EUCOTAX WINTERCOURSE 2023
(Uppsala University)

Title

Subtopic 3: DECISION MAKING PROCESSES AT EU LEVEL

Author: YANIRA MASCARÓS ZAPATA

Supervisor: Dr. ALFREDO GARCÍA PRATS

This work has been conducted by students and researchers of the ETICCs Research Group (International, Constitutional and Comparative Tax Studies Group) of the Universitat de València and the Jean Monnet Chair 'EU Tax Law and Policy', under the auspices of the Jean Monnet Project UE_SRIC_620108-EPP-1-2020-1-ES-EPPJMO-PROJECT SECOTAX, the project "Adaptation of tax rules to the fourth industrial revolution: Artificial Intelligence and Tax Administration" (CIGE/2021/061) and the project PROMETEO/2021/041, XXITAX, " The necessary update of tax systems under the 21st century challenges" of the Regional Ministry of Innovation, Universities, Science and Digital Society.

With the support of the Erasmus+ Programme of the European Union

GENERALITAT VALENCIANA
Conselleria d'Innovació, Universitats, Ciència i Societat Digital

Grupo ETICCs

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1. INTRODUCTION

The aim of this report is to evaluate how decision-making processes regarding tax matters take place in the EU in the legislative, executive, and judicial areas. Moreover, this report concerns itself with the task of evaluating how this processes impact legitimacy in the EU and what can the EU improve to increase legitimacy through its decision-making processes.

Firstly, to achieve this objective there is a clear need for a wide explanation regarding all the decision-making processes that occur inside the EU institutions, specifying which role has each one of them in the three different areas mentioned in the preceding paragraph.

2. A VERTICAL DISTRIBUTION OF POWERS.

The EU is an international organization meant to achieve tighter union among the nations of Europe. Nevertheless, it is not a simple International Organization since it is an organization with a predominant supranational character. This is a unique trait that the EU possesses due to the fact that it is a true international legal community formed by its own legal frame. Moreover, the EU cannot be compared with other international organizations inasmuch as it has its own legal system whose compliance can be enforced by the EU tribunals.

The EU has a unique institutional frame made up by seven institutions and two consultive organs. The institutions are the European Parliament, the EU Council, the Council (of ministers), the European Commission, the Court of Justice of the European Union, the European Central Bank, and the European Court of Auditors. On the other hand, the European Economic and Social Committee and the European Committee of the Regions are the consultive organs whose task is to provide aid to the main EU institutions.

However, the comparison among the EU and the USA, UK and Switzerland is humongous because of the clear difference that sets precedent in any form of organization or decision-making: the sovereignty of these states compared to the lack of sovereignty that dwarfs the EU.

This lack of sovereignty in comparison is due to the obvious fact that the USA and the other fellow states are primary subjects in terms of International Law, whereas the EU is

merely an International Organization, a secondary subject with a functional character, meaning that it only has the competences that the member states want to give. This limited freedom in terms of decision-making is mainly related to the principle of conferral that remains in the Union.

A. THE PRINCIPLE OF CONFERRAL

The principle of conferral refers to the fact that the EU only has the competences that Member States decide to give freely to the Union, meaning that if the EU oversteps and decides in an ambit outside its competences this act will be declared automatically null and void (Ferrando Hernández, 2022).

Not only this principle refers to the competences that Member States transfer to the EU to achieve its goals, but it also addresses the attribution of concrete competences to each of the EU institutions, since these institutions can only act inside the limitations established by the Treaties and following the designated processes, conditions and aims established in them.

Before the Lisbon Treaty there was not a list of the powers that the EU held, nevertheless with this Treaty being approved we have a complete list of the powers that the Member States bestow to the EU. This principle also has consequences in the distribution and delimitation of powers between the EU and Member States, due to this if a competence is not bestowed to the Union in the founding treaties it is still a power held by all the Member States.

Noted that, it must be highlighted that the founding treaties do not expressly confer any competence to the EU regarding direct taxes. Nevertheless, following the general competence established in the article 352 TFEU the Council can act when it is necessary to attain the EU objectives in the functioning of the common market. This competence does not exclude taxation so if the Council considers that adopting a piece of law regarding taxation is necessary, it can be approved (Helminen, 2021).

The principle of conferral has a direct effect on the distribution of taxing powers between the European Union and the Member States. As it has already been established, the European treaties do not confer any express competence to the EU in terms of direct taxation. So, because of that, direct taxation remains a competence held by the Member

States. Nevertheless, we must not forget that the EU also has competence to some extent, even though this competence is limited. Therefore, direct taxation is a divided or shared competence.

Regarding indirect taxation, The European Union has the exclusive competence regarding custom duties based on article 3.1.a) of the TFEU. In practice, this means that the EU can legislate in solitary and adopt legal binding acts regarding this topic. Nevertheless, this exclusive competence does not mean that Member States are completely deprived on competences on this matter, because the executive and administrative role will always fall into the Member States' hands (Mangas Martín , 2008). However, this is the only exclusive competence held by the EU in terms of indirect taxation.

Indirect taxation such as VAT or excise duties are also a shared competence since the treaties do not bestow this power directly to the EU. Indeed, due to it being a shared competence, the European Union has the competence to decide and legislate about indirect taxation due to its importance regarding then functioning of the internal market.

As it has already been said, the EU only holds competences which are conferred by the Member States, meaning that those are not general powers. The powers conferred to the EU are specific and they are established in the Treaties. And as Mangas Martín highlights, the conferral by areas has never been used because it is conceptually incompatible with functional entities, such as the EU which has no intention of replacing the sovereign States (Mangas Martín , 2008).

According to these criteria, there is no alternative to the principle of conferral due to the Eu not being a State. And, therefore, it cannot have general competences because its competence is functional. Given all of that, the nature of the EU and the experience advice to maintain the system based on conferring specific competences to the EU instead of conferring complete areas (Mangas Martín , 2008).

B. THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

While the principle of conferral is referred to the delimitation of powers that the EU holds, there are other two main principles regarding how these powers must be executed: the principles of subsidiarity and proportionality. Both principles were included in the Treaties because of the worries that plagued the Member States with the possibility of the

EU overstepping its boundaries in terms of trying to use more powers than the ones who had been granted by the States.

The principle of subsidiarity is contemplated in the article 5.3 TEU and it mainly reflects that the EU can only act in matters not attached to their exclusive competences if the goals of the action cannot be completely achieved with the actions taken by Member States. Proving that acting in an EU level is the best option to reach these objectives. However, this principle only applies to competences non-exclusive: shared competences and supporting competences (Ferrando Hernández, 2022).

At the end, this principle helps Member States to defend their own competences because it does not allow the EU to act when a Member State can solve a problem better, meaning that the EU is meant to act only when necessary. And in the case, that the EU ends up acting it has to justify itself (Ferrando Hernández, 2022).

As Bou Franch states, the principle of subsidiarity conditions the EU in the exercise of its competences in a double sense. Firstly, this principle serves to determine if in the areas in which it is applicable the EU should or should not intervene using its competence, always bearing in mind that there is not a presumption in favor of the EU. Secondly, if the EU has to intervene, the principle of subsidiarity conditions the EU in the exercise of this competence. So, this principle intends to avoid authorizing the European Union's action unless the needed requirements are met. Those requirements consider both the efficacy criteria at national level and EU level and the supranational effects of the pretended action (Bou Franch, 2014).

