LEGITIMACY OF TAX RULES

Subtopic 2: Decision-making processes of domestic tax legislation

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SPAIN

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1. INTRODUCTION

The aim of this report is to describe the decision-making processes of tax legislation in Spain and analyze how these processes contribute to legitimacy.

In the law theory, legitimacy can be distinguished from legality: an action can be legal but not legitimate or viceversa. According to Brisnau (2002), legitimacy is sometimes used to describe in general terms the criteria for the validity of power. We can subdivide the concept of legitimacy into two: formal and material legitimacy. The formal one is understood as the correct procedure of the state bodies with respect to all the procedures established in the legal system. Material legitimacy is the consensus or recognition of the people generated in approval of the created law or government action.

In order to analyze the legitimacy of decision-making processes in tax legislation, we are going to study the political organization and the system of tax sources in Spain, as the starting point to understand the territorial structure of the country and which institutions have the power to legislate on tax matters.

Moreover, the different ways of elaborating tax legislation will be explained, keeping in mind the structure of Autonomous Communities into which Spain is divided, as it has a big influence on the system projected. At this regard, we will describe both the ordinary legislative procedure at the State level and at the regional level, focusing on the most legitimate aspects of the procedure and which ones can be improved.

Afterwards, the ratification process of Tax Treaties in Spain will be explained. The two most important moments, negotiation and ratification, will be differentiated to see which are the bodies that participate in them. A particular consideration will be made because of the Multilateral Instrument. Therefore, although it is a very recent issue, we will analyze what consequences the ratification of this multilateral treaty has on the Spanish tax system.

Finally, it will be analyzed how persons and technology can influence tax law-making. Current regulations of public consultations and lobbies as human influences in the tax system will be described. On the other hand, the Spanish situation in the field of Artificial Intelligence and other material processes will be explained.

2. SPANISH LEGAL FRAMEWORK

2.1. Political structure of Spain

Spain is a decentralized state, with a very complex political structure. The Title VIII of the 1978 Spanish Constitution is aimed at recognizing the territorial organization of the State, dividing it into municipalities, provinces and Autonomous Communities that might be created, with autonomy for the management of their respective interests. Having said so, the Spanish Constitution establishes the requirements (article 143), in which regions could constitute these Autonomous Communities through the approval of their Statutes of Autonomy. Following this procedure, Spanish regions started the process of decentralization[1] by creating Autonomous Communities with their own competences, and nowadays Spain has 17 Autonomous Communities and 2 Autonomous Cities.

It is important to mention that the Additional Provision Number One of the Spanish Constitution also recognizes the historic rights of the regions with traditional charts (in Spanish, *Territorios Forales*). That is the reason because the Autonomous Communities of *País Vasco* and *Navarra* have crucial differences in the financial sphere.

Then, the Additional Provision Number Three highlights the peculiarity of the economic and fiscal regime of the Canary Islands. This regime must also incorporate the principles and regulations applicable as a result of the recognition of the Canary Islands as an outermost region of the European Union, according to the article 349 of the Treaty on the Functioning of the European Union (from now on, TFEU). As examples of this tax specialty, in the territory of the Autonomous Community of the Canary Islands, Value Added Tax or some Special Taxes are not applied, such as the Special Tax on Hydrocarbons and the Special Tax on Labor of Tobacco. However, the Canary Islands have established their own taxes that are levied on these products.

At the local level, the basic entities in our country are the province, the municipality and the island.

[1]The process of decentralization resulted in the creation of 17 Autonomous Communities between December 1979 and February 1983: Andalucía, Aragón, Asturias, Islas Baleares, Canarias, Cantabria, Castilla y León, Castilla-La Mancha, Cataluña, Comunidad Valenciana, Extremadura, Galicia, Comunidad de Madrid, Región de Murcia, Comunidad Foral de Navarra, País Vasco and La Rioja. Then, in 1995, Ceuta and Melilla, two Autonomous Cities, were officially established.

According to the article 141.1 of the Spanish Constitution, provinces are local entities with their own legal personality, composed of a group of municipalities. Its basic task is to assist municipalities to guarantee the provision of the minimum mandatory services that correspond to them by law.

Moreover, municipalities are the most important entities that compose the Local Administration. We can find the legal description of "municipality" in the Law 7/1985, Regulating the Bases of the Local Regime. The article 11 of the mentioned law says that the municipality is the "basic local entity in the territorial organization of the State. It has legal personality and full capacity to fulfill its purposes". The government corresponds to the City Council (*Ayuntamiento*).

Finally, in the Autonomous Communities of Canary and Balearic Islands, islands have their own administration in the form of *cabildos* or *consejos*[2], respectively.

We must mention other local entities that exist in Spain whose importance is limited to the provision of some public services. Municipalities have the right to associate with others in *mancomunidades* for the common execution of works and services within their jurisdiction. Then, Autonomous Communities, in accordance with their respective Statutes of Autonomy and complying with the requirements established in the laws, may create *comarcas* or other entities that group several municipalities in their territory. They may also be organized in metropolitan areas in case of large urban agglomerations. This aggrupation can happen when there are economic and social links between populations that make the coordination of certain services necessary.

To sum up, Spain is a decentralized country with a very complex organization, as Autonomous Communities are composed by different provinces with its own autonomy; provinces can be divided into *mancomunidades* or groups of municipalities to execute civil works more efficiently, if it is the case. Finally, we find the smallest but most important local entity in terms of financial power which is the municipality.

[2] *Cabildo* is the name of the institution in which the government and administration of each of the Canary Islands falls. *Consejo* is how we name the institution that has the same responsibilities but in the Balearic Islands.

2.2. Constitutional structure and hierarchy of sources of tax law in Spain

The sources of the Spanish tax system are recognized in the article 7.1[3] of the General Tax Act (Law 58/2003).

First of all, at the top of the hierarchical pyramid we find our 1978 Constitution. In this regard, we should take into account the constitutional principles named in the article 31, that should guide the entire tax system: generality, equality, progressivity, economic capacity and legal reserve. In the Spanish Constitution it is also regulated the distribution of financial power, the establishment and requirement of taxes and the approval, execution and control of the budget. As the Constitution is the first one in the hierarchy of tax law sources, the other sources cannot contradict the supreme norm, being expelled from the system if they are declared unconstitutional.

After the constitutional rules, there are International Treaties and Conventions that contain tax clauses. This type of sources is superior hierarchically to internal laws, according to article 96.1 of the Spanish Constitution. Examples of International Conventions could be Agreements to avoid double taxation, which distributes tax power between countries, and need prior authorization from the Spanish Parliament. The Spanish law that regulates International Treaties is of a State nature, since article 149.1 3º of the Constitution establishes that the State has the exclusive competence of international relations.

Since Spain is member of the European Union, another type of tax source is the set of rules of this supranational organization. The European rules have primacy[4] over national law. The

[3] Article 7 of the General Tax Act:
1. The taxes will be governed:
a) By the Constitution.
b) By international treaties or agreements that contain clauses of a tax nature and, in particular, by agreements to avoid double taxation, under the terms provided in article 96 of the Constitution.
c) By the rules issued by the European Union and other international or supranational organizations to which the exercise of powers in tax matters is attributed in accordance with article 93 of the Constitution.
d) By this law, by the laws regulating each tax and by other laws that contain provisions on tax matters.
e) Due to the regulatory provisions issued in development of the above regulations and, specifically in the local tax field, by the corresponding tax ordinances.
Within the scope of the State, the Minister of Finance is responsible for issuing development provisions in tax matters, which will take the form of a ministerial order, when the law or regulation that is the subject of development expressly so provides. Said ministerial order may directly develop a rule with the force of law when expressly established by the law itself.
2. The general provisions of administrative law and the precepts of common law will have a supplementary character.

[4] European primacy means that Member States cannot apply a national rule contrary to European law.

main rules of the European Union are the Treaty of the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Then, there are other important rules such as Directives or Regulations, which are legally binding for the EU Members. For instance, the Directive 2006/112/EC on the common system of Value Added Tax seeks that Members States approve norms with the objective of preserving the functioning of the internal market and avoid distortions of competition. Unlike the state situation, López Espadafor (2017) recalls that in European Law there is no express delimitation of what the material principles of tax justice are. For this reason, the tax harmonization directives do not find clear parameters of justice within the discipline of the Union to which they are subjected. In order to maintain the conditions of the internal market, EU Law affects competences of all territorial levels of government in Spain.

Law is the most important source of tax legislation, consequence of the principle of law reserve in the tax area. Laws are approved by the Parliament, representative of popular sovereignty, following the legislative procedure established in the Regulations of the Chambers, which occupies a hierarchical position below the Constitution and above the other regulations. In general, ordinary laws are the commonly accepted source in the tax field, but there is a type of special law called "Organic Law" which is different from the ordinary one in two aspects: related to the procedure of approbation, the Parliament needs an absolute majority to pass an Organic Law; also, the article 81.1 of the Spanish Constitution establishes the subjective scope of Organic Laws, which is the "development of fundamental rights and public liberties, those approved by the Statutes of Autonomy and the general electoral regime and the others provided for in the Constitution".

Despite of the fact that the commonly used source of tax is Law, there are some specialties we need to mention in this regard: the exclusion of the popular initiative in tax matters (article 87.3 of the Spanish Constitution) and the existence of a "special" ordinary law which is the Budget Law. Budget Law necessarily determines the income forecast and the authorization of expenses that can be made by the State and the Entities linked to it or dependent on it in the financial year in question. In tax matters, section 7 of article 134 of the Constitution provides that the Budget Law cannot create taxes, although it can modify them when a substantive tax law provides this possibility. That means the content of the Budget Law is constitutionally delimited –unlike what happens with other Laws, whose content is, in principle, unlimited. As the Constitutional Court has affirmed in Judgment 44/2015, the Budget Laws have a minimum, necessary and indispensable content. However, it is also true that they are allowed

to regulate those matters or questions that are directly related to the revenue forecasts and expense allowances, according to Martín Queralt (2019).

Additionally, as Spain is a decentralized State in which Autonomous Communities have legislative power, they can also pass Laws with the same hierarchical level than national ones, but without exceeding their powers. That means the relationship between a national law and an autonomous law is not in terms of hierarchy but competence.

On a separate issue, it is important to distinguish Ordinary Laws, it is, rules approved by the Parliament, from other type of bills that are approved by the Government with the same hierarchical level than the first ones. We can find two types of government regulations with the power of law: Law Decree and Legislative Decree.

The Law Decree is a type of rule enacted by the Spanish Government and it has a basic factual circumstance that enables the Government to pass this kind of rule: that there is “an extraordinary and urgent need”. The Law Decree is a temporal legislative provision, because as it is an act of a body that does not have legislative power, its definitive incorporation into the legal system will occur when it is expressly validated by the Parliament.

Regarding this type of rule, in Spain nowadays there is an intense debate around the abuse of this norm with the force of law, since it is dictated by the Government and comes into force immediately and then sent to Parliament for validation as a bill. Therefore, its processing prevents it from being reviewed by Parliament previously. Furthermore, this legal figure is not controlled by the ordinary courts, but only by the Constitutional Court. In fact, the task of the Constitutional Court is to verify that there is a “necessary connection between the extraordinary emergency situation, justified and defined by the Government, and the specific measure that it adopts” (according to the STC 137/2003, of 3 of July). These two limits mean that the excessive use of this legal norm, which in principle was reserved for extraordinary situations, creates problems of legitimacy in our legal system. In this sense, De Juan Casadevall (2021) criticizes that "the improper use of the Decree Law to penetrate tax matters violates the right to participate in public affairs through representatives, by affecting that vital sphere subject to the principle of self-imposition that only a Law in a formal sense can guarantee".

On the other hand, the Legislative Decree is a norm that is dictated by the Government by virtue of delegation granted by Parliament. There are two types of Legislative Decree:

articulated text, if the subject is regulated *ex novo*; or consolidated text, if the task of the Government is to bring together in a single text dispositions already in force dispersed in different norms.

Finally, a Regulation is a source of tax lax dictated by the Government but whose hierarchical position in the tax system is lower than the law. That is why the Regulation is absolutely subordinated and conditioned to the Law: a Regulation cannot go against the provisions of the Laws, even in the case of matters not constitutionally reserved to the Law, according to the principle of preference of law.

We should mention in this regard that it is possible, and the article 7.1 e) of the General Tax Act in its expressly provides it, that the Minister of Finance develops provisions on tax matters, which will take the form of a ministerial order (*orden ministerial*), when has an express habilitation by the Law or Regulation object of development. Hierarchically, they are placed below the Royal Decree of the President of the Government or the Council of Ministers.

In relation to regulatory power, this is attributed not only to the central government, but also to the autonomous governments and even to the local entities through the so-called tax ordinances (*ordenanzas fiscales*). Therefore, there is a difference between the legislative power and the regulatory power, since the first type is held by the State and the Autonomous Communities but not by local entities.

Lastly, the second paragraph of Article 7 General Tax Act establishes the supplementary nature of the provisions of administrative law and common law. Therefore, they will also be part of the Spanish tax order.

2.3. The principle of legal reserve in the tax field

The Spanish Constitution, in its article 31.3, recognizes the so-called principle of legal reserve. This principle is also established in a much more indirect way in the paragraphs 1 to 3 of the article 133 of the Constitution. In our tax system, this principle serves a dual purpose. On the one hand, it guarantees respect for the principle of self-imposition, so that citizens do not pay more taxes than those to which their legitimate representatives have granted their permission. This idea responds to the traditional demand *nullum tributum sine lege* or “no taxation without representation”, which means public authorities cannot unilaterally require citizens to pay any patrimonial and public amount if, previously, it has not been regulated by

legal norms of a higher hierarchical rank emanating from legitimate political representatives. On the other hand, the principle of legal reserve fulfills a clearly guaranteeing purpose of property rights.

Legal reserve has, first, constitutional nature, that constitutes the axis of the relationship between the executive and the legislative in relation to the production of norms. Moreover, this principle acts like a limit not only to the executive power but also to the legislative power, as this task of approving tax laws must be carried out compulsorily. Romero-Flor (2013) adds that the principle of legality in tax matters connects with the principle of legal certainty established in article 9.3 of the Constitution, that even though it is not a value that has a direct relationship with taxes, the certainty of the Law makes it possible for taxpayers can accurately know the scope of their tax obligations.

The content of the referred principle is found in the article 8[5] of the General Tax Act, as it mentions the aspects that are necessarily regulated by law and are considered the essential aspects of the tax, for instance the delimitation of the taxable event or the establishment of tax benefits or incentives.

[5]Article 8 of the General Tax Act**:**
"*In any case, the following will be regulated by law:*
a) The delimitation of the taxable event, the accrual, the taxable and taxable base, the fixing of the type of tax and the other elements directly determining the amount of the tax debt, as well as the establishment of presumptions that do not admit proof in contrary.
b) The assumptions that give rise to the tax obligations to make payments on account and their maximum amount.
c) The determination of the taxpayers provided for in section 2 of article 35 of this law and those responsible.
d) The establishment, modification, suppression and extension of the exemptions, reductions, rebates, deductions and other tax benefits or incentives.
e) The establishment and modification of the surcharges and the obligation to pay late-payment interest.
f) The establishment and modification of the prescription and expiration periods, as well as the causes of interruption of the computation of the prescription periods.
g) The establishment and modification of tax offenses and sanctions.
h) The obligation to present declarations and self-assessments referring to compliance with the main tax obligation and that of payments on account.
i) The consequences of non-compliance with tax obligations regarding the effectiveness of legal acts or transactions.
j) Obligations between individuals resulting from taxes.
k) The cancellation of debts and tax sanctions and the granting of moratoriums and reductions.
l) The determination of the acts susceptible of claim in economic-administrative way.
m) The cases in which the establishment of permanent tax interventions is appropriate".

Following the previous idea, the Constitutional Court, in its ruling STC 37/1981, has confirmed that the principle of legal reserve is only fulfilled when the legislator establishes the essential aspects of taxes.

The legal reserve applies not only to State taxes, but also to the taxes of the Autonomous Communities. That means it is a requirement constitutionally imposed on both the Spanish Parliament and the regional Parliaments and from which neither the former nor the latter can do without when they establish a tribute. However, the legal reserve does not apply with the same intensity to municipalities, as they cannot pass laws.

Finally, there is a special relation between legal acts of the Parliament and the non-legislative rules enacted by the executive power. As we have mentioned before, the essential aspects of taxes must be regulated by law, but there is no objection to the development of this tax act being done through norms approved by the Government, such as a Regulation, obviously when this development respects what is contained in the law. This has been explained by the Constitutional Court in the Judgement 185/1995[6].

Moreover, the scope of the collaboration of the regulation will depend on the diverse nature of the legal-tax figure in question. This has been recognized by the Constitutional Court itself in its Judgment 102/2005, because the principle of legal reserve is stronger for instance, when the taxable event of a tax is regulated, than the situation in which a Regulation develops a fee or special contribution, where it does not exist the same degree of coactivity.

2.4. The role of regional or local bodies in the creation of tax legislation

The legislative power, as we have mentioned before, rests in the hands of the State and the Autonomous Communities, so their Parliaments are the institutions entrusted in the creation of legislation in general, and more specifically, tax legislation.

