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Some thoughts on taxable capacity and confiscatory taxation after the French Constitutional Court's decision 2012-662 DC

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Introduced in the 1920s, the French individual income tax system originally was a mix of flat-rate and progressive taxes. Replaced in 1960 by a single individual progressive income tax (*impôt sur le revenu*, IR)¹, the new mechanism's intent was to promote equal discharge of public burdens seeking an aim of social justice. Hereafter, direct taxes should be personalised and take into account the individual's taxable capacity/ability to pay (*capacité contributive*)². The progressive tax trend drove the highest income tax rate to a level higher than 70% in the 1980s. A wealth tax (*impôt de solidarité sur la fortune*, ISF) was introduced in the same period, affecting non-business income and capping at 85% of the taxpayer's available income, this safeguarding mechanism being it, in itself, subject to limitations.

The effect of progressive income taxation³ was subsequently blurred by a limitation of the amount of income tax brackets, a reduction of the marginal tax rates and an introduction of new flat-rate individual income taxes, named social contributions (*prélèvements sociaux*). Progressivity was further limited by the creation of mechanisms such as the "tax shield" (*bouclier fiscal*), limiting the

¹ For a concise overview, G. Gest, *France*, in H. Ault, B. Arnold, *Comparative Income Taxation*, Alphen aan den Rijn, The Netherlands, Kluwer Law International 3rd ed., 2010, pp. 45-63. Recent evolutions have been discussed in the conference « Refonder l'impôt sur le revenu? », Paris, Jan. 2012, summarized in *Lexbase Hebdo édition fiscale*, 25 Jan. 2012, no. 470, pp. 1-7. For a further analysis, see Th. Lambert, *Propos introductifs*, in J. Buisson (ed.), *La sécurité fiscale*, (Conference, 9 Oct. 2009, Centre de recherche Droit de la sécurité et de la défense de l'Université Paris Descartes/Institut international des sciences fiscales), Paris, L'Harmattan, 2011, pp. 45-62.

² "Taxable capacity" and "ability to pay taxes" seem to be considered as synonym concepts. The terms' etymology, and the consideration of the object of individual taxation leads to the following remark: if the justification and quantification of tax burdens is the wealth contained in the individual's property or income, the term "capacity" is more appropriate (lat. *capacitas/capax* < *capere* = contain). In French, the term "*capacité*" is preferable over "*faculté*" for the same reasons. L. Agron, *Histoire du vocabulaire fiscal*, Paris, LGDJ, 2000, p. 165. On the qualification of the concept of taxable capacity as a positive rule of the tax system, H. Laufenburger, *Revenu, capital et impôt*, Paris, Sirey, 4th ed., 1950, p. 344. For an assessment of indicators that can be used to determine taxable capacity, see A. Steichen, *La justice fiscale entre justice commutative et justice distributive*, in *L'impôt: Arch. Phil. Droit*, 2002, no. 46, pp. 243-279, spec. pp. 251-253.

³ On progressive aspects of compulsory levies over individuals and its redistributive effects in France, see the report of the French Court of Accounts, *Prélèvements obligatoires sur les ménages: progressivité et effets redistributifs*, 2011, La Documentation Française, 2011, 416 p.

global level of compulsory levies on individuals at a percentage of the available income of the taxpayer⁴. Flat-rate levies in discharge (*prélèvements forfaitaires libératoires*), launched as a simplifying mechanism for various categories of income, limited in fact the progressive philosophy of the tax system.

The aim to reduce the public deficit to the EU ceiling of 3% by the end of 2013 brought fiscal considerations to the foreground of the 2012 French presidential campaign. The common denominator of the candidates' programmes was an increase of tax pressure, although the means to achieve this objective were not unanimously accepted⁵. For the new majority, the increase of fiscal revenue should be borne by the wealthier families, in order to ensure an equal discharge of public burdens. The reform of the individual income tax system, as it was implemented through two Finance Acts in 2012⁶, intended to reinforce the *personal aspects* of the individual income tax system, which had faded over the last decades. To achieve this, the government's Finance Act drafts included some measures of financial efficiency, and others whose major *rationale* was rather symbolic.

I. A tax reform implementing a repersonalisation of the individual income tax system

A. The evolution of the concept of taxable capacity and of the object of taxation

First, the 2012 reform entailed an alignment of the tax treatment of capital income to the active income tax regime, as the former disparity of the tax treatment of these categories was considered to be unfair⁷. To this end, taxation of savings was unified with the tax regime of professional earnings. An important exception from this reform was made for capital gains from shares and property. Consequently, the option for a flat-rate levy in discharge (*prélèvement forfaitaire libératoire*), formerly optional for taxes on interest and

⁴ This percentage was first set at 60% (2005 Finance Act no. 2004-14, 30 Dec. 2005, article 74, *Official Gazette*, 31 Dec. 2004, p. 22459) then at 50% (2007 Law promoting work, employment and purchasing power, no. 2007-1223, 21 Aug. 2007, *Official Gazette*, 22 Aug. 2007, p. 13959, article 11) and finally was eliminated in 2011 (Rectifying 2011 Finance Act, no. 2011-900, 29 Jul. 2011, *Official Gazette*, 30 Jul. 2011, p. 12969, article 30) the elimination taking effect from 2013 onwards.

⁵ For a critical analysis of the various electoral suggestions, see D. Gutmann, La sous-imposition des particuliers et des entreprises: Un thème majeur de la campagne présidentielle. *JCPE*, 2012, no. 15, 433, pp. 710-714.

⁶ Rectifying 2012 Finance Act no. 2012-958, 16 Aug. 2012, *Official Gazette* no.0190, 17 Aug. 2012, p. 13479; 2013 Finance Act, no. 2012-1509, 29 Dec. 2012, *Official Gazette* no.0304, 30 Dec. 2012, p. 20859.

⁷ M. Collet, Chronique annuelle 2012 de droit fiscal, *RJEP*, April 2013, chron. 1. For a historical perspective on earnings and capital taxation in France, Ch. De la Martinière, Retour sur l'imposition du travail et du capital en France depuis la Révolution, *Droit Fiscal*, 2013, no. 9, 163.

dividends, would no longer be possible⁸. Reviewing the constitutionality of this article of the Finance Act, the Const. Court⁹ ruled it constitutional but refused to give a retroactive effect to this decision¹⁰.

This alignment of the tax treatment of capital-derived income and professional income, through an extension of the income subject to the progressive individual tax scale, marks a substantial change in the scope of the concept of taxable capacity¹¹. Furthermore, the alignment of tax treatment of the different categories of income can be interpreted as a landmark of the evolution of the *object of taxation*: it is no longer income, but the individual itself who is the object of taxation¹².

B. Outdated mechanisms serving the evolving object of taxation

The subsequent question is if the above-mentioned evolution towards a “repersonalization” of individual income taxation can be compatible with mechanisms such as the fiscal household (*foyer fiscal*). This mechanism implies that two or more persons can be considered as a unit for individual income tax purposes¹³. Indeed, it is not unanimously accepted that this unit is the pertinent level for locating consumption. Moreover, this mechanism disregards the growing need to individualise income from international activity, as the indifference of the allocation of income between spouses prevents the assessment of personal elements related to the creation of individual income.

⁸ Finance Act 2012-1509, 29 Dec. 2012, article 9, *Official Gazette*, no. 0304, 30 Dec. 2012, p. 20859.

⁹ In reference to the French *Conseil constitutionnel*, the term “Constitutional Court” instead of “Constitutional Council” will be hereinafter used without discussing the political or judicial nature of this institution. On this question, see: R. BADINTER, “Une longue marche: du Conseil à la Cour constitutionnelle”, *Nouveaux Cahiers du Conseil Constitutionnel*, No. 25, 2008, pp. 6-8 and P. WACHSMANN, “Sur la composition du Conseil constitutionnel”, *Jus Politicum*, No. 5, 2010, 34 p. [http://juspoliticum.com/uploads/pdf/JP5_Wachsmann_Cseil-constit_corr02-3.pdf]

¹⁰ Const. Court, no. 2012-662 DC, §41-44, *Official Gazette*, 30 Dec. 2012, p. 20966.

¹¹ E. de Crouy-Chanel, Fiscalité des personnes : chronique de l’année 2012, *Droit Fiscal*, 2013, no. 9, 165.

¹² *Loc. cit.*

¹³ This mechanism, accompanied by a partner/family splitting mechanism (*quotient conjugal/familial*) is followed by France, Luxembourg and Portugal, while the majority of other states assess the individual income tax on the level of the individual taxpayer (Assemblée Nationale, *Rapport no. 3779 sur le prélèvement à la source et le rapprochement et la fusion de l’impôt sur le revenu et de la CSG*, 13 March 2007, p. 139).

II. A repersonalisation of the individual income tax system without a correlative individualisation

A. A repersonalisation through an increase of tax progressivity

As regards the individual income tax mechanism, the 2013 Finance Act draft entailed a slight decrease of the family income splitting benefit (*quotient familial*)¹⁴, while at the same time it added one more income bracket on the individual income tax progressive scale, for income between 70.831 and 150.000 €, subject to a marginal rate of 45% (instead of 41%, which was the marginal individual income tax rate in 2012)¹⁵.