So, this principle allows Member States to preserve its competences, due to it impeding the EU to intervene when a problem can be better solved by the States; and only enables the EU to act when it is strictly necessary, normally when the problem at hand has supranational effects and the Member States alone cannot act effectively (Bou Franch, 2014).

It has already been established that direct taxation falls into the scope of shared competence and therefore, the principle of subsidiarity applies when an EU tax provision is going to be adopted. This means that the EU can approve law related to direct taxation only if it is necessary for the functioning of the internal market.

Moreover, Casas Agudo considers that the principle of subsidiarity is one of the technical difficulties which oppose to the advance of harmonization regarding taxation. This author states that this principle is a permanent structural difficulty derived from the insufficiency and indeterminacy of the tax system which affects both indirect and direct taxation (Casas Agudo, 2012).

Nevertheless, this principle has almost no effect in relation to indirect taxation. In VAT this lack of virtuality comes from the total harmonization regarding its constitutive elements, the fact that it is an own resource of the EU and because of how transcendental it is for the free movement of goods and the functioning of the internal market, which could be compromised if there were non harmonized tax elements. In terms of excise duties, the application of subsidiarity is partial since the principle of subsidiarity cannot impede the EU to legislate about the harmonized excise duties. However, Member States are free to legislate and establish excise duties over the consumption of different goods that are not contemplated in the harmonized excise duties. In addition, the principle of subsidiarity plays a more active role regarding indirect taxes regarding the concentration of capital, allowing only the ones that do not provoke any distortions on the freedom of movement (Casas Agudo, 2012).

Continuing with the principle of proportionality established in the article 5.4 TEU and its meaning, it refers to the fact that the form and content of the action taken by the EU must not exceed the necessary for achieving the objectives of the Treaties. This principle is applied to all the competences that the EU holds, including the ones in which subsidiarity is also applied, in that case the principle of proportionality is applied after the application of the principle of subsidiarity. This means that a measure must be adopted unless there is a less restrictive measure which is sufficient to attain the objective (Helminen, 2021).

According to Bou Franch, the principle of proportionality intends to avoid that the EU exceeds itself in the exercise of its competences, including legislating. This principle tries to examine if there are no other means which allow to achieve the European Union's objectives with less demanding requirements that the ones established in thee proposal of act of the EU. Also, the CJEU has established that the acts adopted by the institutions of the EU need to be appropriate and necessary to achieve the established goal and when there are different appropriate measures to choose from, it always must be chosen the less burdensome. This principle is both applied to the content and the form of the acts (Bou Franch, 2014).

This was stated in the Communication of 23 May 2001 on "Tax policy in the European Union - Priorities for the years ahead" (COM (2001) 260) which established the tax policy followed by the European Union till this day the Commission reiterated the lack of need of a harmonization of Member States' tax systems. What is more, it highlights that there only should be legal action at EU level in the tax field if the Member States individually cannot provide an effective solution (European Commission, 2023).

However, this may change due to the situation of crisis caused by COVID19 and the European plan of recovery whose main resource are the funds Next Generation EU, financed by the emission of European debt, this being an extraordinary decision which implies that the EU's budget has to grow meaning that it could be deemed necessary that the EU exercised taxing powers, as this crisis requires a collective response as the Members States alone lack of effective responses.

C. THE PRINCIPLES OF SUPREMACY AND DIRECT EFFECT

In regard of the principles of supremacy and direct effect it must be established that both are related to the application of EU law.

On the one hand, the principle of direct effect means that European law creates directly rights and obligations for the individuals, who can demand those rights in front of national judges and courts of justice and those are forced to grant them. With this principle the EU makes sure that Member States obey the European laws because it does not depend only on their will but also in the European citizens (Bou Franch, 2014).

So, both legal persons and individuals with the nationality of a Member State can benefit from the direct application of the EU treaties and the directives regarding taxation before the tax authorities and courts of the Member States, even if these provisions were included in domestic laws incorrectly or insufficiently. Furthermore, tax authorities and tax courts must apply EU law ex officio respecting the limits of the national procedural rules (Helminen, 2021).

Whereas, on the other hand, the principle of supremacy of EU law is applied in cases of conflict between national law of a Member State and EU law. With the application of this principle in case of conflict the law that is going to be applied is the EU law. This principle

has not been established in any of the foundation treaties. But nevertheless, the TJUE has acknowledged and confirmed its validity (Bou Franch, 2014).

This principle, as Sánchez de Castro Martín-Luengo states, tries to ensure that both the jurisdictional and administrative organs respect European law and its interpretation, which is very relevant in taxation matters. Moreover, it is highlighted that the interpretation and application of the national taxation law in a way that is interpreted against the European law leads to situations in which there are unjustified restrictions of the fundamental freedoms and to situations of double taxation. In addition, these disputes regarding taxation, which derive from the interpretation and application of national tax law in an opposite way to European law, damage public interest since they diminish the essential taxing principles: competitivity, equity and sufficiency. These conflicts, as they provoke the loss of competitivity and attractiveness of the Spanish tax system, lead to a direct loss of raisings (Sánchez de Castro Martín-Luengo, 2019).

To sum up, the principle of primacy implies that every public organism, both the jurisdictional and administrative organs, should not apply the national law that are incompatible with the European law, including original and derivate law (Sánchez de Castro Martín-Luengo, 2019).

D. CONSTITUTIONAL CONSTRAINTS

Article 93 of the Spanish Constitution grants the possibility of authorizing, by organic law, the celebration of treaties that confer some constitutional competences to international institutions, just like the EU foundational treaties. Those treaties after their ratification and publication in the BOE will be part of the Spanish legal system. In this case, it is understood that the competence of publishing the law has also been transferred to the EU, so the publication in the DEU is enough for a European legal act to be legally binding in Spain. Because of the lack of necessity of a reception act, Spanish citizens can demand the application of these law pieces before the Spanish courts (Bou Franch, 2014).

Regarding the principle of supremacy, there is no article in the Spanish Constitution that confirms that the DEU prevails over the Spanish law. Nevertheless, by a systematic interpretation of the Constitution a conclusion has been reached: the international treaties, including the EU foundational treaties, which are part of the Spanish legal system prevail

over Spanish laws with character of law. The Supreme Court and the Constitutional Court have also adhered to that criterion confirming that in case of conflict between a treaty disposition and a national law, the international law must be applied (Bou Franch, 2014).

The Spanish Constitutional court has determined in various declarations that the principle of supremacy applies to the Spanish Constitution whereas the principle of primacy applies to EU law, this being completely compatible since the primacy of EU law applies in determined competences. Moreover, the principle of primacy was introduced in Spanish law when Spain entered in the European Union, and it is completely compatible thanks to the article 93 of the Constitution which allows the adherence to treaties that confer constitutional competences to International Organizations or their institutions. So, constitutional supremacy also implies primacy, however as the constitution envisages the conferral of some of its competences to International Organizations, like the EU, it is possible that EU law replaces national law (Tribunal Constitucional, 2023).

However, this primacy is not general it only acts in the competences of the EU and only because Spain as a sovereign State decided to confer those competences. Furthermore, if Spain, as a sovereign country, wanted to recover those competences it could do so within the voluntary retirement procedure contemplated in the EU treaty (Tribunal Constitucional, 2023).