We can assume that the principle of legal reserve enshrined in the article 133.2 of the Spanish Constitution is recognized in favor of State laws. That means the Constitution establishes the legislative power of the Autonomous Communities, but this power is subordinated to what is expressed in the Constitution and laws. In fact, since the promulgation of our Constitution, it

[6] F. J. 5º of the Constitutional Court Judgement 185/1995: "*It is a relative reserve in which, although the criteria or principles that must govern the matter must be contained in a law, collaboration with the regulation is admissible, provided that it is essential for technical reasons or to optimize compliance. - all of the purposes proposed by the Constitution or by the Law itself, provided that the collaboration occurs in terms of subordination, development and complementarity*".

has been an intense debate about who holds financial power in Spain. At first, some authors pointed out that the State actually had original financial power, while the Autonomous Communities and local entities had derived power. Nevertheless, after the configuration of the Autonomous State, Autonomous Communities do not have a legislative power derived from a pre-existing state power. It would be incongruous to say that they have derived financial power if other articles of the Spanish Constitution recognize financial autonomy to them. That is, regions have an original power in the creation of legislation, expressly established in our Constitution, but they have a clear limit in the national norms and in the Constitution itself.

Regarding the role of municipalities, the Constitutional Court recognizes municipal tax autonomy, but without being full or unlimited. Magraner Moreno (2019) believes that this is so due to the derivative nature from the tax power of Local Corporations and because also with respect to them, as it could not be otherwise, autonomy refers to a necessarily limited power.

As the Constitution does not articulate in a closed way the distribution of taxing powers, the effective distribution of them has been done by the approval of the respective Statutes of Autonomy and, more comprehensively, in the Organic Law of Financing of the Autonomous Communities (LOFCA). Currently, the development of the Organic Law is done by Law 22/2009, which regulates the financing system of the Common Regime Autonomous Communities and Cities with Statute of Autonomy. According to Martín Queralt, this Law has played a decisive role in maintaining some degree of coordination between the different tax systems in Spain.

Having said so, State and Autonomous Communities have a legislative power that allows them the creation *ex novo* of taxes, while local entities need the authorization of a state or regional law that creates the tax and configures the basic features of its legal regime, to "establish" its validity and regulate them if necessary.

On the one hand, regional bodies have a clear role in the creation of tax legislation in Spain. The LOFCA recognizes in favour of the Autonomous Communities the possibility to establish and require its own taxes in accordance with the Constitution and the laws. However, this category of taxes has been residual in the autonomic level since most of the potential taxable facts are already taxed by central authorities. According to the Constitutional Court, to consider that two taxes are the same, three requirements must be met: identity of taxable events, identity of taxpayers and the same purpose of the taxes. However, De Vicente De la

Casa (2020) says that the taxable matter or object of the tax should be used. It is necessary to go to the taxable matter or object of the tax, which is what guarantees compliance with the constitutional principles of article 31.1 of the Spanish Constitution.

As examples of own taxes of different Autonomous Communities in Spain, we can name the Tax on Packaged Sugary Drinks in Catalonia or the Taxes on Waters in the majority of Autonomous Communities, called drainage or cleaning up fee or *canon de saneamiento de aguas*.

Then, Autonomous Communities also have handed over taxes. This type of tax is enacted and established by the State, but transferred to the Autonomous Communities in different ways, as the transfer can be total or partial. At first, the transfer only concerned administrative powers and the collection of the tax amount. With the approval of the Law on Assignment of State Taxes (*Ley de Cesión de Tributos*), the Autonomous Communities were enabled to introduce some normative modifications in the regulation of yielded taxes. Besides, particularly after 2001 the cession has been done in view of certain statistical figures and not according to the application of the connecting elements of the taxable event, according to García Prats.

The traditional classification of handed over taxes is the following.

First, we find the handed over taxes on which Autonomous Communities do not receive any normative or applicative competences. On this type of taxes, Autonomous Communities simply receive an amount of what is collected by the Central State, and they are the result of the growth in the need for funds of the Autonomous Communities as they assume great competences in matters such as health, education or social services. The level of harmonization that exists in these yielded taxes explains why normative competences have not been attributed to the Autonomous Communities. In fact, these taxes can be considered as transfers of resources from a Central State based on certain consumption needs. Taxes that are included in this group are the VAT, which is handed over at 50% level, and the Excise duties[7],

[7] Article 25 of the Law comprise the excise duties, which are the following:
"*g) Impuesto sobre la Cerveza.*
h) Impuesto sobre el Vino y Bebidas Fermentadas.
i) Impuesto sobre Productos Intermedios.
j) Impuesto sobre el Alcohol y Bebidas Derivadas.
k) Impuesto sobre Hidrocarburos.
l) Impuesto sobre las Labores del Tabaco.
m) Impuesto sobre la Electricidad.
n) Impuesto Especial sobre Determinados Medios de Transporte.
o) Impuesto sobre las Ventas Minoristas de Determinados Hidrocarburos".

where Excise duties on Hydrocarbons, Tobacco and Alcoholic Drinks are handed over at 58% level, while Excise duties on Electricity and Vehicles are handed over totally.

Another group of yielded taxes is the one composed by handed over taxes which enables Autonomous Communities to exercise normative competences, but not competences on the assessment and control of the tax. In this group we find one of the most important taxes in the Spanish tax system: the Personal Income Tax. Right now, the Law 22/2009 enables Autonomous Communities of the common regime to regulate the personal and familiar minimum exempt, the tax burden scale (except on the savings part of the income) and create new tax deductions and benefits (except the ones related to business activity). Since 2009, the percentage of the tax handed over is 50% and transfer is based on the criteria of habitual residence. As we have said, the Personal Income Tax is, however, controlled and applied by the Central Tax Administration.

The last type of handed over taxes is the one which imply both the collection and administrative capacity to apply the tax, and certain normative competences. At this regard, state regulation is applied to these taxes, but Autonomous Communities have certain power in some aspects such as minimum exempt, tax scale, deductions or tax credits. Taxes included in this group are the following: Wealth Tax, Inheritances and Donations Tax, Tax on Capital Transfers and Documented Legal Acts and the Game Tax. These taxes had been handed over totally to the Autonomous Communities.

An interesting debate has arisen around what certain Autonomous Communities do with respect to Wealth Tax and Inheritances and Donations Tax, as they have introduced several tax benefits with the consequent differentiation in taxation between regions. Because of that, there is an infringement procedure open by the European Commission against Spain considering that some of these tax benefits could constitute State aids. In this vein, it is important to mention the influence that the Sentence of the Court of Justice of the European Union on tax system of Azores (C-88/03) have had on the consideration of the fiscal measures taken by the Autonomous Communities as constituting “selective fiscal measures”, a subtype of State aid. According to García Novoa (2006), and following the arguments of the Ruling in the Azores case, in order for a fiscal measure adopted by a territorial entity other than the State and of a sub-central nature not to be classified as State aid, it must meet certain requirements, which are the following: that the tax regulations through which the tax benefit is introduced be approved by a territorial Administration other than the state; that the tax

benefit is granted without interference from the central State; that the tax legislation is of general application in said region; finally, that the regional authorities assume the collection cost without compensation from the central government.

On the other hand, at the local level the creation of tax legislation is subordinated at what it is stablished in the Royal Legislative Decree 2/2004, through which the Consolidated Text of the Law regulating local treasuries –hereinafter Local Treasury Law– is approved. This Law applies to every local entity of the Autonomous Communities of the Common Regime. In addition, its regulation establishes municipal taxes which cannot be required by provinces or other local entities. Nevertheless, according to the Local Treasury Law, the Governments of provinces (*diputaciones provinciales*) and islands (*cabildos* and *consejos*) can create fees and special contributions and stablish a surplus in the Business Activities Tax, according to articles 132 to 134 of the Local Treasury Law.

The local tax system in Spain is composed of five municipal taxes provided for in the aforementioned Law, three of which are mandatory and two are voluntarily established by the municipalities. The Real Estate Tax, Business Activities Tax and Tax on Motor Vehicles are required mandatorily by the municipalities. However, the other two taxes prescribed by the State law may be required if approved through a tax ordinance, as well as the rest of their own income, such as fees and public prices. These two taxes of voluntary establishment are the Tax on Buildings, Installations and Infrastructure and Tax on Value Increase of Urban Land.

The article 7.1 e) of General Tax Act recognizes the rules issued by executive bodies as sources of tax legislation. Specifically, it mentions tax ordinances (*ordenanzas fiscales*) as provisions that local executive bodies can pass, and ministerial orders (*órdenes ministeriales*), rules enacted by the Minister of Finance that develop a Regulation or a Law which expressly enables them to do so.

First, tax ordinances are a type of regulation made by the executive body of a local entity. The article 15 of Local Treasury Law indicates that tax ordinances are the legal instrument that local entities have at their disposal for the regulation of their taxes, always within the margins established in the law itself. Fernández Pavés and Jabalera Rodríguez (2006) say that when comparing tax ordinances with state or regional regulations, even though they all have the same rank, it cannot be forgotten that local ordinances come, like the Law, from a body or institution essentially democratic and representative, which guarantees that the taxes are established and approved by the representatives of the taxpayers.

Tax ordinances will be considered norms of regulatory rank that develop and complement what is established by Law or Regulation. This means that each municipality can adapt several aspects of the taxes established in the Local Treasury Law. An example is the Real Estate Tax regulation. This tax is totally developed by the Local Treasury Law, but each City Council has the possibility of increasing tax rates up to a certain limit and establishing allowances.

A point should be made concerning the Spanish tax system, as there are also Autonomous Communities of Charter Regime (Navarra and Basque Country). Result of their historical differences, Navarra and Basque Country have much more tax autonomy than the rest of Autonomous Communities in Spain. The norms applicable in these two Autonomous Communities are Law 12/2002, of 23 May, approving the Economic Agreement with the Autonomous Community of the Basque Country and Law 28/1990, of 26 December, which approves the Economic Agreement between the State and the Foral Community of Navarra.

Article 142 of the Spanish Constitution establishes the need of the local entities' treasuries to have enough funds available so as to accomplish their functions, which should be financed principally by their own taxes but also by the portion of State and Autonomous Communities taxes.

The State is responsible for determining the framework of resources available to local entities because, as we have mentioned before, local entities do not have legislative power. Furthermore, certain Autonomous Communities such as Basque Country and Cataluña have established other frameworks to set additional resources for their local governments. The Constitutional Court has affirmed that these Autonomous Communities are only able to exercise competences in the conformation of the tax system of local entities as far as it is recognized by a national law.

2.5. Explanatory instruments and interpretative positions for tax matters

Article 12.1 of the General Tax Act refers to the interpretation of tax legislation. It sustains that the interpretation of tax law should be made according to the article 3.1 of the Spanish Civil Code[8]. The interpretation criteria set out in this law are: grammatical, systematic, historical, sociological and teleological.

[8] Article 3.1 Spanish Civil Code: "*The rules will be interpreted according to the meaning of their words, in relation to the context, the historical and legislative background, and the social reality of the time in which they are to be applied, paying special attention to the spirit and purpose of those*".

Additionally, the second part of the aforementioned article[9] gives us different ideas about the interpretation of tax regulation.

First of all, concepts and categories of tax regulations are autonomous. This implies that the meaning of a term that appears in a tax regulation is the one attributed to it by the tax regulation itself and not the one it may have in other branches of Law. The Spanish Constitutional Court has affirmed that tax legislator can formulate his own qualifications when dealing with a new institution that is not defined in other branches of law or when it is necessary to give it a different meaning exclusively for tax purposes.

Furthermore, when a term is not defined in the tax regulations, it must be interpreted "in accordance with its legal, technical or usual meaning, as appropriate". It is preferable, in general terms, to interpret the law according to the legal sense when this is possible, leaving the technical and usual interpretations when we use the meaning of the term in other branches or sciences of knowledge and when we must give it the meaning that the word has in a colloquial way, respectively.

Finally, Article 12.3 of the General Tax Act authorizes the Minister of Finance to issue some interpretative or explanatory provisions that clarify the interpretation of tax legislation. These types of provisions, which are ruled by the executive branch of Government at central level, are mandatory for all the bodies that make up the Tax Administration and are published in the corresponding Official Gazette.

In this sense, it is worth mentioning the possibility that the Central Economic-Administrative Court has to unify doctrine. These criteria are binding both for the Tax Administration and for the other Economic-Administrative Courts. However, this option should only be recognized when there is no legal doctrine of jurisprudence, and the situation in which administrative and judicial bodies resolve equivalent cases in different ways cannot arise, since this goes against legal certainty.

On the other hand, the General Directorate of Taxes can respond to questions raised by taxpayers on the application and interpretation of tax regulations. Article 89 of the General Tax Act gives these written tax consultations binding effects for the Tax Administration in relation to the consulting taxpayer and any taxpayer, provided that there is identity between

[9] Article 12.2 of the General Tax Act: "*As long as they are not defined by the tax regulations, the terms used in their regulations will be understood in accordance with their legal, technical or usual meaning, as appropriate*".

the facts and circumstances of said taxpayer and those included in the response to the binding consultation.

The regulatory power of the Local Corporations in tax matters will be exercised through tax ordinances regulating their taxes, and general ordinances for management, collection and inspection. Taking into account both of them, the Local Corporations may emanate interpretative and clarifying provisions of these two types of tax rules of less importance than those provisions issued by the Minister of Finance.

Having said so, the explanatory instruments for tax matters issued by the executive branch of government at central, regional and local level do not have a legal status for citizens, as they are only mandatory for Tax Administrations.

On a separate issue, we find the interpretative positions for tax matters taken by the judiciary, which is composed by different courts.

First, the Spanish Civil Code establishes in its article 1.6[10] the complementary nature of the Supreme Court jurisprudence.

In order to establish jurisprudence and make it binding, it is necessary to meet a minimum series of requirements. Thus, according to the Supreme Court, jurisprudence exists when the legal interpretation assumed by the Supreme Court is upheld in similar matters, it is maintained unalterably in order to guarantee the security of legal relationships, and there are at least two verifiable identical or similar operative parts of the judgment.

In addition, we have to mention the possibility of cassation in tax cases recognized by the articles 86 and following of the Law 29/1998, of July 13, governing the Contentious-administrative Jurisdiction. This type of rulings of the Supreme Court, which were modified in 2016, aims to give more value to jurisprudence and achieve greater uniformity in the judicial application of the law, forcing the interpretation of the rules on which the sentence falls as established by the Court itself.

Finally, the Constitutional Court is the body in charge of interpreting our Supreme Norm. Logically, its pronouncements have effects *erga omnes* in the cases that the unconstitutionality of a rule is declared or if they are not limited to the subjective estimate of a right, as it is

[10] Article 1.6 of the Spanish Civil Code: "*The jurisprudence will complement the legal system with the doctrine that, in a reiterated way, the Supreme Court establishes when interpreting and applying the law, the custom and the general principles of law*".

recognized in the article 164.1 of the Spanish Constitution. In addition, we also have to establish the link to the doctrine of the Constitutional Court by the other organs of the State, as reflected in the article 5.1[11] of the Organic Law on the Judiciary, but also in different articles from the Constitutional Court Organization Act.

[11] Article 5.1 of the Spanish Organic Law on the Judiciary: "*The Constitution is the supreme norm of the legal system, and binds all Judges and Courts, who will interpret and apply the laws and regulations according to the constitutional precepts and principles, in accordance with their interpretation resulting from the resolutions issued by the Constitutional Court in all kinds of processes*".

3. THE ELABORATION OF ORDINARY TAX LEGISLATION

As Spain is a decentralized state where there are different levels of competent authorities for tax purposes, the issue must be analyzed from different approaches. National and regional authorities have both normative competences in Spain, therefore the development of this section will have two parts, analyzing the legislative procedure followed in these two different scopes.

3.1. The national level approach

For legislative purposes, it does not exist a specific definition of a tax provision at the national level. Related with the principle of *nullum tributum sine lege*, tax provisions must be included in ordinary laws. In fact, a law must regulate, according to the article 133.3 of the Spanish Constitution, the *ex novo* creation of the tax, the essential elements of it and any fiscal benefit that affects State taxes.

Even when in our legal system exists the figure of organic laws, these special rules are reserved for specific subjects, in which it is not included the regulation of tax provisions.

In this sense, there is not a specific set of rules applicable to the elaboration and adoption of tax bills, so they do not follow a special legislative process and the normative sources that constitute their applicable framework are the constitutional articles that contain the basic tax principles already mentioned (articles 31, 133 or 86 of the Spanish Constitution, for instance).

Moreover, another source of this ordinary legislative procedure are the Regulations of the Congress and the Senate, which constitute special norms as the Chambers themselves are the ones in charge of approving and amending its Regulations. This capacity of self-regulation is provided for in article 72 of the Spanish Constitution. The Parliamentary Regulation, despite its name, is not comparable with a provision issued by the Government under art. 97 CE. Rather, it is a primary rule directly linked to the Constitution, in accordance with Ruling of the Constitutional Court 101/1983, and therefore has the value of law, although it is devoid of the force of law itself.

Having said so, the approval proceeding is the one followed in general terms for all type of Laws, which in the national level works as follows.

3.1.1. The ordinary legislative procedure

The ordinary legislative procedure includes the set of acts that the legal system qualifies as necessary in the process of formation of the law. In it we can distinguish three different phases: the *initiative*, in which the authorized subjects propose a text for its processing as law; the *constitutive* one, corresponding to the discussion and approval of the text by the two Chambers that make up the Spanish Cortes Generales; and the *improvement*, which consists of the sanction, promulgation and publication of the law.

3.1.1.1. The initiative phase

The first phase, the legislative initiative, is not strictly speaking an act of the legislative procedure but could be considered an essential preliminary condition to activate the procedure. Article 87 attributes the exclusive power to initiate the procedure to the Government, to the Congress of Deputies and to the Senate "in accordance with the Constitution and the Regulations of the Chambers", to the legislative assemblies of the Autonomous Communities and to the citizens, or more precisely, to a portion of the electoral body. But their positions are not at all comparable.

