



# **THE TAX ON LEGAL ENTITIES IN THE LIGHT OF CIVIL LAW: A POSITIVE AND PROSPECTIVE STUDY OF THE INCOME TAXATION FOR CERTAIN ACTORS WITHIN THE SOCIAL ECONOMY**

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# RESEARCH PROJECT – IN A FEW WORDS



# 1. RESEARCH QUESTIONS

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- WHAT RELATIONS *ARE/SHOULD BE* MAINTAINED BETWEEN TAX LAW AND CIVIL LAW?
- « Interdependence of all branches of law » (E. Krings)
  - Dependence/independence
    - Tax law is grafted onto institutions of civil law
    - Tax law deviates from institutions of civil law
  - Interdependence
    - Tax law can also influence civil law



## 2. SCOPE OF THE RESEARCH - LIMITED THEORETICAL FRAMEWORK

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- **CIVIL LAW**

*SOCIAL ECONOMY* = ECONOMIC ACTIVITY + SOCIAL FINALITY

- Four legal forms within social economy are especially analyzed:

NON PROFIT  
ASSOCIATIONS

ACCREDITED  
COOPERATIVES

SOCIAL PURPOSE  
COMPANIES

PRIVATE  
FOUNDATIONS



## 2. SCOPE OF THE RESEARCH - LIMITED THEORETICAL FRAMEWORK

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- **CIVIL LAW**

- Both *civil law* and *tax law* aspects studied:

- => Need to identify the “key elements” of civil law:

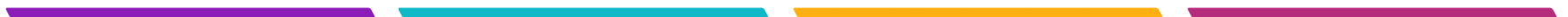
Starting point : “legal speciality” (link with legal personality and capacity)

1. Activities permitted: economic activity ?

2. Purposes:

A. Specific goals ?

B. Effectivity concern : “what can be done with the money earned from an economic activity ?”



## 2. SCOPE OF THE RESEARCH - LIMITED THEORETICAL FRAMEWORK

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- **TAX LAW**
- Attention drawn to the taxation of the income of the *operating entity (direct taxation)* :
- >< Matters relating to taxation in the light of *indirect taxation* (value added tax, registration fees, inheritance taxes)
  - Except: VAT (in the context of a comparison)
- >< Specific tax treatment of the incorporation and liquidation of the entity
  - Except: when the entity is wound up, what about the allocation of the liquidation bonus?



## 3. THE CURRENT SYSTEM

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- Major Belgian income taxes' reform of 1962:
- 4 categories including :
  - a tax on the total income of resident companies, called "corporate tax" (CT)
  - a tax on incomes of legal persons other than companies, called "tax on legal entities" (TLE)
- For the selected entities, TLE applies in competition with CT
  - Important notice : "one taxpayer, one tax" policy (>< mixed of/and partial liability for VAT)
- Legal texts relating to the TLE/CT are inadequate: both (unstable) case law and (shared) doctrine should provide concrete meaning to open and vague notions
  - Undetermined or underminable concepts?
  - What about legality and certainty principles?



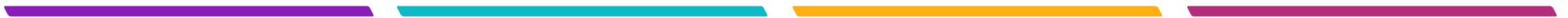
### 3. THE CURRENT SYSTEM

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- Big differences between these two tax regimes (*i.a.*) :

	CT	TLE	TLE <i>versus</i> CT
TAX BASE	active and passive income	only passive income	<b>LIMITATED BASE</b>
RATES	Proportional rate: 33.99% (unless reduced rates)	Specific rate for each income (generally lower than CT rate)	<b>LOWER RATES</b>

- But : other features may make the TLE regime heavier than CT (*e.g.* no imputability of withholding tax for TLE taxpayers)





## 4. RESEARCH PLAN

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- Two parts
- 1. First part : what are the relations maintained between the tax law and the civil law (*de lege lata*)?
- 2. Second part: what relations should be maintained between the tax law and the civil law (*de lege ferenda*) ?



## 4.1. First part : what relations are maintained between tax law and civil law (*de lege lata*)?

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- This part concerns the existing system
- This part aims to clarify the links between civil law and tax law and the influence towards each other (from civil law to tax law and conversely) through an **historical approach**
- This analysis of existing legislation makes possible the edification of proposals to clarify the current tax treatment