A relevant case law on this topic is the case law 145/2012, FJ5 (2nd of July 2012) of the Constitutional Court. In this case law the court sets that the principle of primacy has been assumed by the Spanish legal system as a part of the community acquis since the LO 10/1985, of the 2nd of August. In this case law, the court also recognized the binding effect of this principle settled by the CJEU in the case law Costa against ENEL; and it also highlighted how the primacy of the EU law was accepted, in its competences, by the Spanish Constitution itself (article 93).

Noted that, the Spanish Constitutional Court also has the role to keep watch over the respect of the principle of supremacy of European Law when the CJEU has already established an authentic interpretation of the law (Tribunal Constitucional, 2023).

3. DECISSION-MAKING PROCESSES AT EU LEVEL.

The aim of this section is to determine how decision-making processes are at EU level concentrating in the different types of processes: legislative, executive, and judicial.

3.1. THE EU LEGISLATIVE PROCESS

a. THE LEGISLATIVE PROCESSES

The EU has two different processes regarding the passing of laws: an ordinary legislative process and a special legislative process.

The ordinary legislative process is used for passing legislative acts, mainly directives and regulations. In this process intervene the three main institutions of the EU: the Commission, the European Parliament, and the Council. There are six phases in this legislative process.

The ordinary process starts with the elaboration of a proposal by the European Commission, which has to be motivated by the Council or the Parliament. This proposal establishes in detail all the content of the measures that should be adopted. Then, the project is debated and adopted by the Commission (Ferrando Hernández, 2022).

The second phase is the first reading of the proposal in the European Parliament and in the Council. In this phase the proposal is presented before the Parliament which debates it and makes clear its position about it. The Parliament has three options regarding the proposal: it can approve it by majority vote, it can reject the proposal, or it can modify the proposal through amendments. If the proposal is amended the amended document is transferred to the Council, which can approve it, meaning that the act is adopted; or can reject it, if the document is rejected the Council must establish its position and remit it to the Parliament (Ferrando Hernández, 2022).

The third phase consists of the second reading in the Parliament and the Council. In this case the Parliament has, again, three possibilities. It can approve the Council's position or not decide at all, in this case the act will be approved in the way proposed by the Council. Other possibility is the rejection by the majority of the Parliament which leads to the act not being approved and the end of the proceeding. However, the Parliament can

also approve amendments to the Council's position and in this case the modified text will be passed to the Council and the Commission (Ferrando Hernández, 2022).

If the case, that the Parliament makes amendments the Council must deliberate again and decide on the two alternatives it has. On the one hand, it can approve all the Parliaments' amendments by qualified majority, but only if the Commission has emitted a favorable opinion, if not the amendments can only be approved by unanimity. Nevertheless, if the amendments are approved the act is adopted. On the other hand, if the Council does not approve all the amendments or it does not get the necessary majority the procedure leads to the next phase of conciliation (Ferrando Hernández, 2022).

The phase or procedure of conciliation, which is not often seen, consists in the formation of a committee with 28 members for each the Council and the Parliament. The mission of this Committee is to accomplish an agreement on a joined text of the second reading based on qualified majority. There is a deadline of six weeks, if by the end of the six weeks there is no agreement the act will not be adopted. But if there is an agreement the procedure will continue with the third reading (Ferrando Hernández, 2022).

The phase of the third reading also involves the Parliament and the Council. After the reach of the agreement in the Committee, the Parliament and the Council also have a deadline of six weeks to adopt the act. In the Parliament it must be approved by the majority of emitted votes and in the Council by qualified majority. If those majorities are not achieved the act will not be adopted and the legislative process will end (Ferrando Hernández, 2022).

The last phase of every legislative process is the publication after the approval of the legislative act, if not the law would not be considered valid. So, the definitive act is translated into the official language of the EU, signed by both presidents of the Parliament and the Council and afterwards, it is published in EU Official Diary (Ferrando Hernández, 2022).

The special legislative procedure gives to the Council a prominent position because it establishes this institution as the sole legislator. So, this process is not a balanced decision process since the Council is not in equal footing with the Parliament. This special process is contemplated in the article 289. In truth, there are two different procedures depending on the role of the Parliament (European Council, 2018).

The first one is the Consent procedure, where the Parliament has to consent the act that the Council wants to approve. However, the Parliament can only accept or reject the legislative proposal by an absolute majority vote, but it cannot amend it. The other one is the consultation where the Parliament may approve, reject, or propose amendments. In both processes, the legislative initiative corresponds to the Commission. Nevertheless, the treaties do not give an extended description of these processes, therefore the rules are determined ad hoc (European Council, 2018).

In the consent procedure the Council approves legislative acts after the Parliament has given its consent. In this process the Council cannot overrule the Parliament's opinion. Whereas in the consultation process the Council adopts a legislative proposal after the Parliament has submitted its opinion about it, nevertheless the Council only has to wait until the opinion is established but it does not have to take that opinion into consideration because it is not legally obliged by it (European Council, 2018).

Both procedures are applied under special circumstances. The Consent procedure is used for approving new legislation meant to combat discrimination. This process also gives veto when the subsidiary general legal basis is applied in line with Article 352 of the Treaty on the Functioning of the EU. On the other hand, the Consultation procedure is used in a few matters just like the internal market exemptions and competition law (European Council, 2018).

Finally, we must refer to the role that the European Economic and Social Committee has in these processes. This institution is meant to provide council to the main institutions of the Union when needed. However, the judgements which are emitted by it are not legally binding. There are three types of consultations: the mandatory ones when the legislation to be adopted is about a few enumerated topics, such as the harmonization of indirect taxation or the approximation of laws on the single market; the facultative ones that occur when the Parliament, the Council or the Commission see fit; and the judgements it emits on its own initiative (Ferrando Hernández, 2022).

b. TAXING POWERS

Taxing powers, as it has been established, is not one of the enumerated exclusive competences of the EU. However, there are articles in the foundational treaties that allow the EU to legislate in tax matters.

In the CEE treaty we find dispositions related to the establishment of a Common Market and the approach of the economic policies of the Member States and the candidate States. because of that it was necessary to legislate in a harmonized way in terms of custom duties, quantity restrictions in export and import operations among the Member States and measures of equivalent effect. This also implied the need for the removal of any obstacle to the freedom of movement regarding people, services, and capital. What is more, the Member States established a common custom duty that the third states must pay if they want their products to be commercialized in the EU (CEE at that time) (Caamaño Anido, 2010).

Noted that, the articles that mainly provide foundation for the EU to legislate in tax matters are the article 115 TFEU that establishes that "*the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market*" and article 113 TFEU which states that "*the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition*".

Following article 115 TFEU the legislative process that must be applied regarding the approval of EU tax law is the consulting special legislative process which is explained above. This implies that rules regarding taxation must be approved by an unanimous vote of the Council after it has received the European Parliament's opinion.

In the article 113 TFEU we find the foundation of the legal harmonization in terms of indirect taxes, concretely the harmonization of the VAT in the Member States. Because of this treaty the EU members had to accept EU harmonized legislation regarding

compensation measures meant to apply in exchanges among Member States. This led to the harmonization of the turnover tax and the excise tax. In addition, it also needs to be highlighted that the harmonization regarding indirect taxation has been far more developed because of its bigger impact on the functioning of the internal market.