The government initiative is the most usual way to begin the procedure, whose first draft of the tax law is called *anteproyecto de ley*. Prior to the presentation of the project of law to the Parliament, there is a plan of action to ensure that the future law meets all the requirements and has the support of the institutions and entities affected by the proposed measure, which is presented afterwards.

The Law 39/2015, of 1 October, on the Common Administrative Procedure of Public Administrations (from now on, LPAC) and Law 40/2015, of October 1, on the Legal Regime of the Public Sector (hereinafter, LRJSP) are the latest laws that introduce certain innovations in terms of law-making and regulatory technique.

As established in the Explanatory Memorandum of the LRJSP, derived from the initiatives on *Better Regulation* of the European Union and the recommendations of the OECD, relevant precepts have been introduced in terms of planning and regulatory assessment, both ex ante (analysis of regulatory impact, which until the approval of these laws were regulated by Royal

Decree[12]) as ex post, and to other aspects of the normative technique (publicity of the norms, entry into force), in particular a quality control of the normative activity by the Ministry of the Presidency.

Article 129 of the LPAC includes the principles of good regulation. These are the principles according to which the Public Administrations must act, including the Government when preparing draft tax laws. The principles of good regulation are necessity, effectiveness, proportionality, legal certainty, transparency and efficiency. The Government must justify in the explanatory statement or preamble of the bills or draft regulations that there is an adaptation to the aforementioned principles.

Article 129 closes with the mandate that when the regulatory initiative affects present or future public expenses or income, as could happen with tax legislation, its repercussions and effects must be quantified and assessed (assessment of the economic impact that must be related to with the economic analysis in the elaboration of the norms provided for in article 130.2, with the Memory of the regulatory impact analysis contemplated in the new article 26.3 of the Government Law, and with the *ex post* evaluation provided for in article 130 LPAC), and be subject to compliance with the principles of budgetary stability and financial sustainability.

The first phase of the assessment of the bill is carried out through consultation, hearing and public information procedures, which will be analyzed in Section 6.

After these procedures, it is mandatory to evaluate the bill carrying out a Regulatory Impact Analysis Report ("Memoria de Análisis de Impacto Normativo"). Article 26.3 of the Government Law expands the content of the aforementioned Royal Decree, which regulated it exclusively before the entry into force of the LRJSP. This Report is an instrument of legislative technique that carries out an *ex ante* evaluation of the initiative. In addition, it follows the approach of the questionnaires or *Checklisten*[13].

[12]Royal Decree 1083/2009, of 3 July, which regulates the memory of the regulatory impact analysis, not expressly repealed by the Law but whose content is incorporated to a large extent into the Law of the Government (article 26.3).

[13]The German *Checkliste* model is the "Questionnaire on the necessity, effectiveness and intelligibility of draft normative provisions of the Federation", known as *Blaue Liste*. In Spain, the counterpart would be the "Evaluation Questionnaire that must accompany the regulatory projects that are submitted to the Council of Ministers".

Once the Regulatory Impact Analysis Report and public consultations have been carried out, also article 26 of the Government Law begins the regulation of the procedure for the elaboration of draft laws and drafts of other regulations, stating that their drafting will be preceded by as many studies and consultations as considered desirable to guarantee the correctness and legality of the norm. In other words, when the regulatory provision is a draft law or a draft legislative royal decree, the head or heads of the proposing departments will raise it, after submitting it to the General Commission of State Secretaries and Undersecretaries, to the Council of Ministers, so that it decides on the subsequent procedures, and in particular, on the consultations, opinions and reports that are convenient, as well as on the terms of their realization, without prejudice to the obligatory ones.

They are mandatory for draft laws, in addition to those that may result from the matter subject to regulation, including the opinion of the Council of State[14], the report of the Technical General Secretariat of the proposing Ministry or Ministries. When the regulatory proposal affects the administrative organization of the General State Administration, its personnel regime, the procedures and the inspection of the services, it will be necessary to obtain the prior approval of the Ministry of Finance and Public Administrations before being submitted to the competent body for its promulgation (it is understood that in the bills, it will be before submitting them to the Council of Ministers and their sending to the Cortes Generales, although the wording seems to refer to the regulatory norms); If fifteen days have elapsed since the receipt of the request for approval by the aforementioned Ministry, the latter does not raise an objection, it is understood that it has been granted. A prior report from the Ministry of Finance and Public Administrations will also be necessary when the rule may affect the distribution of powers between the State and the Autonomous Communities.

After all this information and consultation procedure, the resulting texts presented by the Government receive the name of "project of law" (*proyecto de ley*). These must be approved in an official meeting by the Council of Ministers, which sends them to the Congress accompanied by a statement of reasons and the necessary background information to rule on them, according to article 88 of the Spanish Constitution. This preeminent position of the Government is confirmed by the constitutional precept that establishes that its processing begins automatically, so that in the case of projects of law there is no process for taking them

[14]The Council of State is the supreme advisory body of the Government and issues opinions on those matters that the Government or its members submit for consultation, either on a mandatory or optional basis.

into consideration. In addition, according to article 89.1 of our Supreme Law, the processing of these texts has priority over those of other origin.

On the other hand, the parliamentary initiative materializes with the presentation of bills (in Spanish, *proposiciones de ley*) by parliamentary groups (the most common case) or by a number of parliamentarians (15 deputies or 25 senators). Its processing must pass a previous procedure: the so-called "take into consideration" by the respective chamber consisting of a full debate and a pronouncement by the Plenary, favorable or rejecting, in which the motivation is not necessary. If the initiative comes from the Senate, it is not necessary to repeat the consideration also in the Congress of Deputies. Only the proposal must be sent to it to start the substantive processing (article 89.2 of the Constitution). In any case, the Regulations of Congress establish that the proposed laws must be sent to the Government so that it can express its opinion and, where appropriate, oppose the processing of those that imply an increase in credit or a decrease in budgetary income, based on article 134.6 of the Constitution, or when they modify a legislative delegation in force, based on article 84 of the same constitutional text.

It is interesting to elaborate on the capacity granted by the Constitution to the Government to oppose the processing of initiatives that imply an increase in expenses or a decrease in budgetary income. This is a highly relevant debate according to Martín Núñez (2019), since allowing the Government to freely decide which proposals affect the current Budget could severely restrict the ability of Chambers to adopt bills and a consequent loss of the autonomy of them. The Constitutional Court Judgment 223/2006, of 6 July 2006, tends to broadly interpret the power of the Government to identify the initiatives that may be subject to the aforementioned criteria. According to this Resolution, "the execution of a current budget supposes the verification of two confidences: on the one hand, that obtained by the Government with the investiture of its President; on the other, that specifically granted by the Chamber to its annual political program. Just as the first is only lost in expressly established cases (with the success of a motion of censure or the failure of a question of confidence), the second is kept throughout the natural validity period (or extended) of the budget, so that the Government can legitimately claim that the economic forecasts contained therein are rigorously observed in the course of its execution". For this reason, the Executive is empowered "with complete freedom" to oppose initiatives that seek to modify the Budgets, "without the parliamentary bodies being able to pass judgment on whether or not such opposition is manifestly unfounded". On the contrary, the Ruling of the Constitutional Court

242/2006, of 24 July 2006, does grant the Chamber's bodies a greater scope of appreciation when determining which initiatives affect current Budgets. The Judgment recalls that the inadmissibility of any initiative of a general nature must be formally and materially motivated, which is why the Board of Parliament can declare that the Government's criteria opposing a bill is manifestly unfounded. From the foregoing it can be deduced that the Government has a margin of discretion to oppose the processing of legislative initiatives because they imply an increase in expenses or a decrease in income in the current budget year. However, in the event that the Government shows a "manifestly unfounded" criterion, the Board of the Chamber could reject it, so that the bill would continue with its processing.

The legislative initiative attributed to the Autonomous Communities is considered by Rubio Llorente (1986) as a "second degree faculty", analogous to that enjoyed by the parliamentary groups. This initiative is implemented in two ways: requesting the Government to adopt a bill or submitting a bill directly to the Board of Congress (article 87.2 of the Spanish Constitution). In the first case, the regional initiative is only exercised indirectly, since it is up to the Executive to accept the request. In the second, the Regional Assembly can delegate a maximum of three of its parliamentarians for its defense before the Plenary of the Congress of Deputies in the process of taking it into consideration. The initiative that the Autonomous Communities have in the national legislative procedure must not be confused with the legislative procedure of these regions, which will be explained later.

The popular legislative initiative requires the endorsement of 500,000 accredited signatures and must be presented before the Table of Congress. Cabedo Mallol (2009) argues that this type of initiative is the most intense level of citizen participation, which is provided for in article 86.3 of the Spanish Constitution and in all the Statutes of Autonomy of the various Autonomous Communities. However, the Constitution excludes this type of initiative in certain matters, such as tax matters. The legislative development of this third section is represented, fundamentally, by Organic Law 3/1984, of March 26, regulating the popular legislative initiative, reformed in 2015. This rule establishes a series of requirements to exercise the popular initiative that aggravate those provided for in the Constitution. In the first place, its second article excludes, apart from the matters of the Organic Law, those of a tax nature, those of an international nature and those referring to the prerogative of grace, those mentioned in articles 131 and 134.1 of the Constitution; that is to say, the planning of the general economic activity and the General Budgets of the State. In addition, it is required that the presentation document include, together with the articulated text of the bill that must be

preceded by a Statement of Reasons, a document detailing the reasons that advise, in the opinion of the signatories, the processing and approval of the bill and the list of the members that make up the Initiative's Promotion Commission, with expression of the personal data of all of them. Verification of compliance with such requirements and respect for the material limits corresponds to the Board of the Congress of Deputies which, in a process of admission of the initiative provided for in article five, can reject it for not meeting them.

According to Cuesta López (2008), in addition to excluding matters reserved for the Organic Law, the Spanish constituent has chosen to transfer, almost literally, the material restrictions of the Italian abrogative referendum provided for in article 75[15] of the Italian Constitution to article 87.3 of the Spanish one, which is questionable because while the latter institution addresses the electoral body that imposes its will on political representatives, the citizen's legislative initiative can always be rejected in Parliament. As he concludes, the Legislator wants to be spared possible external political pressures with respect to a set of especially sensitive matters. In fact, new regulations related to tax measures and in general about fundamental right and public liberties are capable of mobilizing sectors of society, so perhaps this may be the reason why the popular initiative is not used excessively in Spain.

3.1.1.2. The constitutive phase

The constitutive phase includes the set of preparation procedures that culminate, where appropriate, with the approval of the law in both Chambers. As this phase is carried out exclusively by the Parliament, it is worth making a brief introduction to the Spanish legislative branch.

The exercise of the legislative power of the State corresponds to the Cortes Generales, which represent the Spanish population and control the action of the Government. They are composed of two chambers: the Congress of Deputies and the Senate.

The Congress of Deputies is made up of 350 deputies[16] elected by universal suffrage every four years. All bills must first be examined in the Congress of Deputies, whereas the Senate has the right to veto or amend the text drawn up by Congress and reserving the final decision after further examination.

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[15] Article 75 of the Italian Constitution: "*The referendum for tax and budget laws, amnesty and pardon, or authorization to ratify international treaties will not be admitted*".

[16] As of 17 March 2023, after the withdrawal of Alberto Rodríguez (he has not yet been replaced) and the transition to the Mixed Group of María del Carmen Pita Cárdenes, the GP of Unidas Podemos currently has 33 deputies and, therefore, the chamber has 349 deputies.

The Senate presents itself as the Chamber of territorial representation and is made up of 265 senators. 208 of its members are elected by direct universal suffrage every four years and another 57 are appointed by the Legislative Assemblies of the Autonomous Communities, which elect one senator each and another for every million inhabitants of their respective territory.

The constitutive phase begins in Congress[17] with the publication in the Official Gazette of this chamber of the project or proposed law, the opening of a period for the presentation of amendments and the submission to the corresponding permanent legislative Commission. In tax bills, the permanent legislative commission is the Finance and Public Function Commission.

The amendments presented by the deputies or parliamentary groups can be: amendments to the enacting terms, that is, the addition, modification or deletion of one or several articles of the text presented; or amendments to the whole, proposing a complete alternative text or proposing the return of the project to the Government or the Senate. Once the amendment phase is over, a debate is held in plenary session of the Congress of Deputies only if amendments have been submitted to all of them. Otherwise, a first examination of the initiative and of the amendments to the articles presented by the competent commission for the matter is carried out. In it, a paper is appointed, made up of a small group of deputies, to write a report that will later be debated. This discussion in the Committee concludes with the adoption of an Opinion, which is also part of debate and approval in the Plenary of the Congress of Deputies, by simple majority. Once approved in Congress, it is sent to the Senate where the processing continues.

The discussion in the Senate reproduces the same phases that the project of law or bill has gone through in Congress: publication in the Official Gazette of the Senate, presentation of amendments, preparation of a Report, debate and approval of the Opinion in the commission and deliberation in plenary, if applicable. However, it should be noted that in the Senate there is a two-month term limitation imposed by article 90.2 of the Constitution.

The pronouncement of the Senate can occur in three ways: approval in the same terms of the text submitted by Congress, introduction of amendments to the text approved by simple

[17]Every bill begins its constitutive phase in the Congress of Deputies, except for the Law approving the Interterritorial Compensation Fund, which is presented and begins its processing, exceptionally, in the Senate, by imperative of article 74.2 of the Spanish Constitution.

majority, or veto, for which an absolute majority of the Senate Plenary is required. The veto means a total rejection of the text, which replaces the entire amendments in this Chamber. In the event that the Senate does not modify the text, the parliamentary process ends in this chamber and the approved text passes to its approval and promulgation. In the two remaining cases, the text returns to the Plenary Session of Congress, which must rule on the amendments, accepting or rejecting them by simple majority. When the text is vetoed, after a full debate, the initial text is put to a vote and the veto is lifted if an absolute majority of the members of the House vote in favor of it. If this majority is not obtained, Congress can lift the veto after two months, by simple majority.

The procedure explained reveals the position of subordination in which the Senate finds itself with respect to the Congress of Deputies in the ordinary legislative procedure. This allows us to classify the Spanish case as imperfect bicameralism. In other words, the role of the Senate consists of formulating proposals for amendments to Congress and the power of veto, which is rather considered a right of return to the other chamber so that it can reconsider the approval of the vetoed text.

3.1.1.3. The improvement phase

The improvement phase begins when the text of the law has been definitively approved and includes, according to article 91 of the Constitution, three acts of a different nature. These three acts are carried out by the Spanish King (derived from the consideration of Spain as a parliamentary monarchy) and are the following: sanction, promulgation, and order to publish the law. The Spanish Constitution considers them necessary requirements for the law to acquire full validity and mandatory effectiveness.

Historically, the sanction of the law consisted of the act by which the King approved the norm discussed in parliament or vetoed it if he refused to sanction it. In the current Spanish context, in which, as we have said, the form of political organization is the parliamentary monarchy, this act has become a mere formality, which occurs at the same time than its promulgation.

The promulgation, for its part, consists of the proclamation that the law has been approved by the *Cortes Generales* and is externalized through its definitive incorporation into the legal system.

The publication is the insertion of the law in a newspaper or official publication as a manifestation of the existence of the norm. In the case of state laws, the publication is made in

the Official State Gazette. With this act, article 9.3 of the Constitution is fulfilled, which refers to the principle of formal publicity of the norms, and whose purpose is to allow citizens to know their obligations. From the moment of publication, the *vacatio legis* begins, which is the time period that must elapse from the moment of publication of the law until its entry into force. The Spanish Civil Code sets a general *vacatio legis* period of 20 days, in the absence of an express provision of the law itself, which can extend or reduce it.

The entry into force is also regulated in article 23[18] of the Law 50/1997, of 27 November, of the Government. In fact, this provision can affect to tax laws since it sets as a condition that the bills "impose new obligations on natural or legal persons who carry out an economic or professional activity as a consequence of the exercise of this". In those cases, the aforementioned article establishes that the beginning of its validity will be on 2 January or 1 July following its approval. The reason may be that this legislative change in tax matters only takes effect at the beginning of the calendar year or exactly in the middle of it.

There is no maximum duration for the adoption of a bill. However, a bill takes about five months on average from the moment the Council of Ministers sends it to Parliament until, definitively approved by Congress, sanctioned and promulgated by the King and published in the Official Gazette, it becomes Law.

3.1.2. Other aspects

3.1.2.1. Constitutional control

Regarding the possibility of carrying out a constitutionality control of the bill before it is approved, this option does not exist in the sphere of the ordinary legislative procedure, but rather it is only provided for international Treaties, as will be explained in the following section.

[18]Article 23 of the Law 50/1997: "*Without prejudice to the provisions of article 2.1 of the Civil Code, the provisions of entry into force of laws or regulations, whose approval or proposal corresponds to the Government or its members, and which impose new obligations on natural or legal persons who perform a economic or professional activity as a consequence of the exercise of this, will provide for the beginning of its validity on January 2 or July 1 following its approval.*
The provisions of this article will not be applicable to royal decree-laws, nor when compliance with the deadline for transposition of European directives or other justified reasons so advise, and this fact must be duly accredited in the respective Report".

In other words, it is only possible to examine the constitutionality of a Law once it has been approved, through the so-called actions of unconstitutionality or questions of unconstitutionality, depending on who presents them.

3.1.2.2. The urgent procedure

The urgent procedure constitutes a specialty of the ordinary procedure. In it, no phase of the procedure is omitted, but the terms of the same are reduced by half. Processing a bill through the urgent procedure is a decision adopted by the Board of the Chamber at the proposal of the Government, two parliamentary groups or one fifth of the Deputies. In the Senate, the period of two months will be reduced to 20 calendar days in projects considered urgent by the Government or by Congress, according to article 90.3 of the Constitution.