As regards the wealth tax (*impôt de solidarité sur la fortune*, ISF), the same Act neutralised the 2011 reform that had strongly reduced the progressive effect of this tax, with an aim to re-establish a substantially progressive scale, structured in five brackets. Wealth tax rates would now vary from 0,5% to 1,5%, the higher rate being applicable on property with a value higher than 10M €. However, the tax threshold has not been reviewed, remaining as high as 1,3M€, while, prior to the 2011 reform, threshold was set at 800.000€. The tax cap was set at 75% of available income. According to French scholars, this percentage should not be considered as a general rule to measure a confiscatory threshold applicable to other taxes¹⁶.

B. The “75% tax”: An unsuccessful tentative for individualisation

The public policy of repersonalising taxation should be appreciated conjunctively with the project of fusion of the progressive income tax with the flat-rate generalized social contribution¹⁷, and the implementation of the highly publicised “75% special tax” on very high earnings.

Among the suggested measures presented during the presidential election campaign, the idea of a “75% special tax” on very high income was highly publicised as one of the key suggestions in the socialist tax programme. The announcement of this purely symbolic measure, of a fiscal effect far smaller than the capital-derived income tax reform, entailed the creation of a new extraordinary tax, intended to be applied for two years, and affecting earnings over 1M€, taxed at a 75% rate.

¹⁴ 2.000€ per child, instead of 2.336€ in 2011.

¹⁵ Finance Act no. 2012-1509, Dec. 29, 2012, article 3, *Official Gazette*, no.0304, 30 Dec. 2012.

¹⁶ O. Fouquet, L'impôt confiscatoire est progressif, *FR Francis Lefebvre*, 3/13, 8.

¹⁷ For a critical analysis of this suggestion, J.-B. Geoffroy, Aux risques d'une révolution fiscale: la fusion entre la CSG et l'impôt sur le revenu, *Revue française de finances publiques*, 2012, no. 118, pp. 107-128.

A confusion in the announcement of the *rate* of this new special tax proved that legal reality and political considerations often diverge. Indeed, the 2013 Finance Act provided for a 18% flat-rate tax, applicable on a limited income base, but the political ambition to stress tax progressivity and fair allocation of the increased tax sacrifice prevailed in the announcement of a 75% tax.

The new tax aimed very high professional earnings, capital-derived income exempted. The establishment of this particular base could be interpreted as the expression of the legislator's intent: the aim was not to assess the global taxable capacity of the individual taxpayer, but to prevent, through high dissuasive taxation, very high earnings as being *immoral*. Therefore, the measure could not be qualified as promoting an equal discharge of public burdens: it is clear that capital-derived income, exempt from this special tax, is not only connected to a higher taxable capacity than professional earnings, but usually is the core of very high income. The introduction of a deterrent special tax applicable on a category of income related to a limited taxable capacity could only be qualified as an eventually justified exception from the equal discharge of public burdens¹⁸. One could also argue that the legislator's choice to ignore the fiscal household mechanism in the establishment of the new tax could mark and evolution in the individual taxable capacity apprehension, compatible with the above-mentioned trend of individualisation.

Reviewing this mechanism, the Const. Court ruled it unconstitutional, in that it introduced a breach in equality between fiscal households. The following example could highlight the problem: Given that the individual income tax is calculated on the basis of the fiscal household, a married couple with one partner earning 1,1M€ and the other partner 100.000€ (fiscal household income: 1,2M€) would be subject to the tax, but a couple in which each partner would earn 950.000 € (total fiscal household income: 1,9M€) would be tax exempt.

Taking into account the political consequences, the Const. Court ruled the mechanism unconstitutional on the grounds of the disregard of the fiscal household principle. This ground seemed to be legally secure and politically anodyne. In fact, the inconsideration of the fiscal household in the implementation of taxes, which in the opinion of the Court was not a new special tax but an extension of the individual income tax system, neglected the individual taxable capacity. One should also observe a statement of the same

¹⁸ E. de Crouy-Chanel, *op. cit.*

Court back in 1981, reaffirming that the fiscal household is the income holding centre, after which individual resources and charges are calculated¹⁹.

In sum, the decision brought no definite answer on the constitutionality of the rate of the “7.5% tax” and on the threshold over which this tax should be considered as excessive or confiscatory. However, a study of other points of this decision, combined with previous decisions of the Const. Court²⁰ can be of help in order to shed some light to those questions.

III. The evolving scope of the control of the Constitutional Court in tax matters

A. *Controlling the adequacy of the method of implementation of a tax mechanism with respect to the aim it serves*

The Const. Court is generally reluctant to strike down legislation on the ground of a breach of the *substantive* right to equality, and usually it is the *procedural* equality challenge that is more likely to prosper²¹. This is a logical consequence of the allocation of powers between the legislator and the constitutional judge. Indeed, “the Constitutional Council does not have the same general power of appreciation and decision making as that of the Parliament”, a statement repeated by the court in the past through its decisions.

As reminds the Court, the appreciation of the individual taxable capacity is of the competence of the legislator; in order to avoid a breach in equality regarding public burdens discharge, his appreciation should be based on rational and objective criteria consistent with the *rationale* of the mechanism²². Thus, while designing and drafting tax statutes, the legislator should have in mind that they should be consistent with the *aims* they serve and with the *tax system* in which they intend to operate. The Court’s appreciation is hence restricted to the control of rationality and proportionality of the method that the legislator chooses in order to implement public policies and that the method chosen should respond to objective and rational criteria serving the legislator’s intent.

¹⁹ Const. Court, no.81-133 DC, 30 Dec. 1981, Recueil [Decisions of the French Constitutional Court, hereafter Rec.] p. 41; A. Mangiavillano, Inconstitutionnalité de la “taxe à 7.5%”: chronique d’une inégalité, *Rec. Dalloz*, 2013, p. 19.

²⁰ D. Gutmann, L’impôt confiscatoire au sens de la décision du Conseil constitutionnel no.2010-662 DC du 29 décembre 2012, *Option Finance*, no. 1204, Jan. 14, 2013.

²¹ See for example the Const. court decision declaring discrimination between taxpayers on proof matters connected with administrative taxation non compatible with the Constitution for breach of equality, Const. Court, no.73-51 DC, 27 Dec. 1973, Rec. 25, comm. L. Favoreu, L. Philip, *Les grandes décisions du Conseil constitutionnel*, Paris, Dalloz, 2009, 15th ed., pp. 222-242.

²² G. Eveillard, L’exigence de critères objectifs et rationnels dans le contrôle de l’égalité devant l’impôt par le Conseil constitutionnel, *Petites Affiches*, 28 Jan. 2000, p. 8.

In this specific context, the Const. Court can appreciate if the value that the legislator set as the tax threshold for the “75% tax” responded to an objective and rational criterion. Even if the criterion (1M€) could be considered as justified in the first place, the potential existence of a deficit of the other spouse would neutralise the global income of the household, which is the income-holding unit. Therefore, this could introduce a breach of the equal discharge of public burdens. However, the probability of such a breach is small, as the deficits are normally assessed by income category on the level of the individual income of each spouse, and are not deducted from the global fiscal household income.

The Dec. 2012 decision marks an extension in the Court’s control. This extension has been qualified by part of the French scholars as a judicial redesign of the empowerment of the Court and of the Parliament²³. This evolution originates in the 1980s decisions of the Court and could be anticipated after the 2009 decision on carbon tax²⁴. In this case law, the Court rejected the statute implementing the carbon tax because the numerous exemptions implemented by the bill resulted in 93% of the carbon-emitting industry being exempt from the mechanism. In the opinion of the Court, this rendered the method of implementation of this tax inconsistent with the aim to counter global warming.

B. Controlling the mechanism’s consistency with the system it integrates

This method has been used by the Court in order to rule unconstitutional the “75% tax”. This tax, targeting professional earnings higher than 1M€ was in the opinion of the Court qualified as an extension of the individual income tax system²⁵, and therefore should be rejected as inconsistent with the system’s philosophy. If this mechanism was an extension of the individual income tax, it should logically apply to the fiscal household and not to the individual taxpayer. As explained above, if the application of the tax on the individual level would be applied individually, the special tax would create a breach of equality between households. So, apart from the appreciation of the mechanism with respect to the legislator’s aim, the Court also reviews the measure’s rationality with respect to the system it integrates.

However, the government’s aim was not to alter the individual income tax regime but to create a new tax²⁶. Therefore, the Court’s reasoning, qualifying

²³ M. Collet, *op. cit.* 2013, chron. 1.

²⁴ Const. Court, no. 2009-599 DC, 29 Dec. 2009, Rec. p. 218.

²⁵ Const. court, no.2012-662 DC, §71.

²⁶ M. Collet, *op. cit.* 2013, §19. The aim is explicitly mentioned in the Government’s observations submitted to the Const. Court for the review of article 13 of the Finance Act project (published together with dec. no.2012-662 DC on the Court’s website).

the special income tax as part of the individual income tax mechanism, inseparable from it, is hardly compatible with the statute's structure: conceived to be applied for two years, the tax was set on a limited income base, targeting different taxpayers and aiming to discourage excessive earnings. Thus, it was not meant to apply an extra contribution over the fiscal household's taxable capacity.