This treaty also provided legal basis for giving the competences to community institutions of administrative cooperation and exchanging information among Member States with the aim of detecting capital flight and tax fraud.

In terms of direct taxation, as it has been indicated above this competence belongs to the Member States. Despite that, Member States must respect community law. However, thinking that there is no reference in the Treaty regarding direct taxes it is a mistake due to the existence of some articles that provide legal basis for harmonization in indirect taxes (Caamaño Anido, 2010).

In the article 112 TFEU there is a prohibition against adjusting border taxes that are not indirect, including income taxes. Moreover, there are various articles in the Treaty that permit the EU to legislate and approve taxes regarding specific areas, such as investigation, technological development, and environmental related activities (Caamaño Anido, 2010).

What is more, for many authors, there is no significance in the lack of explicit previsions regarding income taxation in the EU foundation treaties. Moreover, this is reflected in legal dispositions which can be used to support income taxing legislation in the EU. The articles that can be used to support legislation in direct taxation are the following ones: article 112 TFEU; articles 114 and 116 TFEU, the articles related to State aid and the article 352 TFEU (Caamaño Anido, 2010).

In the article 112 TFEU there is compiled a set of legislative powers regarding the Common Market which can affect the direct taxes. There have already been some examples of legal acts which affect direct taxes such as the Directive Parent-subsidiary and the Directive of Fusions. In addition, the articles 114 and 116 regarding the approximation of laws also refer to some powers that could be used to achieve the harmonization of the Member States' taxing systems (Caamaño Anido, 2010).

In terms of State aid, the articles regarding this matter have led to Commission's decisions and law cases forbidding aid set out as incentives in income taxes. This law cases and

decisions could also be used to provide foundation of future European law (Caamaño Anido, 2010).

Finally, the article 352 TFEU states the theory of implicit powers which allows the EU to legislate until it is necessary to achieve its objectives. The precept states the following: "*If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures*".

Now, we are going to pint out the most relevant law pieces that have been approved regarding taxation, most of them being directives. In the first place, we have to list the legislation regarding indirect taxation that covers VAT, custom duties, excise duties and energy taxation.

In terms of VAT we can find four directives: the **Council Directive 2010/45/EU of 13 July 2010 amending Directive 2006/112/EC on the common system of value added tax as regards the rules on invoicing**, the **Council Directive 2009/132/EC of 19 October 2009 determining the scope of Article 143(b) and (c) of Directive 2006/112/EC as regards exemption from value added tax on the final importation of certain goods (Codified version)**, the **Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State**, and the **Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax**.

Regarding excise duties we can find the following directives: the **Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco (codification)**, the **Council Directive (EU) 2020/262 of 19 December 2019 laying down the general arrangements for excise duty**, the **Council Directive 92/84/EEC of 19 October 1992 on the approximation of the rates of excise duty on alcohol and alcoholic beverages**, the **Council Directive 92/83/EEC of 19 October 1992 on the harmonization of the structures of excise duties on alcohol and alcoholic beverages**, and the **Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital.**

There are also two directives regarding energy taxation which are the **Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (Text with EEA relevance)** and the **Council Directive 95/60/EC of 27 November 1995 on fiscal marking of gas oils and kerosene**.

Lastly, we have to address the legislation concerning custom duties which is the only one consisting of regulations, this being related to the fact that it is the only taxing competence inside the scope of EU exclusive powers. Those regulations are two: **Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast)** and **Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff**. However, there is also a Commission Regulation (TARIC) which is published each year to bring up to date the tax rates of custom duties (Serrano Antón, 2019).

Next, we are going to list the directives regarding direct taxation which are the following: the **Council Directive 2014/86/EU of 8 July 2014 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States** which pretends to eliminate corporate double taxation; the **Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States (Codified version)** which applies to business restructuration operations; and, **the Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States** which is also related to corporate taxation.

Finally, there are three directives related to administrative cooperation regarding taxation which are **Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (Text with EEA relevance)**, **Council Directive (EU) 2016/1164 of 12 July 2016 laying**

down rules against tax avoidance practices that directly affect the functioning of the internal market, and **Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.** These directives are mainly focused on the fight against tax evasion and fraud.

However, it is not always obvious to determine the legal basis for approving a legal act regarding taxation due to the fact that there are many disciplines involved.

As an example, we can analyse the Directive 2021/2101 of THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 24 November 2021 amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches (public country-by/country reporting) which was not approved by the special legislative procedure that is normally used to pass EU taxation law. This directive which main topic is the freedom of establishment was approved by the ordinary legislative procedure because it has its legal basis in article 50 TFEU that states that "*in order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives*". This directive is clearly linked to the corporate income tax, however as it directly affects the freedom of establishment of the companies the right legal basis was the article 50 TFEU.

This difficulty in selecting the legal basis has caused some problems such as the one presented in case law C-338/01 (recovery indirect tax) in which it is demanded the annulation of the Council Directive 2001/44/EC of 15 June 2001 amending Directive 76/308/EEC on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties and in respect of value added tax and certain excise duties. The annulation is demanded by the European Commission which argues that the legal basis for adopting the decision is not the right one.

The directive was approved following the consultation procedure in which the Council holds the decision power by a unanimous vote. This legislative process was applied because the chosen legal basis was articles 93 TEC (now article 113 TFEU) and 94 TEC (now article 115 TFEU). However, the problem was that when the Commission presented

the proposal for a directive about the reform of the directive 76/308 which extended its application to some direct taxes and conditioned the collection of the taxes affected by the directive. This directive along with the Commission's proposal for a new one were sustained by article 95 TEC (now article 114 TFEU) which determines that the piece of legislation must be approved by the ordinary legislative procedure.

Nevertheless, the Council considered that the proposal was about taxation matters decided that the appropriate legal basis were articles 93 and 94 TEC. So, the Commission based on the belief that the directive should have been adopted attending to the procedure established in article 95 TEC decided to file an annulment appeal. The Commission argued that this directive did not affect national taxation law and it concerned mainly the functioning on the internal market, however the CJEU determined that the directive contained provisions that indeed were fiscal. And following article 95.2 TEC, article 95 cannot be used to pass a law regarding fiscal or taxation matters, so it confirmed that the Council has acted correctly and that the directive was valid.

c. THE LEGISLATIVE PROCESS OVER TIME.

Nowadays, the legislative process is a co-decision process in which the European Parliament and the Council take part. However, the role of the EU institutions in the legislative process has changed overtime, in this section we are going to give a review of the most significant changes in this process.

First, we must deal with the ECSC which was the precedent of the ECC which later transformed in the EU that we have today. At first, the ECC needed common laws and an authority for the common market to work. That is the reason which led to the National Parliaments to transfer legislative and executive powers to the Minister Council following the proposals of the Hight Authority (which will transform into the Commission). This Council had the power to approve the Hight Authority's proposals by qualified majority and, depending on the topic, sometimes unanimity was required. This legislative process was not public and there were not any accountability or transparency mechanisms, which manifested in a considerable lack of legitimacy (Barón Crespo, 2012).

Regarding the precedent of the European Parliament, in both treaties, ESCS and Rome, there was established a Consultive Assembly which in theory should be directly elected.

However, its members were elected in a second level election by the National Parliaments until 1979 when the European Parliament started to be elected by universal vote. However, the Assembly was mainly consultive and did not have any legislative power (Barón Crespo, 2012).

