

## Is there any space for a taxation of lifestyles?\*

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The term "*fiscalité comportementale*" does not define a specific juridical category, since it makes reference to the various forms of tax provisions which also serve the purpose to influence single citizens' lifestyles: environment taxation, food taxation, the so-called "ethical" taxation.

The common element is the purpose to attain extra-fiscal objectives and it is known that, in the Italian legal order, the use of the tax levy for these purposes can be allowed only in presence of two conditions. On one hand, it is necessary that the tax is nonetheless levied on manifestation of economic capacity (Article 53 of the Constitution); on the other hand, the levy must not constitute a breach of the equality principle, in light of also other constitutional principles.

The levy must, therefore, have a justification on the economic level and the possible consequent difference in treatment with regard to certain subjects, activities, products, consumptions, etc. must be justified in light of the fundamental values of the legal order.

In my opinion, starting from these assumptions, forms of taxation whose extra-fiscal purposes are of an exclusively ethical or moral nature should not be allowed inasmuch as they would be contrary to the Constitution.

This is also because in an "open" constitutional system, with a liberal inspiration, such kinds of interventions would be able to alter individual choices, thus limiting the freedom of the single citizen.

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Furthermore, if certain conducts are deemed by the State to be dangerous, if certain consumptions are considered as inadmissible in light of primary constitutional values (such as, for example, human dignity or the protection of children), such conducts should be forbidden *tout court*, and not simply taxed (or taxed at a higher level than other conducts).

Ever since 2008, the Italian regime on corporation tax (IRES) provides for an additional charge which levies a 25% levy on the income deriving from enterprises operating in the fields of the production and sale of pornographic material, instigation to violence or benefitting from popular credulity through telephone numbers for payments (magicians, fortune-tellers). It is an actual "ethical tax", which does not have any other justification if not the one based on the reprehensibility, on a moral level, of those conducts, which poses more than one question on the compatibility of such a measure with Article 53 of the Constitution.

At the same time, one should highlight that, according to a major scholarly thesis, Article 53 of the Constitution would allow to levy tax not only according to the "traditional" indexes (income, wealth, consumption), but also with regard to "elements of a social relevance", with the only limits being reasonableness, adequacy and proportionality. According to this thesis, one could then allow forms of taxation in which vicious or frivolous conducts or consumptions, which are borderline immoral, are taxed more than others in light of the different impact on a social level of their reprehensibility by society.

It is my opinion that such a thesis would give rise to potentially very dangerous forms of social control and legislative arbitrariness.

The only case of truly ethical taxation would be that of a tax system which really implements the principles enshrined in Article 53 of the Constitution, thus attaining the objective of having all of the citizens to contribute to public expenditure according to their capacity.

Another topic, besides that of "moral taxation", is that of food taxation, on which there is much scholar debate, both at Italian and European level.

Two arguments are resorted to in order to justify forms of higher taxation for the consumption of junk food.

The first one is that taxation thus obtains the effect of discourage the consumptions of such foods, thus guaranteeing the protection of the citizens' health (which is protected also at constitutional level).

The second one is based on a sort of "benefit principle 2.0". Given that such consumptions are then able to lead to future financial expenditure, linked to a higher degree of intervention of the national sanitary system, a higher level of their taxation would allow to guarantee financial balance.

From this perspective, such taxes have been introduced, during the years, in Norway (ever since 1981 citizens pay a specific tax on sweets, chocolate and sugary beverages), in Finland (since 2011 there is a tax on confectionary products), in Hungary (in 2011 a chips tax has been introduced), in France (in 2012, with la tax sodà or the coca cola tax) and so on in the European contest. In Italy a proposal on junk food has been put forward in 2013, but it has been cancelled because, as the report states, "it needed further follow-ups".

Such forms of taxation are not free from various critical elements.

First of all, at the EU level, in case we are dealing with harmonised taxes (increase of tax rates or of excise duties), with very limited margins for intervention for national lawmakers.

Always at the EU level, one must pay attention to the topic of the distortion of market dynamics that could derive from such kinds of taxation. It is particularly significant to remember, for instance, what happened in the case of the Danish levy on foods with a certain percentage of fat, introduced in 2011, which caused a nation-wide reaction on the part of the producers of famous cookies, since consumers had started buying the same product in neighbouring states, with a significant detriment for the activities of domestic enterprises. Which led the lawmaker to repeal the tax.

Furthermore, a junk food tax appears to be strongly regressive, since it concerns foods which, being particularly cheap, are eminently consumed by a less wealthy segment of the population. With the further consequence, as

found by different studies, of moving the consumption to products which are even cheaper, which is the exact opposite of the purpose pursued by the lawmaker.

Generally speaking, it must be highlighted that scientific studies cannot univocally demonstrate the connection between higher taxation and a “virtuous” change in the dietary behaviour of the citizens.

Besides, on a juridical level, the benefit principle concerning future medical and sanitary costs might be seriously challenged because, if we exclude certain products (such as alcohol and tobacco, for instance) it is not the consumption of a certain product *per se* to determine the insurgence of the illness and the related sanitary cost, but, more in general, the overall lifestyle of the subject, which the tax can hardly detect and orient.

We must also consider that if, from a scientific and/or juridical viewpoint, there is no possibility to clearly reconnect the junk food tax to the protection of health, the legislative intervention remains utterly deprived of a justification and, therefore, incompatible with the Constitution. Especially because the truest nature of such form of fiscal levy would then (re-)emerge as based on *lato sensu* moral or ethical options and on the need for the State to come up with always new forms of fiscal revenue.

With regard to this latest aspect, it is significant that the debate on behavioural taxation has developed especially during this period of financial crisis for states, as connected to the more general economic crisis on a global level.

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