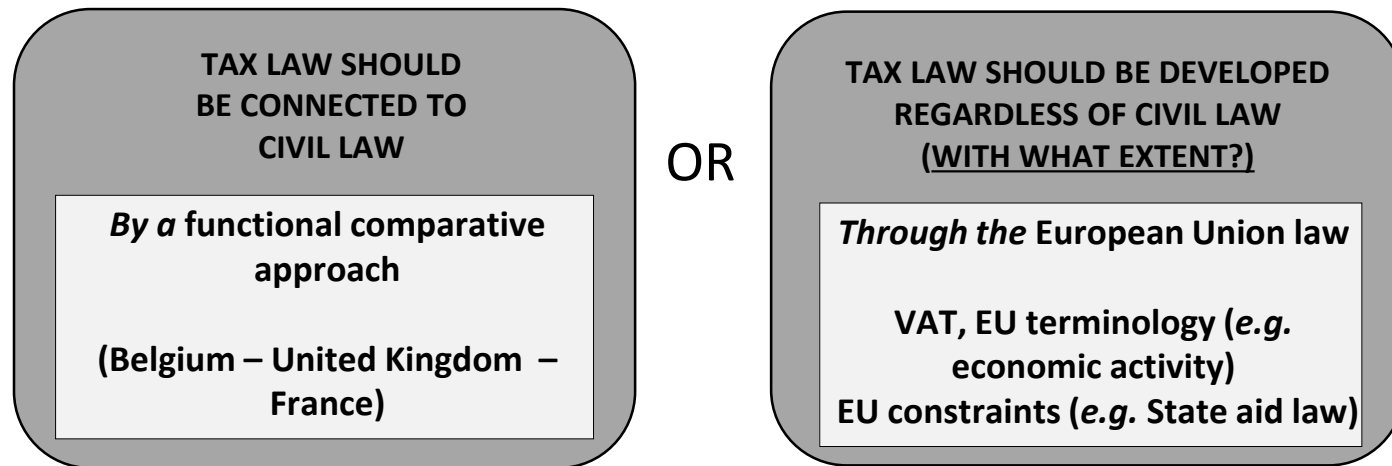


## 4.2. Second part: what relations should be maintained between tax law and civil law (*de lege ferenda*) ?

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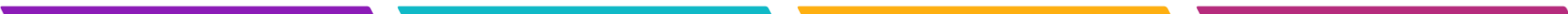
- This part aims to propose a new model of taxation. Should we tax these entities ; if so, why, how and to achieve what purposes?
- Two opposed working assumptions around the question :

### WHICH BALANCE BETWEEN TAX LAW AND CIVIL LAW?



## 4.2. Second part: what relations should be maintained between tax law and civil law (*de lege ferenda*) ?

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- Taxing and regulating non-profits organisations (M. Bowler-Smith and Huigenia Ostik\*) – actual findings
  - (p. 21) *“The real concern for the legitimacy of the non-profit sector is **not how organizations raise their funds but to the extent to which those organizations achieve their stated mission objectives**”*
  - (p. 21) *“The source of income is not an appropriate defining criterion of the non-profit sector”*
  - \*Reference book : *Taxation of Charities* (Frans Vanistendael Ed.), EATLP Annual Congress Rotterdam (31 May-2 June 2012), EATLP international tax series, vol. 11, IBFD, June 2015, 638p.
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## 4.2. Second part: what relations should be maintained between tax law and civil law (*de lege ferenda*) ?

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- **Tomorrow, the opportunity to change the paradigm?**
- (p. 24) *“The focus should be to ensure that the activities of non-profit organizations are aimed at achieving a redistributive goal”*



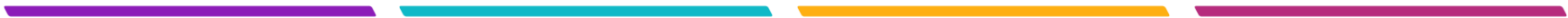
# PRESENTATION PURPOSE – TWO SPECIFIC TOPICS





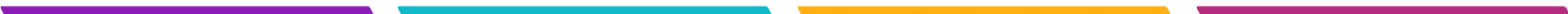
# 1. NEW « CIVIL LAW » IS COMING...

- « The jump to the Law of tomorrow »\* (Koen Geens)
  - *i.a.* « legal persons law (under private law) »:
    - The possibility of distributing a profit becomes the **only distinctive criterion** between companies and non profit associations
    - Extension of the “legal speciality” of non profit associations => economic activity allowed
    - Time frame: ???
  - ...What about the impact on direct taxation system? No working group around the tax area
- Since several years: general transition to UE terminology: « economic activity » ; « undertaking »
  - Convergence of my hypotheses ?
- \*<https://cdn.nimbu.io/s/1jn2gqe/assets/1481026622938/Le%20saut%20vers%20le%20droit%20de%20demain.pdf>



## 2. *DE LEGE FERENDA* : EU CONSTRAINTS


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- Principle : national sovereignty in tax matters...But:
  - For tax measures (general and specific): fundamental freedoms
  - For specific tax measures : State aid law
    - Undertaking (economic activities = goods and services provided on a market)
    - State resources
    - Advantage
    - Selectivity
    - Distorsion of Intra-community Trade
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## 2. *DE LEGE FERENDA* : EU CONSTRAINTS

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- State aid law
  - Selectivity
    - « Derogation approach »
    - « Comparison approach »
      1. Reference framework
      2. Comparable legal and factual situation
      3. Differential treatment?
    - « Paint Graphos » case (C-78/08 to C-80/08, 8 september 2011)
      - Producers' and workers' cooperatives enjoy tax benefits under Italian Law → State aid?
      - Cooperative societies conform to particular operating principles → clear distinction from other economic operators
      - Particular operating principles → comparability yardsticks
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## 2. *DE LEGE FERENDA* : EU CONSTRAINTS

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- State aid law
  - Exception for services of a general economic interest (SGEIS)
  - Exception of 107 (3) TFEU
  - *De minimis* rules
    - *Specific for SGEIS*
    - *General*
  - Notification to the European Commission (108 (3) TFEU)

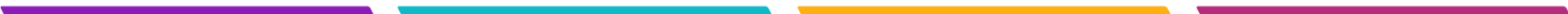


## 2. *DE LEGE FERENDA* : EU CONSTRAINTS

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- S. Stevens (2014)\*:
  - NPOs active for a wide public do probably not fall within the Paint Graphos exception
    - NPOs and commercial undertakings both provide goods and services on a market
  - « *The real difference (between NPOs and commercial undertakings) is profit distribution but in most corporate income tax systems taxation does not follow the distribution of profit but the mere realization of profits* »
- ⇒ He doubts therefore « *that the ECJ will accept that NPOs are not comparable or that a different tax treatment can be justified on the difference on profit distribution* »

\*S. Stevens, « Tax Aid to Public and Social Enterprises: A collision between Competition and Public Policy », EC Tax Review, 2014-3, pp. 149-170.



## 2. DE LEGE FERENDA : EU CONSTRAINTS

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- **Tomorrow, REAL opportunity to change the paradigm?**
- *“The focus should be to ensure that the activities of non-profit organizations are aimed at achieving a redistributive goal”*