This lack of legitimacy was behind the changes introduced by the Maastricht Treaty (TEU) which was the legislative co-decision which consisted in achieving an agreement between the Council and the European Parliament, established as the ordinary legislative process by the Lisbon Treaty (Barón Crespo, 2012).

Summing up, we can establish that the Council dominated the legislative powers since the ECSC to the Maastricht Treaty, always following the Commission's initiative. During this time the Parliament's role was progressively increasing until it became what it is today (Barón Crespo, 2012).

d. THE ROLE OF NATIONAL PARLIAMENTS

The Lisbon Treaty established that National Parliaments have a decisive role in the good functioning of the Union that is why they were given some competences in the role of legislating. Firstly, there is a politic dialogue between the Commission and national parliaments and based on that they must be notified by the European institutions of all the legislative acts that the EU plans to take. This notification from the Commission must be directed at the national parliaments while it is notified to the European Parliament and the Council, and it is done to enable the national parliaments to emit judgments about the legislative proposals. Those judgments must be answered by the Commission in three months and afterwards, both the national parliament's judgment and the Commission's answer will be published online (European Commission, 2023).

Moreover, there are other manifestations of the open political dialogue which are the Commission's participation in the interparliamentary cooperation among national parliaments and the European Parliament; political and administrative visits and meetings, which many national parliaments maintain periodically with the Commission; and, when it is requested, meetings held by EU servants with commissions or representatives of national parliaments (European Commission, 2023).

In addition, National parliaments have the task of securing the principle of subsidiarity in the EU, this is established in both foundational treaties, in the articles 5 TEU and 69 TFEU. This subsidiarity control is meant to occur when there is a new legislative proposal regarding criminal law judicial cooperation and police cooperation or any other shared competence. This subsidiarity control mechanism tasked to national parliaments consists of verifying if it would be more effective to act at national or regional levels rather than in the EU level.

The incorporation of EU law into national tax law can happen in different ways depending on the type of legal provision (regulation, directive, or decision), also having an effect on how the National Parliaments shall act, if required. If the piece of law approved by the EU is a regulation, following article 288.2 TFEU, it is directly applicable in all Member States which means that it creates rights and obligations since its publication in the Official Journal of the European Union. According to this, not only is unnecessary to transpose the regulation, but it is also absolutely prohibited. So, in terms of regulations Member States do not need to adopt any legal measure to adopt this legislation.

Directives, on the other hand, are not directly applicable, as indicated in article 288.3 TFEU. In order to achieve the objectives established in the directive the Member States to whom the directive is angled towards must transpose this directive into its internal law. According to this, the Member States must adopt the necessary measures to ensure that the established goal is attained in the determined deadline, and they must also remove all the legal dispositions which are not compatible with the directive. This entails that National Parliaments are obliged to adopt legal acts so that the directive is applied in its territory. Nevertheless, if the directive is not transposed correctly or not transposed at all once the deadline has expired individuals will be able to invoke it before the national courts, as it has been recognised by the CJEU (Bou Franch, 2014).

Decisions, which are contemplated in article 288.4 TFEU, are also a legislative act which is not directly applicable. These legal acts, as it is established in the TFEU, can be developed by delegated acts or by executing acts from Member States, the European Parliament and the Council, exceptionally. Noted that, it is also possible that National Parliaments have to legislate for making possible the integration of decisions into national law (Bou Franch, 2014).

e. EU'S BUDGET

The article 311 TFEU gives the Union the legal basis for establishing its own taxes because as the article reflects the Union should be capable of sustaining itself with its own resources. The article 322.2 can be also used to justify the legislation which creates or establishes the EU's resources.

We can also find decisions regarding this topic being the latest one which introduces the new environmental tax is the COUNCIL DECISION (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom.

In terms of regulations Council Regulation (EU, Euratom) 2021/768 of 30 April 2021 laying down implementing measures for the system of own resources of the European Union and repealing Regulation (EU, Euratom) No 608/2014; the Council Regulation (EU, Euratom) No 609/2014 of 26 May 2014 on the methods and procedure for making available the traditional, VAT and GNI-based own resources and on the measures to meet cash requirements; the Council Regulation (EU, Euratom) 2021/769 of 30 April 2021 amending Regulation (EEC, Euratom) No 1553/89 on the definitive uniform arrangements for the collection of own resources accruing from value added tax; and the Council Regulation (EU, Euratom) 2021/770 of 30 April 2021 on the calculation of the own resource based on plastic packaging waste that is not recycled, on the methods and procedure for making available that own resource, on the measures to meet cash requirements, and on certain aspects of the own resource based on gross national income.

The main EU initiatives regarding its own resources before the pandemic were the following: the traditional resources, the resource based on the VTA, and the resource based on the GNI. But, in reality, these resources work as transferences from the Member States diluting the link between them and the European citizens.

The traditional resources are two: custom duties on imports to the EU and the agricultural levies tax. The based on value-added tax has a 0.3% rate that is applied to every country's harmonized VAT base, capped at 50% of its gross national income. Lastly, the resource based on GNI consists in transfers from every country to the EU in a uniform percentage of its GNI. In addition, there are other minor resources which are not determinant in EU's financial autonomy, those resources are the default rates and the fines imposed by the Commission or by the CJEU (EUR-Lex, 2023).

However, the traditional resources were not sufficient to achieve the needed recovery after the pandemic, that was the main reason to permit the EU to emit public European debt and to approve new taxes to fund EU's budget. Therefore, since the 1st of January of 2021 there is a new own resource: a contribution based on the quantity of non-recycled plastic packaging waste (European Commission, 2021).

Furthermore, the Commission and the Parliament have set the future agenda for EU's budget introducing new resources that are aligned with the policies and objectives of the EU, such as the fight against climate change. The income generated by these new own resources is meant to pay the loans and tax rates promoted by the Next Generation EU. Following this agenda three different own resources should become a reality in 2023: the income generated by the EU Emissions Trading System, an imposed limit to airlines and installations whose energy use is high; a digital services tax, to provide a just taxation in this area; and the Carbon Border Adjusting Mechanism applied to imports coming from other countries whose goal is to equilibrate the fight against climate change (European Parliament, 2021).

Moreover, a corporate tax for multinationals, which has been promoted by the OECD and the G20; was approved by the EU in 2022, once the veto of Hungary was removed, and it will come into force in 2024. In addition, there is one more proposal of new resources that should be introduced in 2026: a tax on financial transactions (European Parliament, 2022).

f. THE UNANIMITY RULE

The unanimity rule applies in the tax legislation process; therefore, it is applied when the European Commission proposes a new law related to taxation or amendments to a existing EU tax law. Nowadays, EU tax legislation is adopted through a special legislative procedure in which the main actor and sole legislator is the Council of the European Union, formed by representatives of all member states (European Commission, 2023).

In this special procedure the European Parliament is only consulted, however the Council does not have to follow or consider the Parliament's point of view. Despite the lack of binding force conferred to the Parliament's opinion, the Council cannot adopt any piece

of tax legislation before the Parliament has communicated its opinion (European Commission, 2023).

The unanimity rule which is central to the approval of tax law determines that draft laws can only be passed by a unanimous vote of the Council, which means that all the Member States have to agree in the approval of the piece of legislation. Therefore, this rule actually means that one single state can veto an EU tax law, slowing down the harmonization in taxation matters by months or even years if a Member State is fixated in blocking an specific law proposal (European Commission, 2023).

