pay principle.

The second solution is linked to the possibility to enlarge the scope of the ability to pay principle, and, in particular, if we consider that the social function of taxation is growing, with the possibility to measure the ability to pay also looking at the power of the individual rather than his/her sacrifice. The consequence of using this approach, based also on the capability approach <sup>(12)</sup>, in a tax law context, would be that a taxpayer can be taxed, if the legislator decides so, on criteria (*rectius* “advantageous positions”) which are associated to the taxpayers’ existence in the society and not necessarily linked to economic factors.

Therefore, the tax legislator can choose these criteria on a discretionary basis, as long as these “advantageous positions”: (i) are measurable and economically valuable; (ii) are reasonable and not arbitrary. <sup>(13)</sup> Accordingly, with reference to emission taxes, the advantageous positions would be the use of the environment *per se* or the authorization to use it. <sup>(14)</sup> These criteria can be considered reasonable, measurable and economically valuable.

Therefore, accepting this interpretation, emission taxes would be in line with the ability to pay principle.

Furthermore, in the fourth chapter, we have demonstrated that the need to consider a global environmental solidarity in the context of a moral and legal obligation to protect the rights of present and future generations scratches and

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<sup>(12)</sup> M. NUSSBAUM, *Creating capabilities. The Human Development approach*, United States of America, 2011; A. SEN, *The idea of Justice*, United States of America, 2009.

<sup>(13)</sup> F. GALLO, *Le ragioni del fisco, Etica e giustizia nella tassazione*, Bologna, 2007, pp. 82 et seqq..

<sup>(14)</sup> F. GALLO, *Le ragioni del fisco*, op. cit., p. 96; L. PEVERINI, *I tributi ambientali*, in L. SALVINI, G. MELIS (eds.), *Atti delle Giornate di Studio su L'evoluzione del sistema fiscale e il principio di capacità contributiva*, 2014, forthcoming, para. 8.

undermines the traditional concept of sovereignty. This gives room to the possibility of introducing global taxes that, in the environmental field, seem to be the only feasible instrument in order to solve some global environmental issues.

In particular, global environmental taxes are not only a way to raise revenue or to protect the environment *per se*, but – being based on the precautionary principle – they are also an instrument to take the inherently global systemic risks of economic actions to the environment into account, and thus a tool to prevent and avoid the so-called environmental systemic crisis.

In this context, our proposal is to focus on the implementation and the design of carbon taxes and, in particular, on international transportation fuel taxes.