The processing by way of urgency is also provided for in article 27 of the Government Law. In it, it is established that the Council of Ministers, at the proposal of the head of the department to which the regulatory initiative corresponds, may agree on the urgent processing of the procedure for the preparation and approval of bills, royal legislative decrees and royal decrees that must be mentioned in the Regulatory Impact Analysis Report along with the existence of such an agreement when any of the following situations occur.

In particular, when necessary for the rule to enter into force within the period required for the transposition of Community directives or the time established in other laws or regulations of European Union Law, and when other extraordinary circumstances concur that, not having been foreseen previously, demand the urgent approval of the rule. This last clause is broad enough to be able to easily resort to the urgent procedure by the Executive.

For instance, Law 38/2022, of December 27, for the establishment of temporary energy taxes and of credit institutions and financial credit establishments and by which the temporary solidarity tax of great fortunes is created, and modifies certain tax regulations, is a very recent example of a tax law that has been processed through this urgent procedure[19].

3.1.2.3. Procedure of approval of Regulations

The procedure for the elaboration of fiscal Regulations by the Government is also provided for in article 26 of the Government Law. In fact, this precept also applies to legislative decrees. Therefore, the procedure that we have explained for projects of law is also applicable

[19]The agreement to process the bill through the urgent procedure is available at the following link: https://www.congreso.es/public_oficiales/L14/CONG/BOCG/B/BOCG-14-B-271-4.PDF

to regulations (norms with a lower rank than the law) and legislative decrees (same rank as the law).

Regarding the preparation phase, prior to its drafting, studies and consultations will be carried out to guarantee the correctness and legality of the regulation. A public consultation will be carried out and it is also necessary to carry out a Regulatory Impact Analysis Report.

However, the phase of adopting a Regulation is much simpler, since its approval only requires the agreement of the Council of Ministers, which represents the joint will of the Government.

3.2. The regional level approach

The normative competences of the Autonomous Communities in tax matters make it important to also analyze the legislative procedure that these regions follow when approving tax legislation.

In the regional field, we do not find any definition of what a tax provision or bill is. As in the national level, tax laws follow the same procedure than general laws. Having said so, the main rule that applies to the elaboration and adoption of legislation in the regional level is the Statute of Autonomy of each Autonomous Community. The Statutes of Autonomy, according to the thesis supported by Luis Ortega (2010), are norms of competence delimitation, which makes them "secondary constitutional norms", highlighting their nature of material Constitutions. On the other hand, the Statutes of Autonomy are norms with a higher rank than the rest of the laws, due to the position they occupy in the system of sources. Nevertheless, Autonomous Cities of Ceuta and Melilla, even when they have their own Statute of Autonomy, do not have this legislative competence.

In addition to the Statute of Autonomy of the Autonomous Communities, the Regulation of each Legislative Assembly is the other important source of the ordinary legislative process followed, as it establishes the different phases of the procedure for passing regional laws.

3.2.1. The regional legislative procedure

As each regional legislative procedure is based on the regulation of each Statute of Autonomy, these methods differ between Autonomous Communities, although in general lines they follow the same basic principles and must respect the limits of competence imposed in the Constitution. That is the reason why, to simplify this analysis, we are going to explain the

legislative procedure of the Community of Madrid, a Spanish Autonomous Community of Common Regime.

3.2.1.1. The initiative phase

In accordance with article 15.2 of the Statute of Autonomy of the Community of Madrid (hereinafter, the Statute), the legislative initiative can correspond to the Government through the presentation of *proyectos de ley* and to the Deputies, parliamentary groups, citizens and city councils through the presentation of *proposiciones de ley*.

In other words, the Statute follows the general terminology of Spanish public law, for which *proyecto de ley* is the name reserved for government legislative initiatives, while under the term of *proposición de ley* rest all initiatives that do not come from the Government, whether they originate in Parliament, in the citizenry or in town halls.

First of all, the Government initiative has a preference position for the presentation of "projects of law" before the Assembly with respect to the others.

The art. 140 of the Regulations of the Madrid Assembly requires that the bills sent by the Governing Council to the Assembly be presented in an articulated manner and be accompanied "by the necessary background information to rule on them and preceded by a statement of reasons". Therefore, the bills must meet three requirements for their presentation: articulated text, explanatory statement and the background necessary to rule on them. The purpose of this last requirement is for the Assembly to have all the necessary documentation to know the scope of the regulations proposed by the Executive.

The Ruling of the Constitutional Court 55/2018, of 24 May, considers the determination of the procedure of approbation of projects of law by regional Governments a competence of the Autonomous Communities. As a consequence, the requirements that a "project of law" must meet will be those established in the Agreement of 5 March 2019, of the Governing Council of the Community of Madrid, which is the regional equivalent of the Council of Ministers.

Article 7 of the Agreement of 5 March 2019 says that a "project of law" must be written in an articulated manner, in articles with an appropriate use of language, and complying with the

Normative Technique Guidelines[20] contained in the Agreement of the Council of Ministers of 22 July 2005.

The article 3[21] of the aforementioned Agreement says that the competent bodies for the promotion of the normative processing are the technical general secretariats of the regional ministries (*consejerías*).

Moreover, the Agreement of the Governing Council of the Community of Madrid contains the structure of the procedure[22] (article 5) and the public consultation process[23] (article 6, which refers to the State Law of the Government), which are very similar to the ones carried at the national level, as it is necessary to carry out a Regulatory Impact Analysis Report and public consultation procedures, hearing and public information.

Then, articles 150 and 151 of the Regulations of the Madrid Assembly regulate the legislative initiative of the Deputies and parliamentary groups. The first requirement is included in article 151.2 of the Regulation of the Assembly of Madrid: if the initiative is presented by a Deputy, it must be signed by four more Deputies, and if the initiative is presented by a Parliamentary Group, it must be signed by its spokesperson.

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[20]Resolution of 28 July 2005, of the Undersecretariat, which publicizes the Agreement of the Council of Ministers, of 22 July 2005, which approves the Normative Technique Guidelines. Available at: https://www.boe.es/buscar/doc.php?id=BOE-A-2005-13020

[21]Article 3 of Agreement of 5 March 2019, of the Governing Council of the Community of Madrid: "*The technical general secretariats of the ministries will coordinate the normative production procedure, therefore, the projects and their normative impact analysis reports will be prepared and processed by the competent management centers by reason of the matter, without prejudice to the procedures that expressly are assigned to those*".

[22]Article 5 of Agreement of 5 March 2019, of the Governing Council of the Community of Madrid: "*In general, and without prejudice to the specialties that will be described, the procedure for the exercise of the legislative initiative and the regulatory power of the Governing Council is carried out in the following order:*
a) Public consultation.
b) Preparation of the project and its memory of the regulatory impact analysis.
c) Decision on subsequent procedures in the cases of draft law or legislative decree projects.
d) Request for a report on coordination and regulatory quality.
e) Request for mandatory reports and any studies and consultations deemed appropriate.
f) Hearing procedure and public information.
g) Report of the technical general secretariat of the proposing council.
h) Report of the General Counsel of the Community of Madrid.
i) Opinion of the Legal Advisory Commission.
j) Definitive regulatory impact analysis project and report.
k) Submit to the Committee of Deputy Counselors and Technical General Secretaries.
l) Approval by the Governing Council.
m) Publication and entry into force.
n) Electronic file".

[23]

These initiatives must be presented in an articulated manner and preceded by a statement of reasons and may be accompanied by an estimate of their economic costs. The reason for this regulatory novelty, according to Blanca Cid Villagrasa (2019), is to avoid that for reasons of political opportunity, masked as economic reasons, the Government can oppose the processing of a bill.

After the presentation of the bill, article 151.2 of the Regulations of Madrid Assembly provides that the Board of the Assembly has to qualify it and admit it for processing, if applicable, order its publication in the Official Gazette of the Assembly of Madrid. Moreover, it has to comply with the requirement of forwarding it to the Government so that it expresses its criteria regarding the taking into consideration, as well as their agreement or not to the processing if it meant an increase in credits or a decrease in budgetary income for the current financial year.

However, even if the Government expresses its unfavorable criteria regarding the consideration of the proposed law, it can only oppose its processing when the disagreement is because this proposed law implies an increase in expenditure or a decrease in budget revenues of the current financial year. And, in these cases, the Board of the Assembly must carry out a regulated control over the exercise of the power of the Government. This has been confirmed by the Ruling of the Constitutional Court 223/2006, since the Government is in charge of guaranteeing the execution of the economic program approved with the Budget Law.

The requirement established in article 151.2 of the Regulations of Madrid Assembly to refer the initiative to the Government is, therefore, based on respect for the financial commitments assumed by the Government of the Community of Madrid to prepare and execute the Community Budget, after its examination, amendment and approval by the Assembly (*ex* article 61.1 of the Statute).

If the Government does not manifest budgetary objections, it is estimated that it gives its agreement, and the bill will be in a position to be taken into consideration by the Plenary.

3.2.1.2. The adoption phase

A big difference between the regional and national legislative branches is that in the regional level, the legislative power is unicameral. At this regard, article 152 of the Spanish Constitution expressly establishes: "*In the Statutes approved by the procedure referred to in the previous article, the autonomous institutional organization will be based on a Legislative*

Assembly, elected by universal suffrage, in accordance with a system of proportional representation that also ensures the representation of the various areas of the territory". Following this idea, all Statutes of Autonomy have provided for a legislative branch composed of a unique Chamber that can be named differently depending on the Autonomous Community: Cortes (Castilla y León, Castilla-La Mancha, Valencian Community and Aragon); Parliament (Basque Country, Catalonia, Andalusia, Galicia, the Canary Islands, La Rioja, Cantabria, the Balearic Islands and Navarra); Assembly (Madrid, Murcia and Extremadura) and General Meeting (Principality of Asturias).

Although the way in which the laws are processed may be similar to the procedure that is followed at the national level, it should be remembered that the regional parliamentary systems are separate from the national one, so that, as the Constitutional Court has warned in its Judgment 179/1989, of 2 November, the legislative institutions of the Autonomous Communities must not necessarily adapt their structure and organization to those of the national Parliament.

The adoption phase, which in bills begins with taking it into consideration, as the decision-making phase of the entire procedure, is also known as the constitutive phase. All the different procedures are followed one another in an orderly manner and the Deputies, who represent the people of Madrid, will amend, debate and vote on a project or a bill until it becomes law, through the different bodies of the Chamber. It is, the procedure begins after a project of law (*proyecto de ley*) is qualified and admitted for processing or after a bill (*proposición de ley*) is taken into consideration by the Plenary.

Consideration of a bill constitutes a judgment on the entire initiative by the Plenary of the Assembly which, if positive, assumes that the Assembly agrees to process that legislative initiative, which will continue the same channel of projects of law.

The bill taken into consideration by the Plenary ceases to be an initiative of the proponents and becomes assumed by the Madrid Assembly. This is of great importance, according to Blanca Cid (2019), because they can no longer be withdrawn by the author of the same (art. 154 Regulation of the Madrid Assembly) and the parliamentary groups will not be able to submit amendments for full refund, for the reason that when voting to take it into consideration, the Assembly has already said that it wants it to be processed.

Once the bills have been qualified and accepted for processing by the Board, they are published in the Official Gazette of the Madrid Assembly. A period for submitting amendments opens and they are sent to the competent Commission, which in tax matters will be the Commission of Budgets and Finance[24]. As it is reminded by Marco Marco (2021), in Spain, unlike what happens in other neighboring countries where this issue is even constitutionalized, it is the Parliamentary Regulations that regulate the amendments.

If complete amendments are presented, a first phase or reading will be carried out in plenary, known as the total debate. However, if a complete amendment with alternative text has been approved, there are no such amendments or they are rejected, it will go to the second reading or Commission phase. Finally, the opinion approved by the Commission and the document that includes the amendments defeated in the Commission, are raised to the Plenary for the third phase or reading, called the final debate.

The final debate in plenary begins with the presentation of the opinion by the President of the Commission, if the latter has so decided unanimously. After this intervention and provided that no amendments have been presented to the entire bill, the presentation will correspond to the competent Councelor due to the subject matter of the project, in order to establish his position on the opinion of the Commission.

During these debates, it is possible to admit new amendments presented in writing before the Board and with the signature of the spokesperson of the proposing parliamentary group, except for compromise amendments between those already presented and the text of the opinion. In this way, the text of the opinion is an almost closed text, whose modification by the Plenary requires a certain consensus.

However, Blanca Cid (2019) warns that the little or no media impact of the Commission sessions leads parliamentary groups to make the approval of new amendments in these plenary sessions a common practice. This would be an example of how politicians use the approved procedure for interested purposes, constituting a practice that undermines the legitimacy of the explained legislative procedure.

Once the law has been approved, it must be published to entry into force, such as it happens at the national level. Nevertheless, at the regional level there is a specialty at this regard: the

[24]The webpage of the Commission of Budgets and Finance of the Assembly of Madrid is the following: https://presup-xii.asambleamadrid.es

regional law must be published both in the Official State Gazette and in the Official Gazette of the corresponding Autonomous Community. It is only the latter, as indicated by the precepts of the Statutes of Autonomy, which is taken into account for the purposes of its entry into force.

3.2.2. Other aspects

Single reading process and regional Law Decrees

First, some Statutes, such as the one of the Community of Madrid, provide the possibility of processing bills in single reading processes. It is, at the regional level it is also possible to pass tax legislation faster than in the common ordinary legislative procedure, but in this case the greater speed may be a consequence of the simplicity of the procedure, since some phases of it are suppressed. This is different from the urgent state legislative procedure, in which the quickness was derived from shorter terms.

The "single reading" procedure can be applied to all kinds of matters, except those mentioned in article 169[25] of the Regulation of the Madrid Assembly. Therefore it will be possible to pass tax legislation through this special procedure, excepting the Budget Law and the ones that come from the initiative of town halls, which are expressly cited in the aforementioned article.

Then, nowadays most Statutes of Autonomy also establish the option of enacting Law Decrees at the regional level. To put an example, the Valencian Community has added this possibility to the regional regulatory system through the Organic Law 1/2006, of 10 April, on the Reform of Organic Law 5/1982, of July 1, on the Statute of Autonomy of the Valencian Community. According to Borrero Moro (2016), the fact that the Statute of the Valencian Community was the first to grant the Executive this exceptional normative power and giving rise to a new generation of Statutes of Autonomy during 2006 has been demonstrated a whole premonition about the need for the different Councils to have this source of law. However, its use has sometimes been considered excessive in tax matters.

[25]Article 169 of the Regulation of the Madrid Assembly: "*The following may not be processed in a single reading:*
a) Bills of popular legislative initiative and those of the Town Halls.
b) Projects and proposals to reform the Statute of Autonomy of the Community of Madrid.
c) The bill of General Budgets of the Community of Madrid".

Constitutional control

Like state legislation, there is no appeal for unconstitutionality before approval. However, such a possibility does exist at the regional level when the object of the prior unconstitutionality appeal is the project or proposal to reform the Statute of Autonomy itself.

This possibility was reestablished in 2015 through the approval of the Organic Law 12/2015, of 22 September, after 30 years since its suppression, and according to César Aguado (2016), this appeal was used abusively as an instrument of parliamentary obstruction.

Regarding the unconstitutionality appeal once the law has been promulgated, there is a very important difference between the regional laws and the state laws. In the event of an appeal for the unconstitutionality of a state law, its admission to processing does not imply the automatic suspension of the challenged precepts. While in the event that the President of the Government files an appeal for the unconstitutionality of a regional law, he may request in the appeal the suspension of the challenged articles.

4. THE RATIFICATION OF TAX TREATIES

4.1. Applicable framework

In a globalized world like the one we currently live in, tax treaties are international norms of great importance in the tax field. Article 2 of the Vienna Convention on the Law of the Treaties (1969) defines a treaty as "an international agreement concluded between States in written form and governed by international law". Tax treaties are often called "agreements" or "conventions". Nevertheless, article 2 of the Vienna Convention reminds that the way it is called has no effect in its nature.

In the Spanish internal law, as in the rest of the surrounding countries, the system of incorporation of international norms is monism. The monist system means that norms of international law, once the international instruments have been ratified, are automatically incorporated into the internal legal system without the need of any subsequent legislative act. Even so, this monism should be qualified by saying that the Spanish Constitution envisages a "moderate" monist system, because the incorporation is automatic, by virtue of the publication of the treaty in the Official State Bulletin. In this sense, it is the Constitution itself that establishes the conditions for this introduction and to what extent these rules will be valid. This regulation is included in the article 96 of the Spanish Constitution and developed in the Law 25/2014 as we will explain later.

The regulation of tax treaties does not differ from the one established for other international agreements, as they are included in the definition given by the article 2 a) of the Law 25/2014, of 27 November, of Treaties and other International Agreements. Moreover, not only Double Taxation Agreements will follow this incorporation procedure, but also other types of international agreements of a fiscal nature, like the Tax Information Exchange Agreements, which, according to López Escudero (2015), have a very similar nature. Nevertheless, the Additional Provision Number Five of this Spanish law establishes that two types of norms are not subject to the provisions of the mentioned law: friendly agreements for the resolution of conflicts in the application of treaties to avoid double taxation and agreements between tax administrations for the valuation of operations carried out with related persons or entities.

The sources of the incorporation pattern of international norms in the Spanish legal system are from different nature. First of all, Chapter Three of Title Three of the Spanish Constitution includes four articles about International Treaties, which represent the main constitutional

norms on which the Spanish "moderate" monist system is based. Then, Law 25/2014, of 27 November, of Treaties and other International Agreements is a very important rule at this regard, because it exhaustively regulates the internal dimension of the treaty regime, ending the process that Spanish Constitution began in 1978. This important law is of a State nature, since the Constitution in its article 149.1 establishes that the State has exclusive competence in matters of international relations. That means the State holds the capacity to celebrate treaties, that is, the *ius ad tractatum*.