C. Restricting the latitude of the legislator defining tax rates

The French Constitution empowers the legislator to define all aspects related to the base, rates and methods of collection of all types of taxes²⁷. The question is whether the respect of other constitutional provisions, such as the right to property, may limit the legislator's latitude to define tax rates.

The constitutional protection of the right to property is provided in articles 2 and 17 of the 1789 Declaration of Human Rights. Applications for constitutional review based on these articles and aiming to limit the Parliament's power had no success in the past. In fact, the right to property is not of autonomous interpretation and application: a systematic approach shows that the general logic of the Declaration entails limitations to that right, derived from other articles. Indeed, article 4 explicitly establishes the legislator's power to set limits on those rights and article 13 institutes the possibility of tax levies in order to ensure public expenditures.

Nonetheless, the Court has admitted in the past that the principle of equality in relation with public burdens can be challenged by taxes qualified as confiscatory or excessive. If that is the case, the legislator should stay beneath the confiscatory or excessive tax threshold while exercising his power. It is this kind of consideration that triggered the implementation of the "tax shield" mechanism, capping the individual tax pressure at a level considered as reasonable. Determining the tolerable level of taxation is, of course, a delicate operation. Such a task is connected not only with the definition of rates but requires a broader discussion on the tolerable tax pressure. The answer to those questions entails the consideration of economical, philosophical and political aspects; naturally, all these aspects are assessed subjectively. The level of the tax cap is a highly political issue and usually courts are reluctant to enter into this kind of considerations²⁸.

These political questions tend to take a legal character in the Const. Court's case law, however. For the Court, the equal discharge of tax burdens consideration justifies an extension from a *consistency* test to a much larger

²⁷ French Constitution of 1958, article 34.

²⁸ R. Ergec, Taxation and Property Rights under the European Convention of Human Rights, *Intertax*, 2011, no. 87, pp. 2-11.

proportionality test. Admitting in the late 1980s that a tax rate can have confiscatory character, the Court accepted to control not only the tax rate but also the combined effect of the reviewed tax with other taxes on the same income in order to assess the marginal global tax rate²⁹. Subsequently, the Court usually either invoked the legislator's competence to define the level of taxation or gave no special justification in rejecting the challenges alleging the confiscatory nature of the tax. Distinguishing confiscatory from excessive taxation, but without a clear explanation of that difference, the Court tries to forge a *confiscatory tax concept* while reviewing the various wealth tax projects³⁰.

IV. Forging the limit of the tolerable global tax pressure

A. Establishing a wealth tax capping principle

Even if the French wealth tax has relatively low rates and quite a restricted tax base, exempting various categories of income, the confiscatory effect of this tax has often been brought into discussion. The base for this tax is the taxpayer's property, while income and especially available income are not taken into account for the assessment of the tax. As a matter of fact, taxpayers with considerable property but without any income can be obliged, in extreme cases, to renounce their property in order to deal with tax debts.

In order to limit this effect and to link the wealth tax burden to the available income of taxpayers, the wealth tax maximum amount was associated with the previous year's global tax pressure. However, the chosen capping method treated unequally taxpayers possessing property of equal value but income of different amount³¹. Wealth tax capped at 85% and 70% of the previous year's income in 1988 and 1995. The "tax shield" introduced in 2005 limited the cap at 60% in 2006 and 50% in 2007, the major difference being that the new capping mechanism concerned not only the individuals subject to pay the wealth tax, but was extended to all taxpayers. However, this mechanism was repealed in 2011 together with the wealth tax reform that limited the taxable base and lowered the rates for this tax.

²⁹ Const. Court, no. 85-200 DC, 16 Jan. 1986, Rec. p. 9, comm. Y. Gaudemet, Une nouvelle dimension du principe d'égalité devant la contribution publiques? *Droit social*, 1986, p. 372.

³⁰ M. Collet, *op. cit.*, 2013, §26.

³¹ M. Collet *op. cit.* 2013, § 34.

B. Finding a tax capping mechanism as of constitutional value

The Const. Court's initial consideration that the target of the wealth tax was property-derived income³² had as a logical consequence that property as such should be exempted from the levy. This view evolved substantially when the Court stated that the wealth tax base was set on the taxable capacity that the property possession involves³³, which, in other words, means that the wealth tax base cannot be limited to income-productive property. Here again, the assumption that wealth tax levies can concern values other than income raised new discussion on the confiscatory nature of this tax.

The recognition that wealth tax was related with a taxable capacity linked to property possession *as such*, and not only to the property-derived income possession, was followed in Aug. 2012 by an acknowledgment of the existence of a *constitutional principle of global individual tax cap*³⁴. This acknowledgment echoes the "constitutionalisation" of a legislative practice concerning the individual income tax progressive nature³⁵: in reference to the 1988 legislative practice of linking the wealth tax statute with a capping mechanism, the Court induced that tax progressivity is inextricably connected to a global tax pressure cap on the taxpayer's income, and that the legislator should imperatively

³² Const. court, 81-133 DC, 30 Dec. 1981, reviewing the 1982 Finance Act, Rec. p. 41; Const. court, no.98-405 DC, 29 Dec. 1998, reviewing the 1999 Finance Act, Rec. p. 326, *Droit Fiscal*, 1999, no. 1, comm. 1.

³³ Const. Court, no.2010-44 QPC, 29 Sept. 2010, *Époux Mathieu*, Rec. p. 259 ; note O. Fouquet, *Droit fiscal*, 2010, no. 42-43, 398 ; E. de Crouy-Chanel, A.-S. Le Bris, La décision no.2010-44 QPC du Conseil constitutionnel : réflexions sur la notion de faculté contributive, *Droit fiscal*, 2011, no.9, 230 ; M. Collet, Chronique annuelle 2010 de droit fiscal, *RJEP*, 2011, no. 685, chron. 1 ; M. Collet, La question prioritaire de constitutionnalité en matière fiscale, *RJEP*, 2011, no. 690, 5.

³⁴ Const. Court, no. 2012-654, 9 Aug. 2012, *Official Gazette*, 17 Aug. 2012, p. 13496.

³⁵ Reference is made particularly to the Const. Court's decision reviewing the creation of a "socialised general contribution" (*Contribution sociale généralisée*, CSG), in which the Court recognizes that the CSG is of tax nature: Const. Court, no.93-320 DC, 21 June 1993, Rec. p. 146; X. Prétot, Le principe de progressivité de l'impôt sur le revenu revêt-il un caractère constitutionnel? *Dr. Soc.* 1993, no. 9-10, p. 787.

On the constitutional nature of the principle of progressive taxation, see E. de Crouy-Chanel, Progressivité et personnalisation de l'impôt, *Droit fiscal* 2008, special issue: *L'Année fiscale*, 1; D. Gutmann, De la progressivité de l'impôt sur le revenu à la *flat tax* : une tendance inéluctable?, *Droit fiscal* 2008, special issue: *L'Année fiscale*, 2. More recently, it has been stated (Const. Court, no.2011-638 DC, 28 July 2011, official comm., p. 18), that the Court has never established the individual tax progressivity as an autonomous principle or that it has solemnly acclaimed it as a fundamental principle recognized by the laws of the Republic. In fact, under article 62 of the Constitution, the Court's decisions are binding for public authorities including the Court itself. On the interesting theoretical discussion regarding the question if the Const. Court decisions are binding for the Court itself, see E. Millard, Le Conseil constitutionnel opère-t-il des revirements de jurisprudence? *in* : B. Mathieu, M. Verpeaux (eds.) *L'autorité des décisions du Conseil constitutionnel*, Paris, Dalloz, 2010, pp. 89-98, arguing that the binding effect does not extend to a *precedent* effect, and the Court is not obliged to follow past decisions but only to respect the previous reasoning. *Contra* : Th. Di Manno, Les revirements de jurisprudence du juge constitutionnel, *in* : *Cahiers du Conseil constitutionnel*, 2006, no. 20, pp. 135-149.

introduce such a mechanism if the 2012 wealth tax scale was to be validated in review. The legislator responded to that in the 2013 Finance Act.

C. Implementing a global tax capping mechanism

According to the French government, global tax pressure (individual income tax, wealth tax and generalized social contribution) should cap at 75% of the taxpayer's income³⁶. Reviewing the Rectifying 2012 Finance Act project, the Court rejected the inclusion of *potential* income in the wealth tax base, as it disregarded taxable capacity, given that the targeted income was either virtual or inexistent because of economic reasons. As a consequence of this decision, wealth tax can hereafter be applied only on *available* income, which, in the Court's wording, is not limited to property-derived income.

The existent tax breaks for supplementary retirement mechanisms known as "top-hat" pension plans together with "golden parachutes" for retiring CEOs had been discussed during the 2012 presidential election campaign. In order to deter this scheme in the future, the 2013 Finance Act project increased the *combined marginal tax rate* (i.e. the combined highest rates of all taxes applied on the same income) on these top-hat pensions plans. While reviewing the new marginal 45% rate, the Const. Court rejected the increase regarding the top-hat pensions as unconstitutional.