Moreover, this rule plays a fatal role in promoting new EU tax laws not only because of the veto power held by every single Member State, but also because when a common ground is reached is at the lowest common denominator level. Which translates in a less advanced law with impact limitations and a more cumbersome implementation. Furthermore, Member States use their privileged position in their own advantage, making other demands which are not related to the law proposal in exchange for giving their green light and allowing it to pass (European Commission, 2023).

In addition, caution is also a reason for the Member States to avoid approving tax law unanimously, since an unanimity approved law can only be repealed or modified by unanimity. So, the Member States' reluctance is also related to the possible difficulties that may arise if the rule needs to be changed or repealed (European Commission, 2023).

Because of all the precedent reasons, the European Commission has tried on several occasions to change the rule of unanimity for qualified majority voting, also known as the double majority rule. The qualified majority voting is also applied when the Council is voting a proposal, and there are two indispensable conditions that must be met in order to pass the proposal: at least the 55% of Member States must vote in favor of the proposal, which means that fifteen of the twenty-seven states must support it; and the support of Member States which represent at least the 65% of the EU population. This way, to block the decision there has to be a "blocking minority" formed by at least four Member States which represent more than the 35% of the EU population. Although, if the blocking minority does not surpass the threshold (four states) the qualified majority is also deemed attained. This implies that if only three Member States vote against the proposal it will pass even if the states voting in favor do not represent the 65% of the EU population,

meaning that if there are less than four states voting against it the representation percentage is irrelevant (European Council, 2022).

This change would not only make the procedure faster, but it would also provide a better cooperation among Member States resulting in a better decision-making at EU level regarding taxation. Moreover, qualified majority also allows the European Parliament to have its say shaping the EU tax policy, giving the Council and the Parliament an equal footing in this process, which is rather relevant for improving the democratic legitimacy of decisions concerning EU taxation. Because it cannot be forgotten that the Parliament is the institution whose members are elected directly by the EU citizens, so in giving the parliament a decision role this process would get closer to the democratic goals that preside the European Union.

In fact, there have been some proposals to change from unanimity to qualified majority (the ordinary legislative procedure) one of them was issued by the European Commission the 15th of January in 2019. One of the main arguments was that the ordinary process is the procedure mainly used in the EU. Indeed, more than the 80% of legislative procedures are passed by a qualified majority vote in the Council and taxation should not be any different. However, this initiative was rejected by a Communication adopted in 2019 as there are some states, such as Ireland, Sweden, or Hungary, which reject any change in the current decision method existing regarding tax matters.

In this field, Spain's position is quite clear: Spain supports changing unanimity for qualified majority voting regarding taxation matters. Due to the fact, that one of its main goals in EU policy is to move forward to a more united, strong and coordinated EU. Spain is since it is one of the most persistent countries in reducing the differences among countries and sharing responsibilities. Spain's position in this matter has been reinforced by the impact of COVID-19 since it is obvious that collective and unanimous responses need to be taken to improve the economic and financial situation (Molina & Steinberg, 2020).

The opinion of some Spanish authors, like Cordón and Gutiérrez, regarding unanimity rule is the following. They think that unanimity rule has made it easy for the Member States to maintain a strategic competitivity, because with a single no it is possible to veto any fiscal harmonization proposal. This has meant that the fiscal harmonization in the internal market has been mainly competitive and, therefore, Member States have been

obliged to attenuate taxation leading to a spontaneous harmonization of taxation. These authors also consider that taxation harmonization has been unsuccessful in terms of achieving supranational agreements, due to the fact that there will always be countries which benefit more from the non-cooperation that from cooperation (Cordón Ezquerro & Gutiérrez Lousa, 2006).

Nevertheless, the authors highlight that the unanimity rule should not have been an obstacle to the harmonization agreements if the integration calendar had been different. Meaning that it would have been enough to avoid fiscal distortions if the States had conditioned the directives regarding capital circulation to the directives regarding the harmonization of capital yields' taxation (Cordón Ezquerro & Gutiérrez Lousa, 2006).

g. ENHANCED COOPERATION, MARKET DISTORTION PROVISION AND PASSARELLE CLAUSES

The enumerated EU mechanisms: enhanced cooperation, market distortion provision and passarelle clauses are all forms of avoiding the unanimity rules which rules in the legislative process regarding tax law. So, because of that they are contemplated as an alternative to achieve the harmonization of taxation law.

The enhanced cooperation provision appeared first in the Amsterdam Treaty with the intention that some of the Member States could go forward in terms of legal integration. This mechanism is contemplated in the article 20 TEU which dictates the following: "*Member States which wish to establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties, subject to the limits and in accordance with the detailed arrangements laid down in this Article and in Articles 326 to 334 of the Treaty on the Functioning of the European Union*".

The aim of this provision is to give impulse to the EU objectives, protect its interests and reinforce the integration process. The article 20.1 stablishes that the Member States which want to adopt a enhanced cooperation are allowed to use the European institutions and exert the competences conferred to the EU under the treaties but always within the stablished limits and attending to the different modalities (Bou Franch, 2014).

This disposition allows that the Member States which want to move forward can do it without affecting the States that do not wish to legislate in a joined way on certain topics. Nevertheless, the process leaves a door open to the other Member States in case they want to adhere themselves to the acts of enhanced cooperation. Nevertheless, this enhanced cooperation is not allowed to legislate in any of the exclusive competences of the EU (Ferrando Hernández, 2022).

The process regarding its establishment is the following one. The Council must approve the authorization of the enhanced cooperation when it concludes that its objectives cannot be achieved by the EU in a reasonable amount of time, this means that this mechanism is a subsidiary procedure which is used as last resort. First, the Member States must try to achieve the objectives using the ordinary procedures contemplated in the foundational treaties. And only when it is not possible to achieve those goals by the ordinary procedures established in the treaties, some Member States will be able to request the authorization to stablish an enhanced cooperation among them which is set to achieve those goals (Bou Franch, 2014).

This type of cooperation cannot be used to reform the foundational treaties, what is more it must respect all the European law. Along with that, the enhanced cooperation cannot disturb the Common Market, the competition, social or territorial cohesion. Moreover, enhanced cooperations cannot be an obstacle or a discrimination for the transactions among Member States or provoke distortions among them (Bou Franch, 2014).

There is no obligation to participate in this process of enhanced cooperation that is the reason why the adopted acts are only mandatory for the participant Member States. In addition, these acts are not considered community heritage (Ferrando Hernández, 2022).

It must be demanded by at least nine Member States, but it is desirable if more Member States are encouraged to take part in this cooperation. That is why both the Commission, and the involved Member States are obligated to encourage as many States as possible, that is why the enhanced cooperations are permanently open (Bou Franch, 2014).

The effects of the enhanced cooperation are different for the Member States depending on them participating in the enhanced cooperation or not. First, regarding the adoption of measures in an enhanced cooperation, all the members of the Council can participate in the deliberations, but only the members of the Council who represent Member States taking part in the enhanced cooperation process are able to participate in the voting

process. On the other hand, the acts adopted within enhanced cooperation are only binding to the Member States which are part of it (Bou Franch, 2014).