However, this exclusive jurisdiction has been qualified by Ruling of the Spanish Constitutional Court 165/1994. In it, a distinction had to be made between international relations and activities of international projection or relevance, the latter capable of being also exercised by the Autonomous Communities insofar as they do not imply the possibility of concluding treaties, do not affect the foreign policy of the State, nor generate international responsibilities.

4.2. Negotiation of a tax treaty

The process of negotiation of international treaties is included in Article 11 of the aforementioned Law 25/2014. In its section 2, the opening of the negotiating process is included, as it is literally established:

> "*The opening of the negotiation process of an international treaty will be submitted to prior knowledge of the collegiate bodies of the Government through the General Commission of Secretaries of State and Undersecretaries. For this purpose, the Ministry of Foreign Affairs and Cooperation, at the initiative of the interested ministries, will submit a report listing the negotiation processes whose opening is proposed, which will include an assessment of the opportunity of each of them in the framework of Spanish foreign policy*".

The reference made to the "collegiate bodies of the Government" must be understood as made to the Council of Ministers. According to Fernández Tomás (2015a), the requirement that the Council of Ministers must be informed prior to the opening of the negotiation process reveals that this precept tries to maintain a certain balance between legislative precedents, which required something that was not fulfilled in practice, and the habitual actions of not requesting such prior authorization. However, if the Council of Ministers is not aware that an international negotiation has started, this does not seem to constitute a serious administrative

defect. It is simply corrected by informing after the event, so that the Government is aware of what the different branches of the Public Administration are negotiating international treaties.

The competence to negotiate international treaties is included in section 1 of Article 11 of the Law 25/2014, which establishes the following idea:

> "*The ministerial departments will negotiate international treaties within the scope of their respective powers, in coordination with the Ministry of Foreign Affairs and Cooperation*".

A literal interpretation leads to the affirmation that it corresponds to each Ministry to negotiate the treaties that affect it by reason of the matter, since this determines its competence. This means that tax treaties will be negotiated by the Ministry of Finance and Public Function, always in coordination with the Ministry of Foreign Affairs and Cooperation. This seems to mean that the competence of the Ministry of Foreign Affairs is subsidiary and residual. However, the Vienna Convention establishes that a good part of the negotiation consists of drafting the treaty in the way that best expresses what is really wanted by the parties. To carry out this task effectively, legal advice is required.

Therefore, the role of the Ministry of Foreign Affairs will be double: to provide legal advice if requested by the competent ministry in the matter and to participate in the inter-ministerial Coordination Commission recognized by article 6 of the aforementioned Law.

In multilateral treaties of a general scope, the delegations representing Spain in a body of an international organization play an important role, since there is a greater need for coordination if we compare them with bilateral treaties.

The last paragraph of article 11 regulates the participation of Autonomous Communities in the process of negotiation. The Statutes of Autonomy of some Autonomous Communities contemplated the possibility of their participation in the elaboration of international treaties, as well as the Government's duty of information when an international negotiation influences matters attributed to these regions. This specific issue is provided under the Title V of the analyzed Law. Regarding the intervention of Autonomous Communities in this negotiation phase, it should not be forgotten, according to De Casadevante Romaní (2021), that the Autonomous Communities can participate in the Spanish delegation that negotiates the treaty, participation that even becomes mandatory when the treaty that is being negotiated "has as its scope historical rights" of the Basque Country or of the Foral Community of Navarre.

Article 49 includes the possibility for the Autonomous Communities to request the Government to open negotiations to conclude an international treaty. However, as far as tax treaties are concerned, these tend to affect the State as a whole, and not the matters within the competence of the Autonomous Communities, so we will not study this subject in greater depth.

Finally, the legislative branch intervenes in the conclusion process of a treaty when we are within the scope of article 94.1[26] of the Spanish Constitution. Double Taxation Agreements, as we will later develop, are considered treaties within the scope of the aforementioned article, so the Parliament has to agree with this tax treaty for it to be approved.

4.3. Adoption of a tax treaty

The adoption of a treaty is defined by the Law itself as the "act by which Spain expresses its agreement on the text of an international treaty". Article 12 of the Law 25/2014 regulates the adoption of this type of international norms, which expressly says that "It will correspond to negotiators to adopt the text of an international treaty". By negotiator should be understood the negotiating State and not its representative, following the criteria maintained in the Vienna Convention of 1969.

Participating in the process of adopting the text that culminates the negotiation on the treaty is a faculty recognized to the States that have participated in the negotiating process, but not an obligation for them, as explained by Fernández Tomás (2015b), so it must be understood that it will correspond to each one of the negotiating States to express their agreement on the established text, if they wish.

In the specific case of adoption of the text by an international conference or within an international organization, the adoption process is slightly different. The adoption of the text

[26] Article 94.1 of the Spanish Constitution: "*The provision of the consent of the State to be bound by treaties or agreements will require the prior authorization of the Cortes Generales, in the following cases:*
a) Treaties of a political nature.
b) Treaties or agreements of a military nature.
c) Treaties or agreements that affect the territorial integrity of the State or the fundamental rights and duties established in Title I.
d) Treaties or agreements that imply financial obligations for the Public Treasury.
e) Treaties or agreements that involve modification or repeal of any law or require legislative measures for its execution".

by an international conference, in the first place, is determined by the regulations of the conference itself and, secondarily, by the rules of international law, which say that the text is only adopted by a two-thirds majority. However, in the case of a text within an international organization, the adoption will be carried out in accordance with the rules of the organization and the eventual application of the norms of international law, in which no type of majority has been established.

In this area, we can recall what was stated by the European Court of Justice in the Kramer affair, understanding that "the system established by the treaties includes the rules that implicitly emerge from the provisions of the constitutive texts and other fundamental texts, as well as from the acts adopted by the community institutions in the framework of those".

The regulation of the authentication of a treaty is contained in article 13 and is completed by the definition of article 2, paragraph i), according to which, authentication is the “act by which Spain establishes the text of an international treaty as correct, authentic and definitive”.

In the opinion of Fernández Tomás (2015c), authentication supposes something similar to the elevation of the text of the treaty adopted between the parties to what a public deed represents in private legal transactions, to the extent that there, a third party with sufficient capacity to do so attests or certifies the authenticity and finality of the text before him. Authentication is necessarily a formal act, the best example of which is the signing of the treaty by someone with sufficient capacity to do so.

The first paragraph of article 13 regulates two methods to carry out this authentication. The first one consists of authentication through the procedure prescribed in the treaty itself or agreed by the negotiators. The second would be through the signature, the signature *ad referendum* or the heading placed in the text of the treaty or in the final act of an international meeting.

Then, the second paragraph includes a reference to the drafting languages of the treaties and authentic texts. Here we must distinguish between multilateral treaties and bilateral treaties.

On the one hand, multilateral treaties, even if they are written in a foreign language, must be translated into Spanish in order to be officially published in our language. For example, the BEPS multilateral treaty has been translated into Spanish and is available in our language on the OECD website. However, only the English and French versions have legal validity.

On the other hand, bilateral treaties are regulated in the second paragraph of article 13, which expressly says that this type of treaties must be always redacted in Spanish, "notwithstanding that they may also be in other Spanish languages that are co-official in an Autonomous Community or in foreign languages". This possibility of also drafting the treaties in a co-official language is consistent with the recognized capacity of the Autonomous Communities to conclude international administrative agreements and international non-regulatory agreements.

After the authentication, article 14 of the aforementioned law regulates the signature, in all of its different forms. The objective of the article is to determine the competent authorities to authorize the signature of international treaties. This competence is centralized in the Council of Ministers, although there may be specificities of international negotiation, which is why the possibility of opting for *ad referendum* signature is conferred.

González Vega (2015) thinks the reason why control over this point is left in the hands of the Council of Ministers may be the lack of competence of this body to authorize the negotiation of treaties, having a subsequent intervention: ruling on the signature and the acts assimilated to it.

Within the framework of multilateral treaties, the signature can have the special function of beginning a complex process tending to express consent to be bound by a treaty (simple signature) or suppose the expression of the same consent of the State to be bound by it (final signature). Therefore, not all the signatures have the same relevance, but the Spanish Law does not distinguish between them, since the authorization of the Council of Ministers contemplated in the analyzed article refers to all of them.

In view of thereof, the following conclusion can be drawn: the intervention of the Council of Ministers contemplated in article 14.1 can refer to different moments in relation to the internal procedure for the conclusion of treaties, since it will precede the intervention of the Parliament in case the treaty interested some of the categories contemplated in articles 93 and 94.1 of the Constitution. However, it may be carried out autonomously by the Executive if the purpose is to express consent to be bound by the remaining treaties, according to article 94.2. In the latter case, the different functions assigned to the agreement of the Council of Ministers and contemplated in sections a) and g) of article 3[27] of the Law.

[27] Article 3 of Law 25/2014: "*It will correspond to the Council of Ministers:*

Regarding the authorization proposal, the Law establishes that it will correspond to the Minister of Foreign Affairs to submit the authorization proposal to the Council of Ministers. His responsibility, however, is shared in those cases in which, due to its subject matter, the treaty is of interest to a sectorial Department, in which the responsible Minister together with the Minister of Foreign Affairs will submit the proposal to the collegiate body.

Article 14 is closely related to article 10 of the same normative text, since it determines the capacity of the representatives of Spain to participate in the treaty-making process. This provision not only deals with plenipotentiaries or express representation, but also tacit representation, inherent to certain persons due to the functions they perform.

In the first case, the persons endowed with full power will have full capacity to carry out the act provided for in it. This means that the Spanish plenipotentiary may sign, initial or sign *ad referendum* a treaty if that power is conferred on him by the document of full powers.

In the case of tacit representation, the representatives can apparently carry out any acts related to the initial phase of the process of concluding a treaty without the need for full power, which implies considering that these persons could, on behalf of Spain, sign a treaty without having any authorization.

This conclusion, which is in accordance with the generally accepted norms of international law, does not seem to be accepted by article 14 of the Law. This is because the legal provision means that authentication can only be carried out by someone who has been authorized to do so through the necessary agreement of the Council of Ministers. At this regard, article 14.2 establishes that only "the President of the Government and the Minister of Foreign Affairs and Cooperation may sign any international treaty *ad referendum*", without therefore requiring these persons to have any prior authorization.

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a) Authorize the signing of international treaties and acts of a similar nature to signature, in accordance with the provisions of article 14.
(...)
g) Agree on the manifestation of Spain's consent to be bound by an international treaty and, where appropriate, the reservations that it intends to formulate".

The provisional application of an international treaty is regulated in article 15[28] of Law 25/2014. It is a figure that aims to respond to urgent regulatory needs and avoid regulatory gaps without having to wait for compliance with the constitutional requirements for the expression of consent to be bound. For this reason, although it has clear advantages at the international level, at the internal level it is necessary to adopt a series of precautions so that there are no abuses that undermine the legitimacy of these treaties.

It has been said that "a provisionally applied treaty suffers a legitimacy deficit, which takes the form of a democratic deficit if the treaty ought to be subject to parliamentary approval at the national level"[29]. For this reason, so that the provisional application does not imply a loss of parliamentary legitimacy, it is necessary to ensure that the Parliament is informed of the existence of the provisional application and establishes precautions to prevent the authorization from becoming a mere formality.

Entering the substantive nature of the article, two limitations are established: one derived from the constitutional system and another from economic control. The first excludes the provisional application of treaties recognized in article 93 of the Spanish Constitution, while the economic limitation refers to the possibility of provisional application of treaties that imply financial obligations for the State, expressly included in section 4 of article 15.

Finally, it is important to analyze the article 16 of the Law 25/2014, related to the expression of consent to be bound by a treaty, which expressly says:

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[28] Article 15 of Law 25/2014: "*1. The Council of Ministers, at the proposal of the Minister of Foreign Affairs and Cooperation, and at the motivated initiative of the competent department for its negotiation, will authorize the provisional, total or partial application of an international treaty before its entry into force. The Ministry of the Presidency will communicate the authorization agreement to the Cortes Generales.*
2. The provisional application may not be authorized with respect to the international treaties referred to in article 93 of the Spanish Constitution.
3. In the event that it is an international treaty included in any of the cases of article 94.1 of the Spanish Constitution, if the Cortes Generales do not grant the mandatory authorization for the conclusion of said treaty, the Minister of Foreign Affairs and Cooperation will immediately notify the other contracting parties, among which the treaty is provisionally applied, Spain's intention not to become a party to it, ending its provisional application at that time.
4. The Council of Ministers will authorize the provisional application of international treaties that imply financial obligations for the Public Treasury and the disbursement of funds prior to their ratification and entry into force, at the motivated initiative of the competent department, provided there is adequate credit. and sufficient in the General State Budget, in accordance with the scheduled payment schedule, following a report from the Ministry of Finance and Public Administration and on the proposal of the Minister of Foreign Affairs and Cooperation".

[29] R. Lefeber "Treaties, Provisional Application", *The Max Planck Encyclopedia of Public International Law*, vol. X, Oxford University Press.

"*1. The Council of Ministers will agree to the manifestation of Spain's consent to be bound by an international treaty, in accordance with the Spanish Constitution and the laws, in the manner agreed upon by the negotiators.*

2. In the cases of treaties that could be included in articles 93 and 94.1 of the Spanish Constitution, the representatives of Spain may only agree on those forms of manifestation of consent that allow obtaining the authorization of the Cortes Generales prior to the conclusion of the treaty".

The substantive competence to express consent to an international treaty belongs to the Government and to the Parliament. In general, the Government is allowed to enter into treaties with no further limitation than informing the Parliament of this. However, articles 93 and 94.1 of the Spanish Constitution give the Spanish Parliament substantial jurisdiction in the provision of consent to be bound by a treaty. In this way, parliamentary authorization is considered a constitutive element of state consent without which the Spanish State cannot be bound internationally by a treaty that affects the matters of the aforementioned constitutional articles.

However, it should be noted that the parliamentary authorization to express consent to an international treaty does not oblige the Government to bind Spain to the authorized treaty. Therefore, ultimately, the importance of the decision corresponds to the Council of Ministers, as the decision-making body of the Government.

4.4. The role of the legislative branch in the ratification of a tax treaty

The legislative power is involved in the process of ratification of treaties in different ways, according to article 17 of the Law 25/2014, that refers to constitutional precepts.

In any case, the treaty must be sent to the Cortes Generales with all the necessary information so that the they know in detail the terms of the obligations to which Spain intends to consent, which includes a range that goes from reservations and declarations to preparatory documents of the text, which can be used for its interpretation.

Article 17 includes the constitutional mandate to require parliamentary authorization for certain international treaties. This precept refers to the Spanish Constitution on which treaties need prior parliamentary authorization and on the procedure that the Law establishes for each

of them: the procedure of article 74.2 for Treaties of article 94.1 and the organic law procedure for Treaties of article 93 of the Constitution.

In addition, there is a requirement that, in the event that the Government decides that the treaty requires parliamentary authorization, the Cortes Generales must be informed of everything that surrounds the international treaty.

The Council of State has considered that within section e) of article 94.1 of the Spanish Constitution, referring to treaties that involve the modification or repeal of any law, includes all treaties that regulate a matter reserved to law in our system, such as Double Taxation Agreements.

As regards the procedure for parliamentary authorization, article 17 also carries out a referral to the constitutional regulation. The authorization of an article 93 treaty must be carried out through an organic law. However, the treaties of article 94.1 follow the special procedure established in article 74.2 of the Constitution, which provides for the joint action of both Chambers, with the aim of reinforcing the act of parliamentary authorization.

As the majority of tax treaties in Spain are double taxation agreements, which follow the procedure established in article 74.2 of the Spanish Constitution, we are going to explain it broadly.

Once the treaty has entered into the Congress, the Board will order its publication in the Official Gazzette of the Cortes Generales and forward it to the Commission of Foreign Affairs. The Commission must complete the processing within a period of 2 months. At the same time, the period in which Deputies and parliamentary groups have the possibility of presenting proposals opens. These proposals will be considered as amendments.

The Commission ends its task with an opinion in which it communicates its agreement to propose the authorization or deny it for the conclusion of the international treaty. Finally, the Commission sends the opinion to the Plenary, where a deliberation should take place, which in practice consists in most cases of a simple vote. If the authorization of the Treaty is approved in Congress, the President of the mentioned Chamber transfers it to the Senate. The deliberation of the Commission in the Senate has as its objective the debate of the veto proposals and the amendments to the articles and not a report that proposes to the Plenary the authorization or refusal to conclude the treaty, as occurs in Congress. The international treaty

will go to the Plenary, where without the prescribed deliberation the approval of the international treaties will be carried out by assent.

Once the treaty has been authorized by the Senate, the authorization is sent to the Government. In the event that there are reservations made by the Senate, the file is sent to Congress, where they will be debated and voted on, having to be approved by a simple majority and incorporated into the text of the authorization act. If the authorization is vetoed, a mixed Commission will be formed and it will present a text which needs to be voted on in both Chambers. If it is not approved, the Congress of Deputies decides by absolute majority.

As the Parliament is involved in the ratification of tax treaties, parliamentarians can also formulate reservations or declaration proposals if they do not agree with the text of the international treaty. The Regulations of the Congress make a distinction between the treatment received by proposals aimed at formulating reservations or declarations not provided for in the treaty, which will be considered complete amendments, and reservations or declarations that are provided for in the treaty, which will be amendments to the enacting terms. Once a reservation or declaration is formulated by any of the Chambers, the Government is linked to them and must express consent to be bound by the treaty adhering to them. It could also withhold consent and stall the decision to become a party to the treaty. Therefore, the reservations or declarations of the Chambers are binding on the Government.