Indeed, the reviewed statute³⁷ created a new marginal tax bracket for the portion of income over 150.000€, subject to a 45% tax rate, affecting the individual income tax starting 2013 onwards. Challenge against this measure was an unequal discharge of public burdens and a confiscatory effect for income from "top-hat" pension plans, already subject to levies of article L.137-11 and 137-11-1 of the Social Security Code.

The grievance of an *unequal discharge of public burdens*³⁸ was rejected, as the Court held that the 45% new tax bracket is in harmony with the progressive structure of the French tax system and that it does not lay an excessive burden introducing a breach in equality to tax burdens. Regarding the grievance of a *confiscatory effect* for the 45% bracket on top-hat pensions, earlier in 2012 the Court had accepted to appreciate the individual taxable capacity with respect to the global tax charge through a joint consideration of various taxes incumbent on taxpayers³⁹. In the December decision, the Court indicated the limits of this combined tax consideration, rejecting to take into

³⁶ Rectifying 2012 Finance Act no.2012-1509, Dec. 29, 2012, *Official Gazette*, 30 Dec. 2012, p. 20859, article 13, modifying article 885 V *bis* of the General Tax Code (*Code general des impôts*, hereafter GTC).

³⁷ Article 3 of the 2013 Finance Act, modifying article 197 §1, 1, of the French GTC.

³⁸ For an overview of the application of the principle of tax equality in France, Ph. Marchessou, France, in G. Meussen (ed.) *The Principle of Equality in European Taxation*, The Hague/London/Boston, Kluwer Law International, 1999, pp. 75-88.

³⁹ Const. Court, no.2012-654 DC, 9 Aug. 2012, §32, Rec. p. 461.

account employer charges on the top-hat pensions. The fact that this charge is a burden to the employer does not allow it to be added to the pension for the appreciation of the individual taxable capacity⁴⁰.

Therefore, the joint consideration of the various taxes incumbent on these pensions showed that the maximum tax rate for the marginal portion of pensions over 24.000 € was as high as 75,34%: indeed, the combined marginal tax rate on this income consisted of the 45% income tax rate, the 4% special tax on very high income⁴¹, the 6,1% *generalized social contribution* (CSG), the 0,5% social debt repayment contribution (*contribution pour le remboursement de la dette sociale*, CRDS), the 21% salary contribution (14% in 2011)⁴², plus an extra 0,3% contribution⁴³. Those taxes added together resulted in a 75,34% combined marginal tax rate on pensions higher than 24.000€ per month. The Court considered this tax rate excessive and therefore contrary to the equal discharge of public burdens.

V. Assessment and scope of the non-confiscation threshold

A. *The importance of a global assessment of taxable capacity*

Reviewing the top-hat pensions tax scheme, the Court rejected it as unconstitutional not because of a breach in equality provoked by the measure itself, but because of its *global effects*. As it was possible to partially reject the individual income tax increase, just for the top-hat pensions, the Court elaborated reasoning, under which a global appreciation of the taxable capacity implies the need to review a law already enacted, if the law under review is in any way modifying, completing or affecting the other law's domain⁴⁴. From that perspective, and having considered that the combined rate of various taxes was excessive, the Court decided to *incidentally* review and finally eliminate the part of article L.137-11-1 of the social security code which established the upper tax bracket, in order to finally declare constitutional article 3 of the deferred Finance Act. Thus, the increase from 14% to 21% of the marginal tax rate for the special contribution on top-hat pensions, which had been enacted in 2011, was eliminated while reviewing the 2013 Finance Act. This brought the combined marginal tax rate on this income to 68,34% instead of 75,34%,

⁴⁰ Cons. Court, no.2012-662 DC, §18.

⁴¹ Special tax on high income, article 223 *sexies* of the GTC codifying article 2 of the 2011-1977 Finance Act of December 28, 2011, *Official Gazette*, December 29, 2011, p. 22441. The contribution was implemented as a temporary mechanism, intended to last until the public deficit is reduced to zero (article 2IIIA of the same Act).

⁴² Article L.137-11-1 of the Social Security Code.

⁴³ Article L. 14-10-4 of the Social Action and Families Code in its modified version after article 17 of 2012-1404 of 2013 Social Security Financing Act.

⁴⁴ Consistently held position since the 85-187 DC decision of 25 Jan. 1985, §10, confirmed in the decisions 2012-654 DC §83 (review of the 2012 Rectifying Finances Act) and 2012-659 DC (review of the Social Security Financing Act for 2013) §14-15 and finally §20-21 in the decision 2012-662 DC.

which means that, at least for this category of income, the *acceptable tax rate* is situated somewhere in the middle of those two rates⁴⁵.

B. The relative effect of the confiscation threshold appreciation

Can the other tax rates' review be of any help for setting the confiscatory tax rate threshold? The lesson from the top-hat pensions review is that the confiscatory character of a specific tax is to be appreciated *globally*. However, can this globally-determined confiscation threshold be used as a benchmark for all taxes? The Court's case law does not allow such a deduction. The 75% rate of top-hat pensions was ruled excessive, whereas tax pressure for stock-option gains and bonus shares gains should cap at 68,2%, while a total 75,5% tax charge on anonymous bonds was considered as acceptable.

In fact, the Court rejected the increase of the tax contribution on gains from stock-options and bonus shares as introducing a breach in equality⁴⁶. The 2013 onwards submission of this category of income to the individual income tax rate resulted in a combined marginal tax rate of 72% / 77% (depending on the shares' holding period), the 45% individual income marginal tax rate, the 4% special tax rate, social levies being added to the rate of the new salary contribution which was under constitutional review⁴⁷. The revised rate for the salary contribution was rejected, as, in the opinion of the Court, the combined marginal rate was excessive, so, for 2013, the acceptable combined marginal tax rate on capital-derived income should remain at 64,5%, which is the 2012 level.

As regards *anonymous bonds*, which the legislator had also decided to treat unfavourably because of their negative effect on public revenue, the possible options were either to prevent through dissuasive taxation, or to simply prohibit through a non-tax statute. The French legislator chose the first option: the 2013 Finance Act project intent to increase the flat-rate levy in discharge amount from 60% to 75% for this category of income would result in an evolution of the combined marginal tax rate for this category of income from 75,5% to 90,5%, social contributions taken into account. The Court ruled this 15% increase unconstitutional because it resulted in an excessive tax charge. The dissuasive aim fixed by the legislator was not taken into account in this reasoning⁴⁸.

Given the above considerations, it seems that there is no *absolute* threshold over which a tax rate is considered confiscatory⁴⁹. Criteria differ from

⁴⁵ D. Gutmann, *op. cit.* 2013; M . Collet, *op. cit.* 2013.

⁴⁶ Const. Court, no.2012-662, §81.

⁴⁷ 2013 Finance Act Draft, article 11, §II, D, 2 implementing a modification of article L.137-14 of the Social security code.

⁴⁸ Const. Court, no.2012-662, 29 Dec. 2012, §101.

⁴⁹ D. Gutmann, *op. cit.*, 2013.

one case to another depending on the answer to the question whether the reviewed rate is applicable to the *whole* income (this is the case of the rejected 68,2% rate applicable as of the first euro on gains from stock-options and bonus shares) or to *part* of it (this is the case of the rejected 75,5% rate, applicable on pensions higher 24.000€ per month)⁵⁰. Confiscation threshold considerations are of *relative* effect. No single confiscatory tax rate exists, and the only certainty is that the legislator's latitude to set tax rates is larger for *marginal* tax rates than rates applicable as of the *first euro* of income. On the aftermath of the 2012 Const. Court's decisions, a 75,5% marginal tax rate on top-hat pensions is confiscatory, whereas the confiscatory rate threshold is set at 68,2% for capital-derived income.

With respect to the wealth tax marginal rate, applicable on the portion of income higher than 10M €, the relatively narrow tax base was considered jointly with the relatively low tax rate in order to rule the new 1,5% rate constitutional⁵¹. Combined tax considerations come in mind once again, as this narrow wealth tax base coexists with the increased capital-derived income taxation in the 2013 Finance Act.

C. Methods of assessment of the confiscatory effect of taxation

Equality in relation with tax burdens is connected to an aim of tax justice. This idea would logically be linked to a global assessment of the level of tax pressure⁵². However, up to now, tax legislation and theory generally considered taxable capacity separately for each tax⁵³. This method implies that taxable capacity differs from one tax to another. This view seems to evolve, given that now the Court operates a conjunctive appreciation of taxes applicable on the same income and payable by the same taxpayer in order to consider an eventual confiscatory effect⁵⁴. From a tax justice point of view, this evolution seems reasonable.

A global appreciation of an individual's taxable capacity requires taking into consideration an important number of elements. From that perspective, not only tax rates, but also particular tax base aspects, such as allowances, reductions and exemptions, should be considered. However, in the Const. Court's case law, the appreciation is based only on the reviewed taxes' marginal

⁵⁰ Const. Court, no.2012-662 DC, official comm., p. 19.