One initiative regarding taxation carried out as an enhanced cooperation procedure is the Financial transaction tax which aim is to ensure that the financial sector makes a fair contribution to national tax revenues and also to discourage transactions that do not enhance the efficient allocation of resources by the financial markets. There are currently ten Member States participating in the initiative, including Spain. This initiative had been at standstill until 2019 when the discussions were renewed. However, the European Parliament proposed that the financial transaction tax to be a resource of the European Union (Baert, 2023).

In addition, enhanced cooperation has been denied regarding procedural taxation matters.

The market distortion provision is contemplated in the article 116 TFEU which establishes that "*where the Commission finds that a difference between the provisions laid down by law, regulation or administrative action in Member States is distorting the conditions of competition in the internal market and that the resultant distortion needs to be eliminated, it shall consult the Member States concerned. If such consultation does not result in an agreement eliminating the distortion in question, the European, Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall issue the necessary directives. Any other appropriate measures provided for in the Treaties may be adopted*". And, in the article 117 TFEU which dictates that "*where there is a reason to fear that the adoption or amendment of a provision laid down by law, regulation or administrative action may cause distortion within the meaning of Article 116, a Member State desiring to proceed therewith shall consult the Commission. After consulting the Member States, the Commission shall recommend to the States concerned such measures as may be appropriate to avoid the distortion in question*".

This mechanism is designed as a safety valve against the veto where there is danger of a market distortion and there is need for a EU's intervention. Its application is decided by qualified majority which is a clear advantage as it avoids the possibility of a single state vetoing the procedure. However, this mechanism is not seen as the best option to avoid the rule of unanimity and to widely harmonize taxation in the EU. Either way, it is an alternative route for the use of qualified majority voting (Nouwen, 2021).

Nevertheless, to apply article 116 TFEU there are three criteria that have to be met: the existence of a disparity among Member States, this disparity should "distort the conditions of competition in the Internal Market", and the distortion must be such that it "needs to be eliminated" (Nouwen, 2021).

First, we need to address the meaning of disparity. A disparity, as it is defined by the Commission, is the result of legislative or administrative differences between two or more national jurisdictions. In terms of taxation, this disparity can be the result of different tax systems or administrative tax practices, nevertheless this difference must be considerable. Next, we have to be able to determine when this disparity distorts the competition in the internal market. In this case the criteria held by the CJEU is not adequate and we have to turn to the law. In article 116 is clearly defined that the competition should be disturbed significantly. Finally, this distortion must be such as to need to be eliminated, however this is not determined by this article (Nouwen, 2021).

These distortions need to be specific distortions to have the meaning of article 116 as it has established the Commission limiting the possible situations in which a distortion may exist. So, following the Commission's criteria there is a distortion when: a group of companies or industry in a Member State is subject to higher or lower charges than average in that Member State, this is the internal derogation criterion; the external effect criterion which implies that a national intervention has an external effect on competition between groups or sectors from different Member States; and the balancing criterion where the positive or negative derogation is not neutralized by other targeted measures in the derogating Member State. In addition, the Commission recognized that this distortion can be provoked by both specific and generic measures when its effects consist of a deviation and that the measure can be considered a distortion even if it does not met the requirement of affecting companies' cost structure. Moreover, the Commission concluded that it is not the nature of the practice but its distorting effect on the conditions of competition that determines if the market distortion provision can be applied by the Commission (Nouwen, 2021).

This mechanism charges the Commission with the task of eliminating the existing market distortions in cooperation with the Member States and it is a safety valve related to the special legislative process contemplated in articles 113 and 115 TFEU regarding the harmonization of national tax law (Nouwen, 2021).

The process starts when the Commission determines that there is a significant market distortion in the sense of article 116 which means that the effect of the measure changes the market conditions. The Commission to determine this must also evaluate the likelihood of the Member State adjusting in the policy by its own volition. Once this distortion is confirmed the Commission it shall decide if there is need for the EU to act on it and eliminate that distortion or not (Nouwen, 2021).

If the Commission decides that the distortion should be eliminated because the internal market is clearly distorted it must consult the Member States involved to balance the different interests and if the distortion is not removed after the consultation and the Commission still contemplates the removal of the measure as necessary, the Commission must submit a proposal for a directive that should be approved by the ordinary legislative process which is qualified majority voting. This directive can either be directed to all the States, some of them or one of them. Alternatively, other measures contemplated by the treaties can be adopted if necessary, such as recommendations directed towards a Member State (Nouwen, 2021).

Moreover, following the standstill procedure contemplated in article 117, if a Member State plans to apply a measure which can affect the internal market creating a market distortion this state must notify the Commission about it. Then, the Commission shall decide if the distortion is significant or not. If the Commission has doubts about it, it will initiate a consultation. If the consultation ends up concluding that the measure is incompatible with the internal market the Commission must extend a recommendation to the Member State. However, if the Member State does not comply with it, the Commission is required to initiate the process described in article 116 (Nouwen, 2021).

Nevertheless, the effect of the market distortion rules has been limited. Even though, the Commission started fifty-four formal investigations into potentially market distorting measures (tax and non-tax related) in the 70s, in more than half the Commission concluded that the distortions were not excessive. Moreover, in the cases where the Commission determined that the measure should have been eliminated some states refused to make adjudgments. So, this mechanism was not functioning correctly, because it depended on the states' willingness to comply with the Commission's recommendations. It seems like this mechanism has not played any important role after the 70s because even with the demands of the Parliament there is no success because the Commission does not apply the distortion rules (Nouwen, 2021).

However, the distortion market provision is not considered the best mechanism to harmonize tax law in general because the subsidiary nature of the articles, this means that articles 116 and 117 TFEU should be applied only to cases in which other methods have deem to be inadequate. So, the distortion market provision should only be applied to specific situations when: the fiscal market distortions affect two or a few Member States, the distortion is quite relevant and its elimination cannot wait until the approval of uncertain harmonization measures, and if the distortion can be eliminated by unilateral measures from one or a few states. Despite that, this mechanism can complement the EU Code of Conduct Group as well as the implementation of State Aid rules (Nouwen, 2021).

Introducing the "passarelle clauses", they were established first in the Lisbon Treaty as an alternative way that allows the European Council to change the form in which decisions are made in the Council. This mechanism is contemplated in the article 48.7 TEU which establishes that "*where the Treaty on the Functioning of the European Union or Title V of this Treaty provides for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case (...)*". Therefore, with the adoption of this mechanism the number needed of votes changes from unanimity to qualified majority. However, this mechanism has slim chances on being implemented regarding taxation any time soon because it needs unanimity by all the members of the European Council to be activated. So, a single Member State can veto the adoption of this mechanism proving that the procedure is in fact quite inefficient (Nouwen, 2021).

Regarding these alternatives to the unanimity rule we have no clear statement of the Spanish government, so we cannot neither confirm or deny if Spain would be prone to support this alternative methods in issues that directly affect taxation. Moreover, the Spanish doctrine has not declared anything specific regarding these mechanisms.

h. SOFT LAW INSTRUMENTS

It is clearly known that normative initiatives regarding taxes are more difficult to pass due to the unanimity rule. That is the reason behind all the pieces of soft law that have been promoted regarding taxes. This soft law, despite its non-binding nature, is meant to encourage Member States to harmonize their tax systems in a voluntary way and it can

also serve as a preparatory phase before the Member States are ready to pass hard law on certain areas (Gribnau, 2008).