4.5. Control of unconstitutionality of a tax treaty

To safeguard the pre-eminence of the Constitution over the tax treaty, a prior control of unconstitutionality is expressly provided for in the Spanish Constitution. Article 95[30] is the legal precept that includes this possibility, which is recognized to the Government and any of the Chambers (Congress of Deputies and Senate).

The system of the Spanish Constitution closely follows the French model. The control is optional, because, according to the article itself, the Government or the Chambers may require the Constitutional Court to rule on the existence or not of a contradiction between the Constitution and the stipulations of an international treaty whose text has already been definitively established, but to which the consent of the State has not yet been given.

[30] Article 95 of the Spanish Constitution: "*1. The conclusion of an international treaty that contains stipulations contrary to the Constitution will require prior constitutional review.*
2. The Government or any of the Chambers may require the Constitutional Court to declare whether or not this contradiction exists".

The Constitution can be violated in terms of its material provisions or in terms of the procedure provided for the conclusion of the treaties themselves. Therefore, we speak of both material and formal unconstitutionality. The latter occurs when the treaty is not validly concluded, failing to comply with the formal requirements. This is a form of control of the effectiveness of the treaties that, due to the rank superior to the law, cannot be carried out by the ordinary courts. Having said so, this prior control is important in terms of legitimacy and constitutionality.

The nature of the activity of the Constitutional Court in relation to the prior control of the constitutionality of treaties is a controversial problem, and the doctrine is divided on this point. For some, it is a consultative function, relying on the very text of the Law that does not use the word sentence, but the expression declaration. However, for others, the Constitutional Court carries out a true jurisdictional activity. This last position has been defended by the Constitutional Court itself in its Declaration 1/2004 (RTC 2004, 256), where it established that "it is this jurisdictional nature that imposes that our pronouncement can only be based on legal arguments."

It is important to point out that the Constitutional Court Organization Act has specified that the object of the requirement is a proposal or project of a treaty already negotiated that only lacks the provision of consent. In the opinion of Martín y Pérez de Nanclares (2015), it is not allowed, as the French *Conseil Constitucionnel* has already pointed out, to submit to the Court a text at a less advanced stage. The Court submits to its control the treaty in the aforementioned conditions, placing it in relation to the Constitution, both in what refers to the procedure of the celebration and to the material aspects.

The possibility to challenge the conformity of the tax treaty with the Spanish constitutional framework is also included in article 19 of the Treaties Law. This article refers in turn to the Constitutional Court Organization Act, which in its article 78 establishes such possibility. Likewise, given the legitimacy of the two Chambers of the Cortes Generales to require the pronouncement of the Constitutional Court, the Regulations of both Chambers detail the articulation of the procedure. The Congress of Deputies may require this control at the initiative of two parliamentary groups or one fifth of the Deputies. The Senate, for its part, may request constitutional review prior at the proposal of a parliamentary group or 25 senators. In addition, the Government also has active legitimacy to raise this control of constitutionality. Since the Government has carried out the entire negotiating process, it is the

Government that best knows the provisions of the Treaty, so it is coherent that it can present its constitutionality doubts before the Court.

It should be remembered that in addition to *ex ante* constitutional control, in the event that the treaty had already been validly concluded and published, there would be a posteriori control through the action of unconstitutionality (article 161.1 of the Constitution) or the question of unconstitutionality (article 163 of the Constitution) in the event that there were doubts of unconstitutionality.

4.6. Amendment of a tax treaty

The possibility of amending international treaties is regulated by article 36 of the Treaties Law. Its content does not differentiate between the different review mechanisms provided for in the Vienna Convention. This simplification allows for a simple treatment of the procedures contemplated.

First, the Law 25/2014 does not contain any definition of what is meant by an amendment. Nor does the Treaties Law expressly allude to the assumption of the modification of multilateral treaties through agreements concluded between only some of the parties, which raises doubts as to whether the assumption has been included in the concept of amendment.

The procedures provided for by the Law mentioned above are two: the amendment through the conclusion of a new treaty and the amendment to multilateral treaties carried out in an institutional environment (simplified amendments).

The first procedure, as established by Law, must be followed when the treaty does not contain provisions on the matter (section 1). This is the simplest procedure in practice since the revision of the provisions of the treaty is implemented through the conclusion of a new agreement. Logically, the intervention of the Parliamentary Chambers will be required in accordance with the provisions of articles 93 and 94.1 of the Constitution. In all other cases, the Chambers will only be informed of the amendment agreement.

The regulation of the second type of amendment contemplated in section 2 has been carried out in more detail. In it, the Treaties Law contemplates two possibilities in which the role of the Government is essential and the intervention of the legislative power is not allowed. The first possibility is the automatic amendment procedure, which is reserved for those treaties that provide for automatic amendment without requiring an additional decision by the State,

as the amendment enters into force directly. Then, the other possibility is the required pronouncement amendment, foreseen for the cases in which the mechanism arbitrated in the Treaty allows a pronouncement in time by the State party, by virtue of which they can accept or reject the amendment adopted in the institutional environment, through the mechanisms known as *opting in* and *opting out*.

Finally, it is not very clear if the Treaties Law contemplates or not the case of modification of treaties, formally different from the amendment due to its *inter partes* nature. Even so, article 96.1 *in fine* suggests the modification of the treaties without mentioning the amendment procedure, which, however, must be considered included in it. If an amending agreement is carried out, the rules of the Vienna Convention will be followed at the international level. On the other hand, the internal dimension of the procedure will require the analogical application of article 36.

4.7. Publication of a tax treaty

The publication of international treaties is provided for in the article 96 of the Spanish Constitution. According to the constitutional text, the treaty is integrated into the internal legal system through publication, provided that it has been validly concluded. That means the simple conclusion of the treaty without publication is not sufficient for its internal applicability.

The complementation of the abovementioned constitutional provision is done by article 23 and 24 of the Treaties Law. Article 23 begins by formulating the obligation to fully publish the concluded treaties. According to Andréz Sáenz de Santa María (2015), this publication obligation responds to the same spirit as the publicity of norms: to grant legal certainty before the legislative power. The principle of publicity of the rules is expressly provided for in article 9.3 of the Spanish Constitution. Publicity generates certainty of meaning (informative function), certainty of existence (eliminates the discussion about its existence and content) and a condition of legal effectiveness.

Regarding the time of publication of the treaties, it must occur at the time of the entry into force of the treaty for Spain. The possibility of it being published earlier is even foreseen, “if the date of its entry into force is reliably known”. The moment in which the publication is carried out is relevant since it marks the beginning of the production of legal effects in Spain.

The section 2 of the article 23 includes the publication of provisionally applied treaties. The fact that this provision prescribe its immediate publication also responds to legal certainty and the possibility of its application by the judiciary.

Finally, in the last section of article 23 is found the constitutional formula by which the treaties concluded by Spain will be part of internal law once they are published. This publication must be done in the Spanish Official Gazette.

Moreover, article 24 regulates the content of the publication. This content needs to respond to a double imperative: respect its character as an international norm and incorporate it into the internal legal system to preserve legal certainty. This article also clarifies that the text of the corresponding treaty must be published "together with any annexed or complementary instruments and documents, as well as the unilateral acts dependent on the treaty".

5. RATIFICATION OF THE MULTILATERAL INSTRUMENT

Spain is one of the many countries that have ratified the Multilateral Instrument to implement tax treaty related measures to prevent Base Erosion and Profit Shifting (henceforth, Multilateral Instrument).

According to Calderón Carrero and Quintas Seara (2016), the BEPS Action Plan is "another move in the direction of repairing the dysfunctionalities and loopholes found in the current international taxation system, in order to eradicate a large number of schemes and structures of aggressive tax planning resulting in double non-taxation or low taxation".

The Multilateral Instrument, consequence of the BEPS Action Plan, was adopted on 24 November 2016. The official signing occurred on 7 June 2017, at a ceremony in Paris. Finally, the entry into force of the Treaty took place on 1 July 2018.

Years before that moment, Professor Essers (2013) analyzed action 15 of the BEPS Plan related to the Multilateral Treaty and wondered if national parliaments would have any real influence on the development of such a Multilateral Instrument and to what extent a country could afford to say no to the Instrument. Today, these questions can be answered and it is possible to see to what extent the decision-making processes in the Multilateral Instrument have been consensual and legitimate.

In Spain, the voting in the Congress of Deputies of this Multilateral Instrument was on 1 October 2020[31]. In fact, the Multilateral Agreement was voted jointly with five other issues, such as the authorization of the Double Taxation Agreements with Belarus and China. The result of the vote was 319 yeses, 0 no's, 25 abstentions, so the Multilateral Instrument was authorized by this Chamber.

On 28 September 2021, Spain deposited the final instrument of ratification of the Multilateral Instrument in the OECD, activating the mechanisms provided for the computation of deadlines that mean that the provisions contained therein take effect against the double taxation agreements included.

[31] The complete processing of the Authorization of the Multilateral Agreement by Spain can be found in the following link: https://www.congreso.es/en/busqueda-de-iniciativas?p_p_id=iniciativas&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&_iniciativas_mode=mostrarDetalle&_iniciativas_legislatura=XIV&_iniciativas_id=110/000021

Finally, the publication of the instrument of ratification in the Spanish Official Gazette on 22 December 2021 determined the conclusion by Spain of the internal procedures to introduce the Multilateral Instrument into our legal system and deploy the pertinent effects.

On 13 December 2021, anticipating the publication of the instrument of ratification, the Ministry of Finance published a press release stating that, among the list of 88 Double Taxation Agreements that have been designated as covered by the Multilateral Instrument, there were 51 jurisdictions which, for the moment, would be part of the Multilateral Instrument and whose agreements with Spain will be modified when the appropriate formalities are fulfilled.

In Spain, the Multilateral Agreement entered into force on 1 January 2022. However, it does not display its effects with respect to the agreements foreseen for its modification until the pertinent communication is produced to mentioned jurisdictions and to the Depositary of the OECD under the terms and conditions explained below, as explained by Morales Martín (2022).

5.1. Negotiation and ratification of the Multilateral Instrument

The process of negotiation followed in the Multilateral Instrument was a little bit different from other tax treaties. Normally, tax treaties are Double Taxation Agreements, which means the process of negotiation is carried out between two countries. The Multilateral Instrument, as the name already indicates, is a multilateral tax treaty: in the OECD context, a lot of countries have been negotiating and the result of the process is a tax treaty which has to be incorporated in the different legal systems.

Ratification of the Multilateral Instrument followed the same procedure as other tax treaties and international agreements. In fact, the procedure followed was the one explained for the treaties included in article 94.1 of the Spanish Constitution, as we can verify in the beginning of the instrument of ratification published in the Spanish Official Gazette on 22 December 2021. The reason is that this Multilateral Instrument has an impact on different Double Taxation Agreements, therefore the Government needs the authorization of the Cortes Generales in order to ratify the treaty.

5.2. Challenges raised by the Multilateral Instrument

The Multilateral Treaty was conceived to implement quickly and without the need for bilateral negotiation all the recommendations of those actions of the BEPS plan that needed to be integrated into the double taxation agreements signed to date.

Since the negotiation began in 2015, until its entry into force, the Multilateral Instrument has represented an unprecedented challenge for the public administrations of the signatory states. It is necessary to identify the parts of the agreements that must be modified and establish simple rules for their adaptation, among which each State can choose, and whose implementation also depends on the choices of its counterpart in a certain covered agreement.

The entry into force of the Treaty did not imply its immediate application with respect to the specific agreements affected, but it requires that the two signatory states of the initial agreement ratify it through internal processes, that they deposit the ratification instruments and that three months elapse from that date for the Treaty to enter into force. Once the entry into force in the two signatory states occurs, the Multilateral Treaty establishes a next level, consisting of the date on which it begins to have effects for taxpayers and administrations, called entry into effect.

These effects represent a great challenge that Spanish taxpayers will have to face, according to Marín and Viñas (2022). In order to find out which rule is applicable to them, they will not have to read given and directly accessible tax rules, but the taxpayer will have to carry out an analysis of the agreement initially signed, the text of the Multilateral Treaty and the positions of both signatory states. It should be remembered that the Multilateral Treaty only recognizes legal value to its English and French versions, to the positions of both parties and to the text of the double taxation agreements affected by it.

In order to make this task easier for taxpayers affected by the Multilateral Treaty, the Ministry of Finance has prepared the so-called synthetic texts. These documents include the Double Taxation Agreement in question and the changes made by the new Multilateral Instrument. In addition, before the preparation of the synthetic text, the competent authority of the other contracting jurisdiction is consulted.

However, the synthetic texts themselves recall that the Double Taxation Agreements and the Multilateral Instrument prevail over them, since these are the valid legal texts.

As this tax instrument is a novelty, there are some practices that can suppose a risk in the loss of legitimacy because the negotiation procedure may not be as transparent as the process of negotiating a law in a national parliament would be. There is a Royal Decree[32] for the appointment of the Chief Ambassador of the Permanent Delegation of Spain to the OECD. This designation is made at the proposal of the Minister of Foreign Affairs, European Union and Cooperation, and after deliberation by the Council of Ministers, and the position is held nowadays by Manuel María Escudero Zamora.

However, there is no process for appointing the delegates who, on behalf of Spain, negotiate the Multilateral Instrument. The information that has been shared in this regard is that in the negotiation process Spain was represented by the Directorate General of Taxes. According to Jacques Malherbe (2018), "the ability of delegates from countries' tax administrations to agree on tax rules may be questioned. But even so, the fact that almost a hundred tax administrations sit down to discuss the coherence and interaction of their tax systems, receive comments from interested parties, and publish the debated documents and drafts, represent extraordinary advances resulting from an effort highly laudable, although there is still room to increase participation and transparency".

Although the Multilateral Instrument is clearly important because it modifies a big part of the double taxation agreements that Spain has signed, it has not had a parliamentary debate in conformity with its importance. In fact, both in the Session of the Congress of Deputies and in the Senate, there was no debate before the vote on the instrument of ratification.

5.3. Impact of the Multilateral Instrument in the Spanish treaty network

The Multilateral Agreement stands out in the field of international taxation because it is the first international law instrument whose purpose is to simultaneously carry out multiple modifications in the network of double taxation agreements of the signatory parties.

On June 2022 Spain notified of the completion of internal procedures for the provisions of the Multilateral Instrument in relation to 51 double taxation agreements. The recipient of this notification was the Secretary General of the OECD, as depositary of the Multilateral Instrument.

[32]Royal Decree 710/2018, of 29 June 2018, by which Manuel María Escudero Zamora is appointed Chief Ambassador of the Permanent Delegation of Spain to the Organization for Economic Cooperation and Development (OECD).

The effects of the ratification of the Multilateral Instrument are very complex. As we have explained before, the entry into force will happen three months after the deposit of the notification, while the entry into effect depends on the type of income[33]. Regarding taxes withheld at source on amounts paid or credited to non-residents, if the notification was made before 1 December 2022, the entry into effect will be from 1 January 2023. With respect to all other taxes required by that Contracting Jurisdiction, for required notifications made on 1 June 2022, the effects of the Multilateral Instrument will unfold with respect to tax periods beginning on or after 1 January 2023.

In the Spanish case, changes in the network of double taxation agreements have been taking place as Spain and the other countries have notified each other.

Spain has signed a total of 95 agreements currently in force. Of this total number of agreements, the Spanish State has notified 89 agreements. In addition, of the total of 95 Double Taxation Agreements, 21 of them are with countries that have not signed the multilateral instrument and therefore will not be affected by this new rule of international law. The countries that have not signed this instrument are Algeria, Azerbaijan, Belarus, Bolivia, Brazil, Cape Verde, Cuba, Ecuador, El Salvador, Iran, Kyrgyzstan, Moldova, Philippines, Dominican Republic, Tajikistan, Thailand, Trinidad and Tobago, Turkmenistan, United States of America, Uzbekistan and Venezuela.

On the other hand, there are 4 countries that have not notified Spain nor has Spain notified them. These countries are Japan, Norway, the Netherlands, and Sweden. There are also cases of countries in which the lack of notification has been "one way". The countries not notified by Spain but that have notified our country are China and Ukraine. Conversely, the only country that has been notified by Spain but has not sent its notification back has been Switzerland.

The most important dates in terms of impact in the network of bilateral treaties are shown in the following Figure.

Figure 1. Effective dates of the MLI with respect to the tax agreements covered

COUNTRY	Notification of Spain	Notification of the Other State	Effects Tax Withheld	Effects other taxes	Effects MAP	Effects Arbitration
Albania	01-06-2022	-	01-01-2023	01-01-2023	-	-

[33]At this regard, see article 35.7 of the Multilateral Instrument.