⁵¹ Const. Court, no. 2012-662 DC, §91.

⁵² Y. Brard, *Égalité devant l'impôt et égalité devant les impôts* (comm. on Const. Court, no.97-390 DC, 19 Nov. 1997), *Rec. Dalloz*, 1998, p. 117; B. Castagnède, *Le contrôle constitutionnel d'égalité fiscale*, *Petites Affiches*, 2001, no. 86, p. 4.

⁵³ The Const. Court explicitly considers that the legislator takes in account taxable capacity with regard to *each tax's* characteristics: Const. Court, no.2000-437 DC, 19 Dec. 2000, §7, Rec. p. 190.

⁵⁴ Const. Court, no.2012-654 DC, 9 Aug. 2012, §32; Const. Court, no.2012-662 DC, §18.

rates, combined with the marginal tax rates incumbent on the same income payable by the same taxpayer.

It goes without saying that the major advantages of the *marginal* rates' appreciation method are simplicity and certainty, two elements always desired in tax matters. Moreover, this method highlights the percentage that actually serves to pay taxes over a certain level of earnings. Thus, as points out Prof. Collet, if tax-capping mechanisms are justified by considerations linked to the equal discharge of tax burdens, it would seem more appropriate to appreciate not *marginal* but *average* tax rates⁵⁵. In other words, the elimination of any confiscatory effect calls for a measure of tax pressure on the part of income that *mainly* serves for the payment of taxes. It is reasonable to consider that it is *average* and not marginal tax rates that are relevant to this perspective. This kind of consideration existed in the wealth tax capping mechanisms, where a maximum effective tax rate is set by statute, and in case the overtaxation threshold was passed, it triggered the administration's duty to refund the amount of tax paid in excess.

VI. An assessment of the confiscatory effect of taxation that neutralises the tax instrument's purpose

The Court's usual method in implementing the equality principle requires an analysis of the statute's object and aim, followed by the statement that the legislator fulfils a specific public interest objective, neutralising any *purpose* control, with an exception for retroactively applied statutes. Reviewing the 2013 Finance Act, the Court seemed to move towards a more *neutral* approach on the role of taxation, which resulted in ruling unconstitutional tax statutes whose aim were not the increase of tax revenue, but economic regulation through dissuasive taxation.

The *rationale* of the top-hat pensions high tax rate was only to discourage companies from paying such excessive pensions, given that the correlative profit of the measure for the state budget was extremely low (the number of individuals receiving a pension higher than 24.000€/month is limited). Similar considerations justified the anonymous bonds' tax increase or the wealth tax cap base modulation in order to prevent schemes through which taxpayers would try to abuse of the cap mechanism. Those are examples in which the legislator intends to eradicate a practice and chooses *discouragement* through taxes over *prohibition*, introducing mechanisms where the individual's taxable capacity is not in the foreground.

⁵⁵ M. Collet, *op. cit.* 2013, § 51.

Ruling unconstitutional the aforementioned statutes, the Court stated that the mechanisms in question either had no connection with the individual's taxable capacity⁵⁶ or were excessive with respect to that capacity⁵⁷. Thus, the Court refuses to see that taxation has developed functions other than financing public expenditures (article 13 Declaration 1789), such as economic regulation⁵⁸: fighting tax evasion, environmental protection, regional development, fighting inflation, boosting consumption, encouraging savings, which also serves a public interest purpose⁵⁹.

However, in the decision on the 2013 Finance Act, the Court refused to take into account such public interest objectives as elements that could outweigh the taxable capacity argument. Thus, it seemed to embrace some logic in which excessive taxes can't be justified for any reason. The subsequent question is: if taxation has a limited usefulness, what other instruments can the legislator implement in order to prevent harmful behaviour or practices, besides simple prohibitions? We have no answer to that question. However, despite the very high-income special tax being ruled unconstitutional, the government insisted in keeping a measure that was, by its own statement, mainly symbolic.

A. The latitude in drafting a new mechanism targeting very high earnings with respect to constitutional constraints

Given that the French Government acknowledges that the present financial situation requires an extra effort from the wealthier families, a reorganisation of this effort is currently under discussion⁶⁰. In order to avoid legal obstacles on this new draft and in order to respect the constitutional framework regarding the exercise of normative powers in the field of taxes⁶¹, the government requested the opinion of the French Supreme adm. Court (*Conseil d'État*), acting in its advising function⁶².

⁵⁶ Const. Court, no.2012-662 DC, § 95.

⁵⁷ Const. Court, no.2012-662 DC, § 19, § 51, § 81.

⁵⁸ G. Orsoni, Brèves remarques sur l'utilisation de l'instrument fiscal, in M. Leroy (ed.), *Regards croisés sur le système fiscal: Allemagne, France, Italie, Russie*, Paris, L'Harmattan 2005, pp. 135-153.

⁵⁹ B. Castagnède, Nature et caractères du droit fiscal, *L'Année Fiscale*, 2007, (supplement to *Droit Fiscal*, 2007, no. 25) pp. 23-25.

⁶⁰ Minister of Finances, Answer to the formally submitted question no.16008, *Official Gazette*, 13 March 2013, p. 2832.

⁶¹ Under French law, the government has an exclusive initiative with respect to Finance Act drafting. See B. Ducamin, Les contraintes constitutionnelles dans l'élaboration de la loi fiscale *EDCE*, 1995, p. 483-510. Also : Conseil d'État, *Guide pour l'élaboration des textes législatifs et réglementaires*, La Documentation française 2007, 2^e éd., 549 p.

⁶² Historical reasons have made that the *Conseil d'État* has a double function in the French legal system. Before being recognized as the jurisdiction empowered to *review* the legality of administrative action (law of 24 May 1872) the Court was, since its creation in 1799, the "State's Council" as *Conseil d'État* literally means. Having preserved this role, it is *co-author* of laws, as it participates in the law drafting and consults the government on law design (article 39,

In fact, the *Conseil d'État* has the power to advise on the design and drafting of norms of any legal value⁶³, constitutional revisions included. Apart from the legal substance and the form of the submitted project, its opportunity is also taken into account. The opinions' scope is wide, as chances for a decision ruling the new provision unconstitutional are also taken into consideration together with any other judiciary control that could prevent the statute's applicability. So, the advice of the *Conseil d'État* is not a mere control of legality, but is a search for the *optimal solution*.

Having already been consulted on the 2013 Finance Act draft (opinion not published)⁶⁴, the Supreme adm. Court had not foreseen the unconstitutionality ruling for the "75% tax". In fact, the qualification of the reviewed mechanism as an extension of the individual income tax system was not foreseeable, as we have above explained that the government's aim was to create a temporary mechanism, subject to a totally different regime from the individual income tax⁶⁵.

In the aftermath of the Const. Court's decision, the Minister of Finance asked the Supreme adm. Court the conditions under which a contribution on very high income, similar to the one ruled unconstitutional in December, would pass the constitutionality test. The opinion of the Court's finance chamber was submitted to the government on 21 March 2013⁶⁶ and the government decided to render it public. On the one hand, this publicity reinforces the idea that any choice, most probably embodied in the 2014 Finance Act draft, would be made in compliance with constitutional principles. On the other hand, it neutralises political responsibility in case this project is finally abandoned.

The opinion, drawing all the conclusions from the aforementioned Const. Court decisions, can be summarised in the following points: the combined marginal income tax rate of any tax should be no higher than

Constitution of 1958; article L. 112-1, Administrative Justice Code). The Court has even the competence to suggest to the authorities, on its own initiative, reforms for laws, regulations or administrative provisions.

⁶³ Y. Gaudemet, B. Stirn, T. Dal Farra, F. Rolin, *Les grands avis du Conseil d'État*, Dalloz, 2008, 3rd ed., p. 39. In the 2012 opinions regarding the introduction of the 4% special tax for high income and the elimination of the tax shield mechanism, the Court considered the constitutional framework together with the constitutional court's decisions in its opinion: Conseil d'État, *Rapport public 2012, Activité juridictionnelle et consultative des juridictions administratives*, La Documentation Française, 2012, pp. 244-251.

⁶⁴ The opinions of the Court are secret. The opinions' secrecy is at the disposal of the authority that requested the opinion, which can decide to render it public. Publication can be either spontaneous or a result of the suggestion made by the Court, measuring the importance and the opportunity of such a publication. See Y. Gaudemet, B. Stirn, T. Dal Farra, F. Rolin, *op. cit.*, p. 50.

⁶⁵ Observations of the French government, pp. 9-11, published together with the Const. Court's decision 2012-662 DC, available on the Court's website.

⁶⁶ Opinion released to the public by the French Ministry of Finance together with a press release, no. 490, 22 March 2013 [www.economie.gouv.fr/presse/communiqués].