Andorra	01-06-2022	-	01-01-2023	01-01-2023	-	01-07-2022
Saudi Arabia	01-06-2022	-	01-01-2023	01-01-2023	-	-
Australia	01-06-2022	-	01-01-2023	01-01-2023	01-07-2022	01-07-2022
Austria	01-06-2022	-	01-01-2023	01-01-2023	01-07-2022	01-07-2022
Barbados	01-06-2022	-	01-01-2023	01-01-2023	-	-
Belgium	01-06-2022	-	01-01-2023	01-01-2023	01-07-2022	01-07-2022
Bosnia and Herzegovina	01-06-2022	-	01-01-2023	01-01-2023	-	-
Canada	01-06-2022	-	01-01-2023	01-01-2023	-	01-07-2022
Qatar	01-06-2022	-	01-01-2023	01-01-2023	-	-
Chile	01-06-2022	-	01-01-2023	01-01-2023	01-07-2022	-
Cyprus	01-06-2022	-	01-01-2023	01-01-2023	-	-
Korea	01-06-2022	-	01-01-2023	01-01-2023	01-07-2022	-
Costa Rica	01-06-2022	-	01-01-2023	01-01-2023	-	-
Croatia	01-06-2022	-	01-01-2023	01-01-2023	-	-
Egypt	01-06-2022	-	01-01-2023	01-01-2023	-	-
United Arab Emirates	01-06-2022	-	01-01-2023	01-01-2023	-	-
Slovakia	01-06-2022	-	01-01-2023	01-01-2023	01-07-2022	-
Slovenia	01-06-2022	-	01-01-2023	01-01-2023	-	01-07-2022
Estonia	01-06-2022	01-06-2022	01-01-2023	01-01-2023	-	-
Finland	01-06-2022	-	01-01-2023	01-01-2023	-	01-07-2022
France	01-06-2022	-	01-01-2023	01-01-2023	-	01-07-2022
Georgia	01-06-2022	-	01-01-2023	01-01-2023	-	-
Greece	01-06-2022	-	01-01-2023	01-01-2023	-	01-07-2022
Hong Kong	30-11-2022	21-02-2023	01-01-2024	23-09-2023	-	-
Hungary	01-06-2022	-	01-01-2023	01-01-2023	01-01-2023	01-07-2022
India	01-06-2022	-	01-01-2023	01-01-2023	-	-
Indonesia	01-06-2022	10-11-2022	01-01-2023	10-06-2023	01-01-2023 10-06-2023	-
Ireland	01-06-2022	-	01-01-2023	01-01-2023	01-07-2022	01-07-2022
Iceland	01-06-2022	-	01-01-2023	01-01-2023	-	-
Israel	01-06-2022	-	01-01-2023	01-01-2023	-	-
Kazakhstan	01-06-2022	-	01-01-2023	01-01-2023	-	-
Latvia	01-06-2022	-	01-01-2023	01-01-2023	-	-
Lithuania	01-06-2022	-	01-01-2023	01-01-2023	-	-
Luxembourg	01-06-2022	-	01-01-2023	01-01-2023	-	01-07-2022
Malaysia	01-06-2022	-	01-01-2023	01-01-2023	-	-
Malta	01-06-2022	-	01-01-2023	01-01-2023	-	01-07-2022
New Zealand	01-06-2022	-	01-01-2023	01-01-2023	-	01-07-2022
Oman	01-06-2022	-	01-01-2023	01-01-2023	-	-
Panama	01-06-2022	-	01-01-2023	01-01-2023	-	-
Pakistan	01-06-2022	-	01-01-2023	01-01-2023	-	-
Poland	01-06-2022	-	01-01-2023	01-01-2023	01-07-2022	-
Portugal	01-06-2022	-	01-01-2023	01-01-2023	01-01-2023	01-07-2022
United Kingdom	01-06-2022	-	01-01-2023	01-01-2023	01-07-2022	01-07-2022
Czech Republic	01-06-2022	-	01-01-2023	01-01-2023	01-07-2022	-
Russia	07-02-2023	-	01-01-2024	09-09-2023	-	-
Senegal	30-11-2022	-	01-01-2023	30-06-2023	-	-
Serbia	01-06-2022	-	01-01-2023	01-01-2023	-	-
Singapore	01-06-2022	-	01-01-2023	01-01-2023	-	01-07-2022
Thailand	30-11-2022	-	01-01-2023	30-06-2023	01-01-2023 30-06-2023	-
Uruguay	01-06-2022	-	01-01-2023	01-01-2023	-	-

Source: *Spanish Ministry of Finance and Public Function webpage*

The first column of the table shows the countries affected by the Spanish notification. Then, the second column indicates the date on which the notification from Spain took place, a date that, is important when determining the effective date, as we have explained.

The column called “Notification of the other state” refers to the date on which the country different from Spain made its notification to the Spanish State. It should be added that the gaps in which the notification date does not appear mean that the State concerned does not need to make this notification for the agreement to take effect.

The rest of columns of the figure show the date in which the Multilateral Instrument will entry into effect between Spain and the rest of States. This date differs depending on the type of effects.

First of all, the date in which the entry into effect of withholding taxes will take place is, in general terms, on 1 January 2023. The only exceptions, which are shown on the Figure and derived from the difference in the notification day, are Hong Kong and Russia, in which the effective date will take place one year later: on 1 January 2024.

Then, the entry into effect of other taxes levied will be also on 1 January 2023. Nevertheless, there are also some exceptions like Hong Kong, Indonesia, Russia, Senegal or Thailand, whose entry into effect will be at a date after 1 January 2023.

Finally, the last two columns refer to the friendly procedure and arbitration. Regarding the penultimate column, the empty boxes indicate that the article referring to friendly procedures is not modified by the Multilateral Instrument. The last one indicates the date of effect in the arbitration procedure between the two countries, therefore the gaps mean that the arbitration regulation of the Multilateral Instrument does not apply to them.

To sum up, the great impact that the Multilateral Instrument has had poses new challenges to countries that, like Spain, have seen most of their Double Taxation Agreements altered. It is worth reflecting on whether this type of multilateral tax treaties respect the sovereignty of the countries and if they do not imply a loss of parliamentary power by having a much more restricted debate procedure at the national level.

6. THE INFLUENCES ON THE LEGITIMACY OF TAX LAWS

6.1. The influences by persons

6.1.1. Public consultations

The legislation that regulates the process of public consultations does not refer to tax regulations, but the general regulations of this procedure are applied, as it is going to be explained.

In the elaboration of the bills, citizen participation is provided for in the Spanish Constitution. Article 105 establishes the hearing of citizens, directly or through organizations and associations recognized by law, in the procedure of elaboration of the general provisions that affect them. In general, with certain exceptions, a public consultation procedure will be added to the hearing of the interested parties.

Article 133 of the Law 39/2015, of 1 October, on the Common Administrative Procedure of Public Administrations (hereinafter, LPAC) imposes that, prior to the elaboration of a project or draft law or regulation, the procedures for consultation, hearing and public information must be carried out in the following way.

In the first place, a prior public consultation will be carried out through the webpage of the competent Administration in which the opinion of citizens, organizations and associations before the elaboration of a normative project will be obtained about the problems that are intended to be solved with the initiative, the need and opportunity for its approval, the objectives of the regulation and possible alternative regulatory and non-regulatory solutions.

Without prejudice to public consultation, when the rule affects the rights and legitimate interests of people, the competent management center will publish the text on the corresponding web portal, in order to give audience to the affected citizens and collect as many additional contributions as possible made by other persons or entities.

The consultation, audience and public information must be carried out in such a way that the potential recipients of the regulation and those who make contributions about it have the possibility of issuing their opinion, for which the necessary documents must be made available to them, which will be clear, concise and gather all the necessary information to be able to pronounce on the matter. According to García-Escudero Márquez (2016), the regulation of the process of consultation, hearing and public information aims to comply with

the requirements of the principle of transparency, which implies enabling access to the documents of the process of elaboration of new legislation.

This process of consultation, hearing and public information can be dispensed in the case of budgetary or organizational regulations of the different administrations.

The omission of public consultation is also provided for when the regulatory proposal does not have a significant impact on economic activity or impose relevant obligations on the recipients, as well as in the urgent processing of the exercise of the legislative initiative or regulatory power, when the regulations of the Administration in question provide for it.

The difference between hearing and public consultation is not clearly defined, although it seems that it can be distinguished, in the first place, by its purpose, since the consultation is prior to the elaboration of the text and deals with the different regulatory alternatives, while the hearing is produced on an articulated text, that is, at a later time. There are also differences in the matter on which they fall, since the hearing is scheduled only when it may affect the rights and legitimate interests of citizens, while in the prior public consultation everyone can participate.

It should be added that in other countries there is the possibility for citizens to participate in the central phase of the legislative procedure. In this sense, Presno Linera (2012) reproaches the Spanish legislative system for the fact that there is no specific provision in any of the Regulations of the two Chambers for the direct participation in the legislative procedure of groups that may be affected by the approval of a certain law.

On a separate issue, there are a series of public entities whose objective is to advise on regulatory matters and contribute to the legitimacy of the regulatory system. In tax matters, we could mention the work carried out by the Economic and Social Council[34]. The Economic and Social Council is a public law entity included in article 131.2 of the Spanish Constitution, of an advisory nature to the State Government in socio-economic and labor matters. In fact, there is a permanent working commission on economy and taxation within the Council, which will be dedicated to tax issues, among others.

Among its functions, we can highlight, in relation to public consultations, that of issuing an opinion, with a mandatory nature, on the Draft State Laws and Draft Legislative Decrees that regulate socioeconomic and labor matters. The fact that the interests of trade union

[34]The webpage of the Economic and Social Council: https://www.ces.es

organizations, business organizations, but also of other important parts of society, such as consumers or cooperatives, are represented on this Economic and Social Council, recognize the important role they should have these interest groups in the approval of tax legislation.

Regarding the modification of the tax ordinances, the Report of 10 January 2018 of the General Directorate of Taxes[35], regarding the impact of the LPAC on the procedure for the approval of tax ordinances, concludes that since it supposes a regulation of partial aspects of the matter, the public consultation is mandatory when approving a new tax ordinance, being able to ignore this procedure when it comes to the modification of a previously approved tax ordinance.

Moreover, it is worth mentioning an initiative that in recent years has been developed in some Autonomous Communities such as the Valencian Community, called the "Fiscal Observatory". Some functions of this organization are evaluating the effects of the legislative measures introduced in the scope of application of the Valencian tax system or preparing publications to disseminate knowledge and regulations on tax matters to improve citizen access to regulatory aspects in tax matters, encouraging their participation.

The existence of this type of organizations, created with the aim of improving the link between the tax system and citizens, is undoubtedly a good option to provide greater legitimacy through the action of public authorities.

6.1.2. Lobbying and conflict of interest

Another type of influence that people have, or rather, groups of people, is the activity carried out by the so-called “lobbies”. The term “lobby” or “pressure group” is not defined in the Spanish legal system. The Spanish Royal Language Academy defines it as “the group of people who, for the benefit of their own interests, influence an organization, sphere or social activity”.

At the national level, a regulation is necessary to control the activity of lobbies in the elaboration of tax regulations. In this sense, the European Commission issued a Report on the rule of law in Spain that highlighted the lack of state regulation on lobbies. As a consequence, in November 2022, the Spanish Council of Ministers approved the Draft Transparency Law

[35]The aforementioned Report of the General Directorate of Taxes can be found here: https://elconsultor.laley.es/Content/Documento.aspx?params=H4sIAAAAAAAAEAMtMSbH1dDMAARNTE2MjtbLUouLM_DxbIwNDCwMjAzOQQGZapUt-ckhlQaptWmJOcSoAA6B8_TUAAAA=WKE

on Interest Groups to regulate the activity of lobbies in the public sector. In this draft law, it is provided for the creation of a mandatory Register of Lobbies and determines the activity of influence that must be carried out by a natural or legal person to be considered as a lobby. We will soon see how this future law materializes, but the current situation in Spain is as follows.

An optional Register of Interest Groups[36] exist in Spain, which was created by the Spanish National Markets and Competition Commission. A Resolution of this entity created the Register in 2016 which, by the way, gives a definition of what is considered as a group of interest, although it does so for the sole purpose of that resolution. Therefore, it cannot be considered a general legal definition applicable for tax legislation purposes.

In addition, it is also necessary to control the so-called "revolving doors"[37]. At this regard, the Law that regulates the conflicts of interests in the public sector is the Law 3/2015, of 30 March, regulating the exercise of high positions of the General State Administration. Although this Law constitutes a good purpose to start fighting against revolving doors, in our country there is still a lot to be done. For example, as reported by the Tax official Ricardo Rodríguez[38], in the area of the Tax Agency, tax inspectors can request a leave of absence and go to advise private companies, which represents a clear conflict of interest and constitutes a lack of legitimacy in the regulation of the public function. The Ministry of Finance and Public Function created the Conflict of Interest Office in 2006 to try to control this type of situations that occurs in practice. This body is in charge of the legal control of the incompatibilities of the high positions and the rest of the Administration personnel.

At the regional level, there are different Autonomous Communities that have legislation regarding lobbying and conflict of interests. Some regions, for instance, have their own Register of Lobbies, such as Catalonia, the Community of Madrid, Castilla La Mancha or the Valencian Community. Then, like at the State level, regional Conflict of Interest offices have been established.

Finally, according to Álvarez and De Montalvo (2014), the connection between national and community lobbies seems to be evident, so that addressing the advisability of regulating this

[36]The different groups of interest registered can be found here: https://rgi.cnmc.es

[37]The expression "revolving door" colloquially designates the fact that a high public official goes to work for a private company, obtaining benefit from his previous public occupation and producing conflicts of interest between the public and private spheres, in harm to the public interest.

[38]The tax official Rodríguez is interviewed with regard to the problem of "revolving doors" in the context of Tax Administration. The interview is available at: https://www.eldiario.es/economia/privado-giratorias-agencia-tributaria-impuestos_128_1853496.html

phenomenon in our legal system requires doing so paying attention not only to the structures of the political game at the national level, but also to the extent in which regulation can improve the participation of public and private actors in decision-making within the framework of the European Union.

6.2. The influence of technology and other material processes

6.2.1. The use of Artificial Intelligence

For several years technology advances rapidly and constitutes a constant source of innovation in different branches of science. Specifically, between all the different types of technology, it is important the development of what is known as Artificial Intelligence (from now on, AI). There is not a universal definition of AI, so the international efforts have been focused on describing its main characteristics. The Recommendation of the Council on Artificial Intelligence of the OECD defines an AI system as "a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments. AI systems are designed to operate with varying levels of autonomy".

Artificial Intelligence is used in different fields of activity nowadays to make the work of humans more efficient. In fact, the European Commission in its *Coordinated Plan about Artificial Intelligence* maintains that AI can contribute to improving public services in a variety of ways, for example by enabling smarter analytics capabilities and a better understanding of real-time processes. As long as the Tax Administration is part of these public services, AI can be implemented also in its regular tasks as we will explain later, especially since this tax body has a large amount of data on taxpayers and on the economic activities carried out that make the application of AI technology more feasible in this background, as Hinojosa Torralbo (2022) explains.

In the concrete area of tax law, it is true that its development is still booming, although there are already certain advances that we can mention.

In this section, we are going to analyze the introduction of AI in two separate tax areas. As the use of AI by the Spanish tax legislator is considered residual, the analysis will be focused on the Administration and the judiciary. First, the different tasks of the Tax Administration helped by the use of AI are going to be exposed. Then, we are going investigate to what extent the judges use AI when making judicial decisions.

Probably the most interesting use of AI related to tax law in Spain is the one that does the Spanish Tax Administration. At this regard, the activity of Tax Administration is divided in two components: facilitate compliance with tax obligations through assistance and information activities, and the fight against tax fraud. It is true that, due to the nature of this administrative body, some of the means that are used are not publicly available for citizens. However, despite this secrecy, it has been possible to confirm certain uses.

Regarding the assistance of taxpayers, Oliver Cuello (2021) states that the Spanish Tax Administration uses big data and AI to improve assistance and, in particular, to offer them more personalized services that facilitate voluntary compliance. An example of a virtual assistant is the one currently used to support taxpayers included in the Immediate Supply of Information. This tool automatically resolves the technical doubts of taxpayers, improving the productivity and efficiency of both taxpayers and the Agency itself.

However, according to Serrano Antón (2020), the fundamental application of AI of the Tax Administration is called ZÚJAR[39]. The Spanish Tax Agency created this informatic tool in 1993, which is used in all types of activities of the Tax Administration, it is, management, inspection and collection. It is a very powerful tool, which has been improving over the years, allowing data crossing and information filtering through algebra of thousands of variables and millions of records. In addition, according to Resolution 825/2019 of the Transparency and Good Governance Council, it allows "to establish risk vectors, which is a planning technique to decide to carry out control actions based on the potential risk of non-compliance of each taxpayer, evaluated at through statistical techniques based on previously defined objective parameters". Moreover, ZÚJAR is used not only to select taxpayers, but also to calculate the taxable amount or quotas under an indirect estimation regime.

Other relevant applications regarding AI in the Tax Administration are TESEO[40], DÉDALO[41] or PROMETEO[42].

[39]The 2004 Spanish Tax Agency report describes this program as a "computer tool, installed both in the traditional environment and in the Intranet environment, which allows the treatment of existing information in the databases for the selection of taxpayers".
[40]TESEO is an application that allows to automatically obtain the relationships between taxpayers from a set of them.
[41]DÉDALO allows to identify and localize taxpayers, of whom there is no precise information.
[42]PROMETEO makes a detailed analysis of documents obtained electronically, such as accounting, VAT books and bank accounts.

Related to the specific objective of fighting against fiscal fraud, the Spanish Tax Administration has created the so-called risk profiles. This is one of the most important lines of action of the Tax Agency: the use of a tax risk analysis system that allows selecting the riskiest taxpayers. According to the OECD, Spain is one of the 16 jurisdictions that use predictive methods to calculate tax risks. Specifically, Spain carries out this task with a programme called HERMES, which is based on the information provided by ZUJAR. HERMES takes advantage of the wealth of existing data in the Spanish Tax Agency databases to produce standardized risk reports, which are used in audit selection processes. This tool also optimizes the use of new international sources of information, such as the automatic exchange of financial information or the presentation of country-by-country reports.

Once the different uses of AI by the Tax Administration have been mentioned, it should be remembered that they cannot imply an interference in the data and information of the taxpayers. In this sense, Soto Bernabeu (2020) recalls that algorithmic transparency becomes essential in the use of AI by Tax Administrations.