66,66%; the special tax should be applied to the whole income and not only to earnings, and calculated by reference to the fiscal household and not individual taxpayers. The Court was very careful in formulating its answer in which it expresses reserves with respect to the mechanism in question. The opinion is structured in three steps, following the questions submitted by the government:

1 – The first question was related to the *adequate tax base* for a new special tax, and more specifically if this base could be limited to professional earnings or, on the contrary, it should be extended to all income subject to the individual income tax. The Court stated that the government’s aim to tax very high professional earnings with a new mechanism should respect the individual taxable capacity, as highlighted the Const. Court’s decision 2012-662 DC.

The Court admits that the fiscal household method disregards the allocation of income between couple partners, and hence prevents the accomplishment of the government’s aim to tax beneficiaries of very high earnings. However, given the importance of the fiscal household for the individual income tax, the Court adds that the choice to maintain the tax threshold at 1M€ for the fiscal household will result in taxing earnings lower than 1M€ in dual-income households. At the same time, if the threshold is set at an amount higher than 1M€, the switch to the fiscal household will result, for households with only one working parent, in a tax exemption of individual earnings between 1M€ and the threshold.

Given the above, the Court considers that the government’s aim *cannot be served* by such a tax, at least as regards professional earnings. If the aim to tax high earnings remains, a solution could be to set a tax mechanism not on the fiscal household but *on the source* of such payments. Practically, this could be implemented in the corporate level, either by preventing the deductibility of the part of salaries exceeding 1M€ from the corporate taxable result or by taxing that part of payment with a special contribution. The Court gives the example of the special contribution applied on bonus payments made by credit institutions in 2009: the portion of this kind of payment, which was higher than 27,500€ per employee, was subject to a 50% contribution for the 2009 tax year⁶⁷.

2 – The second question concerns mainly the *adequate rate* for the special tax, and, in particular, if a 18% rate can be held. The government wanted to know if capital-derived income and income subject to heavy taxes

⁶⁷ 2010 Rectifying Finance Act, no. 2010-237, 9 March 2010, article 2, imposing a 50% special contribution on bonus payments for 2009, *Official Gazette*, 10 March 2010, no.0058. The levy was deductible from the corporate tax (see the Project for this Act, no. 2239, p.146).

should be treated in a particular way, and finally if a spouse/family income splitting mechanism should be joint to the new tax. Foreseeing the constitutionality test, the Supr. Court considers that it would be unlikely that the Const. Court accepted a tax base limited to earnings as rational and objective, in regard to the national solidarity purpose, which was the aim that the legislator had fixed as a *rationale* for the special tax⁶⁸. In fact, disregarding the global taxable capacity would create a breach in equality with respect to public burdens between taxpayers and therefore, the tax base should be extended to all income possessed by the subject to the tax.

The Court also suggests that before drafting one more new mechanism, the government should not disregard the existence of another contribution added on top of the individual income tax regime already, i.e. the special tax of article 223 *sexies* GTC⁶⁹, applicable for a limited period on the income of the fiscal household. If no other reason than the *efficiency* justifies the aim for a new special tax, the Court recommends preferring a review of the individual income tax scale or of the aforementioned special tax, through the creation of more income tax brackets or the increase of existent rates, to the creation of a new tax. Adding an extra burden to the already complex French tax legislation is not justified by a public interest reason⁷⁰.

As regards the appreciation of the *confiscatory effect*, the Supreme adm. Court follows the Const. Court considering that the combined marginal income tax rate could not exceed 2/3, regardless of the income source. Thus, any tax rate resulting in an excess of that percentage could be rejected as confiscatory or excessive as it introduces an unequal discharge of public burdens. In this context, the Court reminds that marginal tax rates higher than 2/3 on stock-option gains and bonus shares gains, affecting single taxpayers with a 150.000€ income⁷¹, have been ruled unconstitutional. It continues by stating that a 72% cap should be respected when the combined marginal tax rate can exceptionally exceed 2/3 for very high income⁷² or for specific categories of income such as anonymous bonds⁷³.

The Court considers the wealth tax rate is not to be taken into account for the appreciation of the combined marginal tax rate. Referring to the Const. Court's decision *Époux Mathieu*⁷⁴, the Supreme Court stresses that the wealth tax is not a tax on capital-derived income but a tax on capital as such. In other words, the targeted taxable capacity for this levy is connected to property possession as such and not to income possession. The fact that the Const.

⁶⁸ Opinion, pp. 2-3.

⁶⁹ Article 223 *sexies* of the French GTC, above note 41.

⁷⁰ Opinion, p. 3.

⁷¹ Const. Court. no. 2012-662 DC, §81.

⁷² *Ibid.*

⁷³ Const. Court, no.2012-662 DC, §51.

⁷⁴ Const. Court, no.2010-44 QPC, 29 Sept. 2010, *Époux Mathieu*, §11, above note 33.

Court took into account the tax increase on capital-derived income in order to validate the new wealth tax scale is not altering this appreciation in the opinion of the Supreme court.

On the question of the *adequate treatment of already heavily taxed income*, the Court observes that *any* income subject to a marginal maximum tax rate exceeding $2/3$ shall not be taxed further. This principle is induced from the unconstitutionality ruling of the special contribution on top-hat pensions⁷⁵. So, any increase of the individual income tax or the already existent special contribution on very high income should respect the global appreciation of taxable capacity, the $2/3$ global cap of the combined marginal tax rate, and, therefore be followed by a correlative reduction of the other taxes applied on the same income. However, income tax allowances should also be considered for the appreciation of the maximum marginal tax rate on the different categories of income.

3 – The last question concerns the conditions under which the *fiscal household* should be considered and the opportunity of a mechanism *capping the advantage* from the income splitting mechanism for married couples. The Court, stressing its reserves for a new mechanism given the above remarks, provides further technical details for the case in which the government insisted in adopting a new special high income tax, similar to the one rejected by the Const. Court in December.

Through this focus, the tax threshold for married couples, taxed jointly, should be connected to an *income-splitting coefficient* (x2) for spouses. The Court underlines the importance of such a coefficient for any individual income tax and considers it to be unavoidably linked to the switch from the individual taxpayer to the fiscal household method. Because the allocation of income between spouses is of no importance for the tax due to be paid⁷⁶, as seen above, it is impossible to cap the benefit relative to the doubled threshold for couples when spouses are not taxed jointly. The new tax should apply to the global income of the fiscal household, while the Court suggests that a mechanism “smoothing out” non-recurring income should also be considered.

Finally, the new tax should entail a *single rate*, regardless of the source of income, given that the tax should apply on the fiscal household income as a whole. In order to establish this rate, the legislator should first consider if any categories of income are already subject to the highest marginal tax level, i.e. with a marginal tax rate of $2/3$. Introducing allowances from the new tax for those categories of income would not solve the problem. In fact, it would introduce a breach in equality in relation to public burdens, as it would create

⁷⁵ Article L. 137-11, article 137-111-1, Social security code.

⁷⁶ Opinion, p. 5-6.

an advantage for individuals possessing those incomes. In any case, income already subject to the maximum marginal tax rate of 2/3 should be exempt from the special tax base, if the tax pressure on that income was not reduced in the first place⁷⁷. In conclusion, the Court cautions that, from a constitutional point of view, the government decision to maintain the new tax project would not be entirely safe.

B. *Perspectives on the wake of the Supreme Court's opinion*

Given the legal restraints highlighted by the Supreme Court, few wiggle room is left⁷⁸. Reiterating that the combined marginal maximum tax rate could not exceed 66,66% on any category of income, the government observes that, specifically for very high earnings, the tax capping would actually be as low as 60% and not 66,66%, given the disparity of the social security levies between active income and capital-derived income.

Therefore, if the government insists on this reform, and if it follows the Supreme Court's opinion, the new tax would be introduced not as a new tax but either as applicable on a new income bracket of the progressive individual income tax scale, or as a modification of the already existent special high income tax of article 223 *sexies* GTC. In any case, the tax rate could not vary among different sources of income, given that it would apply to the income of the household, which is considered globally.

If the government engages in a new income tax project, the 18% rate should be considered as abandoned, as the maximum *tax rate* could not be higher than 4%⁷⁹ in order to respect the combined marginal tax rates cap. The implementation of this reform will have a collateral effect on other decisions, such as the possibility to increase the generalised social contribution rate that can be implemented only if the special tax rate is even lower than 4%.

The *tax threshold* would most probably be set at 2M€, as an effect of the obligation to respect the fiscal household method of tax payment. In order to avoid a breach in equality between married couples and single taxpayers, the threshold's effect should be appreciated together with the income splitting mechanism in order to ensure a limited tax advantage from splitting for married couples. The number of taxpayers affected by the new special tax

⁷⁷ Opinion, p. 6.

⁷⁸ Minister of Finance, communiqué no. 490, 22 March 2013 (above-mentioned), note 66.

⁷⁹ The latitude between the already existent tax pressure, expressed by the combined marginal tax rate of 62%, and the combined marginal tax rate capping at 66%, which expresses the amount over which tax pressure would be considered as excessive, is 4%. More specifically, the 62% rate is a combined marginal tax rate summing up the 45% marginal income portion tax rate, the 4% rate of the already existent high-income tax for income higher than 500.000€, and the 8% rate of social security levies.

would be the same as for the rejected tax, in case the switch to the fiscal household is followed by an increase of the threshold at 2M€.

Another option would be to introduce a mechanism comparable to the special contribution on bonus payments made by credit institutions for the tax year 2009. From a constitutional point of view, this choice seems to be safe, and its economic efficiency is higher than the one of the special high income tax. Finally, the government could simply abandon this project. The Supreme Court has provided sufficient legal arguments to justify a step back. It is at the discretion of the government to balance political cost and legal certainty in implementing public policies. In view of an eventual future constitutionality review, and given that the Court has given no definite answer regarding the confiscatory effect of the “75% tax” – the unconstitutionality ruling was based on other grounds –, it would be useful to appreciate the framework of exercise of normative taxing power by the legislator, including norms of domestic but also of international origin. Finally, it could be interesting to rethink the role of taxation following the re-neutralisation trend in the Const. Court’s reasoning.

VII. Tax law design in compliance with the substantial rights of the taxpayer

It is generally agreed that the tax instrument can be used not only to ensure public expenditures but also to serve other extra-financial objectives and fulfil economic and social functions such as the “allocation and redistribution of burdens and benefits of living in an organised society”⁸⁰, therefore human rights should be considered conjunctively with the efficiency of tax mechanisms. Even if, in practice, the prescriptive value of human rights in tax law drafting is not clear, they can be used as a tax policy benchmark and as a tool in litigation against States⁸¹. Regarding the protection against excessive or confiscatory taxation, the normative framework entails both domestic and international law elements.

A. An attempt to identify a general non-confiscation principle in domestic law

With respect to the aim of taxation, the original intent of the 1789 Declaration of Human rights was that tax levies were established as

⁸⁰ A. Christians, Fair taxation as a Basic Human Right, *International Review of Constitutionalism*, 2009, vol. 9, p. 211. However, social justice is not the main function of a tax system, and no tax system could achieve complete social justice: P. Lalumière, *Le système fiscal français*, Bordeaux, Librairie Montaigne, 1978, p. 131.

⁸¹ D. Gutmann, Taking Human Rights Seriously: Some Introductory Words on Human Rights, Taxation and the EU, in G. Kofler, M. Poiars Maduro, P. Pistone, S. Besson, *Human Rights and Taxation in Europe and the World*, (5th GREIT conference, Badia Fiesolana, Italy, 16-17 Sept. 2010), Amsterdam, IBFD, 2011, pp. 105-112.

counterparty for individual property possession⁸² and as a guarantee for its effective protection by the State. In that context, tax necessity meant no more than the necessary *proportionality* between the tax amount and the provided guarantee. Nowadays, this private-law “contractual duty” approach is outdated. Being a branch of public law⁸³, tax law unavoidably affects private property because of its object, even more than other branches of public law do⁸⁴. The fact that citizens accept State intervention in tax matters⁸⁵ and that this intervention is organised on the basis of the taxable capacity principle⁸⁶ establishes the legitimacy of taxes. However, the aim of a limitation of the tax obligation to a reasonable level is often connected to the idea that taxes are the counterparty for the use of public services and infrastructure, linked with the generation of taxable income. Therefore, economic allegiance cannot be used to establish jurisdiction to tax, as it is not a legal concept, but can be invoked in order to personalise the tax duty. Distinguishing the *grounds* of the tax obligation from the *requirements* that the legislator should respect while exercising the power to tax and designing statutes that implement the public policy’s aims he has fixed, one should consider if the right to property and the protection of individual property could limit the exercise of the legislator’s power to tax⁸⁷.

First of all, the normative value of the Declaration⁸⁸ has been recognised since the Const. Court revisited the principles of that text to give them an interpretation compatible with the evolution of the tax system towards more progressive schemes. Therefore, the notion of taxable capacity was “revitalised”⁸⁹ and tax necessity now means that tax levies are *mandatory*. Besides the taxable capacity and the tax equality principle, no other domestic principles can help in defining the threshold over which tax levies can be

⁸² Opinion expressed by Mirabeau, 1789 Constitutional Assembly, 24 Aug. 1789 proceedings, *in: réimp. de l'ancien Moniteur*, vol. I, Paris, 1840, p. 380. For a contractual theory on tax, see P.-J. Proudhon, *Théorie de l'impôt* (1860), text presented and commented by Th. Lambert, Paris, L'Harmattan, 2000, 328 p.

⁸³ B. Castagnède, *op. cit.*, above-mentioned note 59.

⁸⁴ P. Delvolvé, Droit de propriété et droit public, *in L'État de droit, Mélanges en l'honneur de Guy Braibant*, Paris, Dalloz, 1996, pp. 149-167, at p. 163.

⁸⁵ Declaration of Human Rights, article 14; E. De Crouy-Chanel, La citoyenneté fiscale, *in Arch. Phil. Droit : L'impôt*, vol. 46, 2002, pp. 39-77.

⁸⁶ Declaration of Human Rights, article 13.

⁸⁷ On the question if property rights should limit the power to tax, see H. Vording, The Normative Background for a Broad Concept of Tax, *in B. Peeters (ed.), The Concept of Tax*, 2005, EATLP Congress, Naples (Caserta) 27-29 May 2005, pp. 30-48; In French theory, see P.-M. Gaudemet, Les protections constitutionnelles et légales contre les impositions confiscatoires, *RIDC*, vol. 42, 1990, no. 2, pp. 805-813; E. de Crouy-Chanel, Le Conseil constitutionnel mobilise-t-il d'autres principes constitutionnels que l'égalité en matière fiscale?, *Nouveaux cahiers du Conseil constitutionnel*, 2011, no. 33, pp. 15-26.

⁸⁸ Const. Court, no. 71-44 DC, 16 July 1971, *Liberté d'association*, Rec. p. 29.

⁸⁹ J.-J. Bienvenu, Impôt et propriété dans l'esprit de la Déclaration, *Droits*, 1988, no. 8, pp. 135-142, p. 135; S. Rials, *La Déclaration de 1789*, Paris, Hachette, coll. Pluriel, 1988, pp. 344-346.

considered as excessive or confiscatory. Individual income tax mechanisms, implemented over the past decades, have resulted in various levels of global tax pressure. Apart from the constitutional principle of equal discharge of public burdens according to taxable capacity and a —discontinuous — legislative practice capping tax pressure either for a certain tax (wealth tax cap mechanism) or for all compulsory contributions incumbent on an individual taxpayer (tax shield mechanism), there is no benchmark in domestic law on the maximum tolerable level of taxation⁹⁰. The opportunity of public policies, implemented through the use of the tax tool, is not appreciated by the Const. Court, whose competence is limited to the proportionality control.

The idea of a general limitation of tax obligation causes some problems related with *technical presuppositions* of such a guarantee, as there is no consensus over the meaning of confiscation and the confiscation threshold. At the same time, the *legal structure* that should embody such a guarantee is arguable. As we have seen, a legislative protection is not guaranteed to be long-living and an enshrinement of such a guarantee in the constitutional framework stumbles upon the Parliament's reluctance to give away decisional leeway in tax matters. Last, it is not clear if such a guarantee could be founded on tax equality or on the right to property or on a combination of the aforementioned principles, or if an autonomous non-confiscation principle should be constructed.

In France, a general non-confiscation autonomous principle doesn't exist, and the property protection is based on articles 2 and 17 of the 1789 Declaration. However, those articles' scope is limited compared to article 14 the German Fundamental Norm⁹¹, for example, and seems only to prevent expropriation and nationalisation, to which tax levies can hardly be assimilated. Therefore, it would be necessary to recognise an autonomous non-confiscation principle in the French case.

As regards the threshold over which tax levies are considered to be excessive, a guideline can be given by the German Constitutional Court's decision⁹² ruling unconstitutional the German wealth tax. This decision is founded on the equality principle and on the right to property, both of constitutional value. Following the interpretation of this decision's wording in Germany, the level over which property taxation has a confiscatory effect is

⁹⁰ J.-B. Geoffroy, *Aux sources du bouclier fiscal : l'émergence d'un principe de non-confiscation par l'impôt*, in *Mélanges en l'honneur de Pierre Beltrame*, Aix-en-Provence, PUAM, 2010, pp. 175-205.

⁹¹ J.-B. Geoffroy, *op. cit.*, p. 193.

⁹² J. Grosclaude, *De l'inconstitutionnalité de l'impôt de la fortune en Allemagne et en France*, in *Gouverner, administrer, juger, Liber amicorum Jean Waline*. Paris, Dalloz, 2002, p. 49.

50%, given that the same property serves equally two interests, one public and one private⁹³.

In France, the Const. Court has not used the right to property or tax equality to induce a general autonomous non-confiscation principle. Discreetly expressing tax progressivity⁹⁴, the French Const. Court embraced a conception of taxable capacity similar to the one developed by the German Const. Court with respect to capital taxation. Accepting that only income-productive capital can be subject to wealth tax, the Court acknowledged that property possession is not taxed as such⁹⁵. Moreover, we have seen that this conception evolved in the *Époux Mathieu* case⁹⁶, thereupon the Court considers that the wealth tax targets taxable capacity intrinsic to property possession. However, the Court has not established a maximum levy rate, or recognised that wealth tax can have a confiscatory character if, despite the existence of a cap mechanism, the tax resulted in levying an amount higher than the available income.