The third question is the presence of AI in the judiciary. According to Barona Vilar, “the digital and technological era has permeated the procedural and justice modus operandi in general”, so AI is a reality in the judicial processes and decisions. Even when this development is something unstoppable, institutions of the European Union are concerned about the way in which this technology is implemented in an activity that must be especially guaranteeing the rights of citizens. The European Parliament in one of its resolutions about AI has shared some general ideas, such as the necessary risk assessment involved in the use of AI in this field prior to deciding on its implementation, the preeminence of the principle of prudence in decision-making or the exclusion of the total substitution of the human factor in the judicial decision.

In the Spanish judiciary, the incidence of AI systems has received more attention in the field of civil and criminal courts. Nevertheless, many of the considerations made in these areas are transferable to the contentious-administrative process. The presence of AI in the field of Spanish justice for several years cannot be denied, especially in the field of judicial proceedings or the aspect of procedural processing. In fact, the use of this technology has led to numerous advances as a working tool in the courts, which has made the automatization of tasks possible with great efficiency. To analyze its influence, we will talk first about the

application of these systems in the procedural field and differentiating it from the use that is given to AI in decision-making that concerns judges.

On the one hand, in the legal process AI is used with the objective of increasing efficiency and effectiveness and improving the organization of work in judicial bodies. In these cases, they are normally AI systems programmed explicitly to carry out specific tasks and are tools to help the work of the judicial body. According to Nieva Fenoll (2018), in the courts, it is common to see only AI in word processors, case law search engines and of course in the practice of some scientific tests. That is to say, both Judges and Magistrates as well as Court clerks and other service personnel of the court use it.

We must mention, at this regard, the article 230 of the Spanish Organic Law on the Judiciary which regulates the use of electronic, informatic and telematic media by different Courts within the framework of judicial proceedings and judicial offices. Programmes such as LexNET (telematic notification management system) or SIRAJ (system of administrative records to support the Judicial Administration) are examples of real implementations of this technology in the Spanish judiciary.

On the other hand, the AI is can be used in the court to carry out judicial decisions. With these systems, judges would be able to find lots of different judicial pronouncements on the issue. The principal advantage is that Courts that do not have many material resources or due to lack of time, decide a matter without taking into account the doctrine emanating from the Supreme Court. Having a proper AI technology would have a positive impact on the jurisdictional power, but it is true that in our country this matter is yet to be developed. Nevertheless, some projects already exist in Spain, like BIDARACIV[43], a regional project carried out by the Legal-Business Laboratory of the University of Zaragoza in cooperation with the Technological Institute of Aragón. Moreover, related to the criminal branch, the General Directorate of Justice of the Government of Navarra has joined forces with the Public University of Navarra to carry out a project that applies AI in the judicial field.

Finally, I would like to make a consideration about the application of AI in the judiciary. As it is one of the three powers of the State, the work carried out by judges must be full of

[43] BIDARACIV is a project whose objective is the analysis through big data techniques of the legal arguments made on certain matters of civil jurisdiction in Aragón.

guarantees and respect constitutional principles, as those established in article 117[44] of the Spanish Constitution. Keeping this in mind, the use of AI should not suppose the substitution of the assessment made by the judge, because he/she operates as a law thinker, while a machine will never do that, with all the inconveniences that this entails in Justice.

One of the issues that should concern us the most is that human minds can carry out jurisprudential evolutions, since they can interpret and apply the norm in accordance with the evolution of society. However, Artificial Intelligence is far from carrying out this task since it feeds on all past judicial decisions. This implies a discrepancy between judicial AI and society since no legal system is static: these must evolve just as the reality in which it affects does.

In conclusion, AI is a positive tool to make easier the work carried out in our Courts, but its use can be a problem when it falls directly on the decisional work of the judges, because it can mean the loss of legitimacy of judicial decisions.

6.2.2. The use of other material processes

Other material processes, such as vote procedures, can affect also to the legitimacy of the Spanish tax system.

In the Spanish voting procedures of the legislative branch it is very common to vote through electronic voting procedures. By electronic voting we understand those procedures in which parliamentarians use an electronic device to register their vote.

Article 84 of the Regulations of the Congress of Deputies establishes two ways through which ordinary voting is carried out: rising first in case of approval, then in case of disapproval, and finally by abstention; or voting by electronic procedure.

In the Spanish parliamentary system there is a specific type of electronic vote that is carried out outside the Chamber, the so-called telematic vote. A curiosity about this possible vote, which was used much more regularly as a result of the COVID-19 crisis, is the result it produced in the vote on the labour reform of the year 2022. Thus, a Popular Party deputy voted electronically against the criteria of his party, which is why the reform obtained the

[44] Article 117.1 of the Spanish Constitution: "*Justice emanates from the people and is administered in the name of the King by Judges and Magistrates who are members of the judiciary, independent, immovable, responsible and subject solely to the rule of law*".

necessary support, since if he had not been wrong, the labour reform would have been rejected.

Months later, the Spanish Congress reformed the telematic vote to avoid cases like that. The reform seeks, according to the Chamber, to encourage parliamentarians to attend the debates and to provide that those who vote remotely by mistake cannot later correct that position[45].

On a separate issue, in some countries the rules of legislative processes enable to block the tax law-making. At this regard, we can mention the Senate cloture rule also known as the Filibister rule in the United States, which consists of delaying or blocking a vote on a measure by preventing debate on it from ending. However, the Spanish Regulations of the Congress and the Senate give the possibility to the President of the Chamber to withdraw the "speaking right" of the Deputies, as it is provided for in the article 70 of the Regulation of the Congress. Likewise, article 84 of the Regulation of the Senate also establishes this option by the President. Having said so, in our country debates and vote procedures are quite proportionate and in general, there are no parliamentary practices that constitute a blockage in the tax law-making.

Moreover, both at the Spanish national and regional level, there are no special voting rules in the approval of tax legislation, such as qualified majorities or unanimity.

However, there are exceptions in other fields. One of the most important ones is the majority provided for by the precept that regulates the designation of the members of the Spanish Constitutional Court. At this regard, article 159.1 of the Constitution establishes a qualified majority of three-fifths both in the Congress and in the Senate to choose those members. According to Carmona Contreras (2022), "the analysis of the participation of the Chambers in the elective processes foreseen both in constitutional and legislative headquarters, it is outlined, then, as a matter that needs special attention. And not only theoretically, as a generic manifestation of a desire to breathe new life into democratic legitimacy of origin into some instances that, by definition, given their counter-majoritarian nature, lack it". In other words, the participation of the Chambers in the election of members of this special bodies tries to enhance the legitimacy of them, especially if the election has to be carried out with a qualified majority, a decision that requires greater consensus at the Parliament, the maximum representative of sovereignty.

[45]The Resolution of the Board of the Congress of Deputies, of 21 June 2022, for the development of the telematic voting procedure can be found here: https://www.congreso.es/en/cem/21062022vottelem

Derived from this regulation, the main Spanish political parties with the greatest representation in Parliament (one progressive and one conservative) had been negotiating these charges for years, not only in the Constitutional Court but also in the General Council of the Judiciary, the highest government body of the judicial branch, and whose designations needed the same three-fifths majority, according to article 122.3 of our Supreme Norm. In the opinion of Baamonde Gómez (2021), the general interest pales before the attitude of the parties to "control" the renewals to the greatest extent possible. Thus, this attitude ends up imposing itself against the institutional logic that should preside over such exchanges.

On 2022, regarding this process of renewal of the members of Constitutional Court, the Spanish Government and the General Council of the Judiciary had to choose 2 new members each one. This renovation was considered very important as it would allow a change in the correlation of forces from a conservative majority to a progressive one. However, since the General Council of the Judiciary had its mandate expired, it could not carry out such a discretionary decision. For this reason, the Socialist Party, which was the majority partner of the coalition Government, registered a bill in June 2022 to return to the Judiciary the ability to make Constitutional nominations despite being in office, which was finally approved a month later.

At the beginning of September, following the negotiations between the main parties on the renewal of the General Council of the Judiciary, the Popular Party asked to renew the two bodies (Constitutional Court and General Council of the Judiciary) at the same time. That same month, the term established in the law is complied without the members of the Judicial Power having chosen the two Constitutional magistrates.

In December, despite the growing pressure on the General Council of the Judiciary, the agreement between conservatives and progressives to designate their two Constitutional magistrates seemed impossible. The Government took another legislative step to try to end the blockade: change the laws that establish how the magistrates of the Constitutional Court are designated. This reform was intended to be executed through two amendments to the Penal Code reform that the Congress was processing urgently. The processing was the subject of an appeal by the Popular Party when it was already in the Senate. The Constitutional Court itself decided on 19 December, for the first time in its history, to intervene in the processing of a Law that the Spanish Parliament was seeing, with important consequences in the relations between State powers.

Finally, this institutional crisis finished on 27 December with an unanimous agreement in the General Council of the Judiciary to nominate César Tolosa and María Luisa Segoviano as magistrates of the Constitutional Court.

Although it may seem that this blockade does not have a direct impact on the tax field, it should be remembered that the Constitutional Court is in charge of reviewing the constitutionality of the different legislation of the Spanish legal system, including tax rules. In fact, some very important tax issues in our country have gone through this constitutional control. In particular, we can mention the declaration of unconstitutionality of the obligation to jointly declare family income by the spouses in the Personal Income Tax[46] or the declaration of unconstitutionality of some regional taxes, for instance the Catalan Tax on Radiotoxic Elements[47]. Conversely, the Constitutional Court has recently endorsed the constitutionality of another Catalan tax: the Catalan Tourist Tax for stays in Hotels and Cruises[48].

To conclude, we could mention a tax that has also been appealed recently to the Constitutional Court by two different Autonomous Communities (Community of Madrid and Andalucía) and had a big media repercussion: the Solidarity Tax on Great Fortunes.

To begin with, as Ruiz Almendral (2022) alleges, this controversy is an example of how inappropriate it is that the only control mechanism is the unconstitutionality appeal, which by definition is not designed to facilitate the coordinating effect that is sought with the delegation of tax powers.

To analyze the alleged unconstitutionality of this new temporary tax, we refer to the Report presented by the Institute of Economic Studies in 2023, in which renowned jurists and economists have participated.

In the report, not only the material unconstitutionality of the Tax is alleged, but also the formal or procedural one, which is the one that interests us the most because it supposed to approve the aforementioned Tax but in an illegitimate way, going against the Spanish constitutional precepts.

The formal or procedural unconstitutionality is based on the incorporation of the Tax through an amendment to the bill that was being processed. In addition, the bill contained two more temporary taxes (Temporary Energy Tax and Tax on Credit Institutions and Credit Financial

[46]Ruling of the Constitutional Court 45/1989, of 20 February 1989.
[47]Ruling of the Constitutional Court 43/2019, of 27 March 2019.
[48]Ruling of the Constitutional Court 125/2021, of 3 June 2021.

Establishments). The fact of processing these taxes through a bill and not a project of law by the same Parliamentary Groups as those that belong to the Government (Socialist Party and *Unidas Podemos*) also means providing it with fewer guarantees, since not all prior procedures included in Law 50/1997, of the Government (public consultation, Regulatory Impact Report) will be applicable. This idea is defended by García Novoa (2023) in the Report of the Institute of Economic Studies, which even qualifies the processing as "very strange and anomalous" when this is done by the Parliamentary Groups that support the Government.

On the other hand, the fact that a tax is incorporated as an amendment to two other taxes of a different nature, may be reprehensible. In this sense, the Constitutional Court in its Judgment 59/2015, of 18 March, requires that the submitted amendment have a connection of homogeneity with the legislative procedure with respect to which the amendment is proposed, a connection that does not seem to exist between the two taxes raised in the bill and the Solidarity Tax of Great Fortunes.

In the words of Alonso González (2023), "the result that all this leads us to is that the channeling of the Solidarity Tax of Great Fortunes, through an amendment to a bill, is characterized by shortening its processing so much that the possibilities of engaging in political debate are drastically cut". In the end, when prior consultative procedures are not carried out in a tax regulation and the debate is not performed in a normal way, the regulation will be considered less legitimate since political representatives have not participated in the same way in its elaboration.

We will have to wait to see how the appeal is resolved by the Constitutional Court, but for now it is possible to appreciate at least certain notes of irregularity in the legislative procedure followed.

7. CONCLUSIONS

Once the decision-making processes in the elaboration of tax legislation have been analyzed, it can be concluded that Spain is a very guaranteeing country in legislative processes both at the state and regional level. This means that the level of legitimacy of the tax system is high and citizens, in general, feel that decision-making in tax matters is carried out in a reasoned and proportionate manner.

Regarding the territorial organization of the State, Spain is a State Member of the European Union with a very particular political structure. Spanish State is decentralized and divided in 17 Autonomous Communities, which are very different from each other in the tax field. First, we have 2 Autonomous Communities of Charter Regime, which are Basque Country and Navarra, with much more autonomy at the tax level than the rest of them. Canary Islands have also peculiarities as they are considered an outermost region of the European Union and the Spanish Constitution itself remarks its differences in the tax regime. For instance, the VAT is not applicable. Finally, we find two Autonomous Cities, Ceuta and Melilla, without any type of normative power at this regard. At the local level, in Spain we find different entities. The most important ones are provinces, islands and municipalities. This last type of local entity is the main one at the financial sphere.

As in majority of countries, Spanish main tax sources are, in order of hierarchy: Spanish Constitution, International treaties, laws and finally government regulation. Spanish Constitution recognizes the principle of legal reserve. That means, according to the Constitutional Court, that the essential aspects of taxes must be regulated by Law, but Government could develop it.

Regarding the Spanish tax system, we find 3 different levels. The State regulates some important taxes, like the Corporate Income Tax or VAT and Excise Duties. Then, the Autonomous Communities have normative power over other kind of taxes, which can be classified in handed over taxes, which are regulated by the State but several aspects can be modified by regions, such as Wealth Tax or Personal Income Tax; or own taxes, which are less important and different in each Autonomous Community. Finally, at the local level, municipalities obtain 5 local taxes, which are regulated in general terms by a State law, but certain aspects can be modified by these local entities.

The elaboration of tax laws is done by the Central State and the Autonomous Communities, as they have normative competences in the tax field.

At the national level, we find the ordinary legislative procedure, applicable to every law including tax law, which has three phases: the initiative, the constitutive phase and the improvement of the law. The initiative in Spain corresponds to Government, Parliament, legislative assemblies of the Autonomous Communities and to the citizens. However, the Spanish Constitution excludes the popular initiative in tax matters. The constitutive phase is carried out exclusively in the Parliament, which in Spain is composed of two Chambers: the Congress and the Senate. However, the Congress is much more important than the Senate, as a law can be passed even when the Senate does not agree, situation that can suppose some inequality in the legislative process. Finally, the law must be signed and published to entry into force. A consideration has to be made in the excessive use of the Decree Law in tax matters, as the Government considers it easier and faster to resort to this "extraordinary" rule than to proceed with the Law, which would be the correct one by endowing the approval procedure with many more guarantees.

At the regional level, the legislative procedure in every Autonomous Community is very similar from the one explained at the national level. However, we have to take into account the regulation provided for in each Statute of Autonomy, which can be considered as "Regional Constitutions".

Another type of source in the Spanish tax system are tax treaties. The Spanish Constitution establishes the exclusive State competence of international relations. As a consequence, the Spanish Law of Treaties is the State applicable Law to tax treaties signed by Spain, except two types: Friendly agreements for the resolution of conflicts in the application of treaties to avoid double taxation; an Agreements between tax administrations for the valuation of operations carried out with related persons or entities.

The process of ratification of a tax treaty is the same than other international treaty and englobes the negotiation, which corresponds to the Ministry of Finance in cooperation with the Ministry of Foreign Affairs; and the Adoption, that in the case of Double Taxation Agreements, it must be authorized previously by the Parliament. Nevertheless, before the vote in Congress, a debate commensurate with the importance of the decision is not usually held, since international treaties are hierarchically superior to laws. Finally, the Spanish Constitution provides the possibility of carrying out a previous control of unconstitutionality over the tax treaty.

Apart from the bilateral tax treaties, Spain has signed the so-called BEPS Multilateral Instrument in 2017. The voting in the Congress was done in 2020, but no debate was carried out in the Chamber. The ratification of this instrument by Spain was published in December 2021. As its interpretation can suppose problems to taxpayers, the Ministry of Finance has published Synthetic Texts to make easier the understanding of the applicable documents. However, this text is not legally binding.

Other influences related to people and technology can also impact the legitimacy of the tax system. On the one hand, public consultation processes can increase the reputation of tax legislation, since citizen participation is a key aspect in the pursuit of legitimacy. In Spain, these consultation processes are regulated extensively prior and during the elaboration of tax law. On the other hand, the influence of lobbies can be negative and for this reason the Spanish Public Administration must carry out a mandatory registry of them, as it is expected to happen in a short time.

Regarding technology, it is important to highlight the role of Artificial Intelligence in the activity of the Tax Administration mainly, but projects that use this technology have also recently been carried out in the Spanish judiciary. Even so, in order to maintain the legitimacy of the system very cautious use must be made in judicial decision-making due to the repercussions they have on citizens. Other material processes such as the blockade on the renewal of the Constitutional Court as the highest interpret of the Supreme Norm can affect legitimacy of tax legislation, as this body decides about the constitutionality/unconstitutionality of very important tax laws.

As a final reflection, Spanish decision-making processes in tax legislation are quite legitimate and the interests of citizens are represented in the elaboration of tax regulations. However, there are also anomalies in the processes such as the ones shown that imply a loss of confidence by social agents. This means that the Spanish situation can be improved in the coming years through more transparent decision-making processes and by legislating on recently-emerged issues that pose a risk to legitimacy.

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