Reviewing the “tax shield” mechanism, the Court stated that the taxable capacity principle would be violated by levies of excessive or confiscatory character⁹⁷. With no direct recognition of an autonomous non-confiscation principle, the Court considered that the “tax shield” is an adequate mechanism to prevent a breach in equality among taxpayers. So, in the French case, the fact that non-confiscation is structured and measured always in relation with tax equality doesn’t allow measuring the threshold over which taxation would be confiscatory, as only *manifest* breaches of equality can be ruled unconstitutional.

As for domestic ordinary courts, one should observe that the case law of the French Supreme jud. Court is in line with the Const. Court’s decisions with respect to the absence of a general recognition of a non-confiscation rule. In fact, the Supreme jud. Court refused to see a confiscatory character in the wealth tax mechanism, acknowledging the State’s power to regulate property use in order to serve public interest or public revenue⁹⁸: wealth tax is part of measures that States can adopt. Hence, the adoption of such a mechanism by a statute which described its function and the existence of a progressive scale and of a capping mechanism is sufficient evidence for the Court that the wealth tax respects the taxable capacity principle, with no further need to discuss the

⁹³ For an interpretation of this statute in the context of the unconstitutionality ruling of the German wealth tax, see German Federal Const. Court, dec. 22 June 1995, 2nd senate, BvL 37/9, spec. §C, III, c.

⁹⁴ See for instance, Const. Court, dec. no. 90-285 DC, 22 Dec. 1990, §40.

⁹⁵ Const. Court, no. 98-405 DC, 29 Dec. 1998, Rec. p. 326.

⁹⁶ Const. Court, no. 2010-44 QPC, *Époux Mathieu*, above note 33.

⁹⁷ Const. Court, no. 2005-530 DC, 29 Dec. 2005, *Official Gazette*, 31 Dec. 2005, p. 20705, §66-67.

⁹⁸ Supreme jud. Court, commercial chamber, 03-10.068, 25 Jan. 2005, no. 199 FS-PBI, *Imbert de Trémiolles*, Bulletin, 2005, IV, no. 16, p. 15.

obviously existent public interest aim of the tax and the proportionality of the chosen method.

If no general anti-confiscation rule can be found in domestic rules, as domestic courts interpret these rules, it would be useful to see if international law includes such a guarantee or any other guarantee of an effect similar to an anti-confiscation general principle.

B. An attempt to identify a general non-confiscation principle in European law

Norms providing protection of substantial human rights, such as the tax equality principle and the right to property, are present not only in domestic but also in international instruments, and may have an impact on the design of national legislation, preventing mechanisms incompatible with those norms to be adopted. Even the constitutionality review of statutes is, in theory, exclusively based on the constitutional framework, international and EU norms related to the human rights protection can in practice have an impact on the Const. Court's reasoning⁹⁹. Thus, national courts are influenced in shaping the content of constitutional and other rights by "interpretative *acquis*", i.e. interpretation adopted by the ECtHR or the ECJ¹⁰⁰. For example, if a legislative "tax shield" mechanism no longer exists under domestic law¹⁰¹ and in the absence of any general constitutional principle preventing overtaxation, it would be interesting to measure if the Protocol 1 article 1 of the ECHR guarantee can serve as a *treaty-based "tax shield"*¹⁰².

The European normative framework in tax matters includes the European convention of human rights (ECHR) and the Charter of fundamental rights of the European Union (Charter), which is part of positive EU law since the Lisbon treaty. Substantial guarantees that could play a role in

⁹⁹ This consideration can sometimes be explicit in the wording of the decisions: Const. Court's no. 2004-505 DC, Rec. p. 173, in which the Court clearly takes into account a ECtHR decision in its reasoning: "Taken in account the ECtHR decision no. 44774/98 of 29 June 2004...". For an overview of the ECHR consideration in the French Const. Court decisions, see B. Mathieu, *Les décisions du Conseil constitutionnel et de la Cour européenne des droits de l'homme: coexistence - Autorité - Conflits - Régulation*, NCCC, 2011, no. 32, pp. 45-66.

¹⁰⁰ Th. Fortsakis, *The Role of Individual Rights in the Europeanization of Tax Law*, in G. Kofler et al., *Human Rights and Taxation in Europe and the World*, *op. cit.*, note 80, pp. 95-103.

¹⁰¹ The mechanism was eliminated in 2011 at the same time when the wealth tax progressive rates decreased. The wealth tax capping mechanism has also been eliminated with the 3rd Rectifying Finance Act for 2012, ruled constitutional by the Const. Court, no.2012-654 DC, 9 Aug. 2012. In fact, the Const. court has never stated that the respect of taxable capacity relative to property possession needs to be accompanied by a capping mechanism with reference to perceived income (Const. Court, no. 2010-99 QPC, 11 Feb. 2011, Rec. p. 111).

¹⁰² L. Ayrault, *Droit fiscal européen des droits de l'homme : chronique de l'année 2009*, *Droit fiscal*, 2010, no. 8, 209, § 17 ; *id.*, *chronique 2010*, *Droit Fiscal*, 2011, no. 9, 240, § 15.

excessive or confiscatory taxation are established in both the ECHR and the Charter: ECHR Protocol 1, article 1, provides for a protection of property¹⁰³, which is usually invoked conjunctively with article 14 of the same Convention that prohibits discriminations. Article 17 of the Charter also established the right to property, while article 20 establishes equality of the rule of law and article 21 provides a guarantee against any kind of discrimination in the same way ECHR article 14 does. Finally, a general provision (article 52 of the Charter) establishes the rule that any limitation of the Charter's guarantees should be implemented by statute and be justified by a public interest reason.

Having accepted that ECHR Protocol 1, article 1, in conjunction with article 14, is applicable on tax matters¹⁰⁴, and that the scope of the protection extends to any kind of possession¹⁰⁵, the ECtHR has developed three standard rules for the interpretation of those articles¹⁰⁶. The first rule, of a general nature, concerns the determination of existing possession that the individual may enjoy peacefully. This rule is followed by a second rule, regarding the conditions under which limitations of the peaceful enjoyment of property are tolerated. The third rule concerns the entitlement of contracting States to control the use of property in order to serve public interest¹⁰⁷.

Thus, if a tax statute is found to be interfering with the right to property, a balance between public interest and private interest needs to be made. National tax authorities have a margin of appreciation compatible with the ECHR human rights protection framework¹⁰⁸. The original intent of Protocol 1 article 1 was to safeguard the State's prerogatives in regulating property rights¹⁰⁹. However, the dynamic interpretation of the Convention by the ECtHR has transformed it into a protection instrument and, in that context, the existent public interest reason can justify the interference, provided that the method of implementation of that interest passes the *proportionality* test¹¹⁰.

¹⁰³ R. Ergec, Taxation and Property Rights under the European Convention of Human Rights, *op. cit.* above-mentioned, note 28. For a general view of the impact of human rights on taxation, see G. Kofler, P. Pistone, General Report, *in* G. Kofler, M. Poiares Maduro, P. Pistone, S. Besson, *Human Rights and Taxation in Europe and the World*, *op. cit.*, pp. 3-33.

¹⁰⁴ ECtHR, 23 October 1990, *Darby*, Series A, no. 187.

¹⁰⁵ ECtHR 5 Jan. 2000, app. no. 33202/96, *Beyeller v/ Italy*, § 98.

¹⁰⁶ J. Lamarque, O. Negrin, L. Ayrault, *Droit fiscal général*, Paris Litec, 2nd ed., 2011, §346-348.

¹⁰⁷ ECtHR, 9 Dec. 1994, app. no. 13092/87; 13984/88, *Holy Monasteries v/ Greece*, §56.

¹⁰⁸ G. Kofler, P. Pistone, *op. cit.*, p. 16; C. Brokelind, The role of the EU in International Tax Policy and Human Rights: Does the EU Need a Policy on Taxation and Human Rights? *in* G. Kofler et al., *op. cit.*, pp. 113-128.

¹⁰⁹ Ch. Rozakis, P. Voyatzis, Le droit au respect de ses biens : une clause déclaratoire ou « omnibus » norme ? *in* H. Vandenberghe et al. (eds.), *Propriété et droits de l'homme* (Conference publication, Université catholique de Louvain, 23-25 Aug. 2006), Brugge, Die Keure, 2006, pp. 1-28.

¹¹⁰ See for example ECtHR, 23 July 1968, *Belgian Languages*, Series A, no. 6.

with the absence of extension of the property protection to excessive taxation, allows only the rejection of statutes introducing a *manifest* breach over the taxable capacity principle. Therefore, it is possible to consider that the only way to ensure legal certainty over the qualification of excessive or confiscatory levies and a long-lasting taxpayers' substantial protection would be to enshrine a non-confiscation guarantee in the constitutional framework, defining the threshold over which compulsory levies are ruled excessive. As we have seen, the value of legislative non-confiscation guarantees varies according to the agendas of political majorities and can disappear at any moment.