Soft law is a mechanism used in both direct and indirect taxation and it is considered an alternative to more formal measures such as directives. According to this, soft law is considered an appropriate instrument to overcome the lack of political consensus that often occurs regarding direct taxation (Gribnau, 2008).

In addition, soft law can also be used to reinforce a piece of hard law or to ensure compliance with hard law, such as the Code of Conduct that will be explained later that serves to complement the State aid law (Gribnau, 2008).

There are some pieces of tax soft law that have been passed, one type of them is the Communications from the Commission to the Council, the European Parliament and the European Economic and Social Committee. This Communications ascertain if a new law is needed or desirable for the EU and it is a mechanism which paves the way for the adoption of future pieces of law. Regarding its legal basis, communications from the Commission are not mentioned in the treaties.

The most relevant ones that have been approved are the following: COM (2004) 297 final, relating to the activities of the European Forum about Transference Prices; COM (2005) 543 final, regarding the work done in the joined EU Forum about the required documentation in relation to the transfer prices and linked operations; COM (2006) 823 final, related to the coordination of Member States' direct tax systems in the Internal Market; COM (2006) 824 final, which is about the Tax Treatment of Losses in Cross-Border Situations; and COM (2006) 825 final, which follows exit taxation and the need for co-ordination of Member States' tax policies. All of them were considered an important achievement in the EU and most of them affected direct taxation, such as the income taxes (Caamaño Anido, 2010).

The EU also counts with a Code of Conduct for Business Taxation. Its role is promoting fair tax competition, inside EU's borders and beyond. The Code of Conduct was created by the finance ministers of the EU in 1997 as an intergovernmental instrument. This instrument relies on peer pressure for the States' compliance due to it not being legally binding. Its main role is to identify and assess preferential tax measures that are possibly harmful. However, the Ecofin Council approved a revised Code of Conduct in November of 2022. This revised Code of Conduct broadened the scope including tax features of

general application, which can lead to double non-taxation or to the double or multiple use of tax benefits. This renewed Code of Conduct will be applied from the 1st of January 2024, and it will oversee tax features of general application introduced since the 1st of January 2023. Participating in this instrument implies that the States commit to limit existing tax measures that consist in a harmful tax competition and refrain from introducing this type of measures in the future (European Council, 2023).

Another example of soft law are the guidelines emitted by the Commission which main role is to complement legislation regarding VAT. These guidelines are explanatory notes or other documents that provide practical and informal guidance on how determined provisions regarding VAT should be applied. These guidelines are elaborated by the Commission's Directorate General for Taxation and Customs Union. However, guidelines are not legally binding, and they do not replace the VAT Committee guidelines or Implementing Regulations. The guidelines published on VAT by the Commission are the following ones: the Guide to the VAT One Stop Shop, the explanatory notes on the VAT e-commerce rules, the Explanatory Notes on the EU VAT changes in respect of call-off stock arrangements, chain transactions and the exemption for intra-Community supplies of goods ("2020 Quick Fixes"), the Explanatory Notes on the place of supply rules for services connected with immovable property, the Explanatory notes on the place of supply rules for telecommunications, broadcasting and electronic services that entered into force in 2015, the Guide to the VAT mini One Stop Shop, the Additional guidelines – auditing under the MOSS and the Explanatory notes on the main VAT invoicing rule changes as from 1 January 2013 (European Commission, 2023).

In the article 288 TFEU there are also contemplated two types of soft law that can be approved for the achievement of the EU objectives: recommendations and opinions. Nevertheless, these instruments are not legally binding.

Recommendations can be issued by the European Commission, the European Parliament, the Council and the European Central Bank. The aim of recommendations is to achieve certain objectives without having to impose any mandatory legal measures. Recommendations can be issued to certain Member States or to policies of the EU. As it has already been established, recommendations are not legally binding, however, it is expected that the subject to whom a recommendation is directed complies with its suggestions. Moreover, recommendation serve to pave the way for future legislation because they set certain standards and create precedent.

There have been some recommendations issued like the Council Recommendation of 16 June 2022 on ensuring a fair transition towards climate neutrality 2022/C 243/04 that it is related to energy taxation.

On the other hand, opinions are a piece of soft law often used to evaluate a certain issue and propose possible actions that can improve it. This instrument is often used in very specific situations, and it is normally addressed to certain Member States. An example of an opinion would be the Council Opinion on the updated stability programme of Malta, 2009-2012 or the 73/25/EEC: Commission Opinion of 5 January 1973 addressed to the Government of the French Republic with respect to the Article in the draft Finance Law 1973 concerning the special tax on certain road vehicles, which is no longer in force.

There is also another piece of soft law not contemplated by the treaties, which is less common nowadays: the Council resolutions. This piece of soft law is also non-binding and its use decayed with the Amsterdam Treaty which introduced more specific and specialised legal instruments. Despite that, the Council still uses this procedure, albeit rarely. This instrument is designed for evaluating certain developments and setting some goals, nevertheless its value is only political because of the lack of suggestions on how to achieve those goals. The process for adopting resolutions is not defined in the treaties, mainly because this instrument is not also contemplated by them, however it will be adopted by one of the Council methods of voting depending on the topic, regarding taxation the most adequate is unanimity. As an example we can cite the Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on a revised Code of Conduct for Business Taxation 2022/C 433/01 and the Council Resolution of 21 April 1970 on taxes, other than turnover taxes, on the consumption of manufactured tobacco.

There are also resolutions emitted by the European Parliament such as the European Parliament resolution of 12 December 2013 on the call for a measurable and binding commitment against tax evasion and tax avoidance in the EU (2013/2963(RSP)).

i. NON-LEGISLATIVE ACTS

Analyzing another additional element of the EU legislative process, we must refer to the non-legislative acts: delegated acts, contemplated in the article 290 TFEU, and

implemented acts, in the article 291 TFEU. The power to adopt these acts will be given to the Commission under certain conditions. Moreover, the implementing powers can also be attributed to the Council in justified specific cases and in the cases compiled in the articles 24 and 26 TEU (European Council, 2022).

The delegated acts are non-legislative acts of general application which can only be adopted if there is a delegation of powers contained in a legislative act. Their aim is to amend or supplement non-essential elements of that legislative act. This act is adopted mainly because it gives to the Commission the possibility of a quicker response to some problems which may require it (European Council, 2022).

Delegated acts are adopted by the Commission after it consults experts on the topic, some appointed by the Member States. The Commission must ensure that the drafts of delegated acts are transmitted simultaneously to the European Parliament, to the Council and to the member states' experts. It also has the possibility of opening a four-week public consultation on the draft text (European Council, 2022).

In the next two months following the approval of the delegated act the Parliament, via committee, and the Council, via working party, examine it. This period of time can be elongated if it is solicitated. However, if the Council or the Parliament objects the act within this period it will not be applied. Moreover, the Council and the Parliament can revoke the delegated power at any time during the period that the Commission has this power (European Council, 2022).

Delegated acts have been used regarding taxation in the form of delegated regulations approved by the European Commission. As an example we can cite a few of them: the Commission Delegated Regulation (EU) 2022/2300 of 30 August 2022 supplementing Regulation (EU) 2021/847 of the European Parliament and of the Council with provisions on the establishment of a monitoring and evaluation framework for the Fiscalis programme for cooperation in the field of taxation, the Commission Delegated Regulation (EU) 2020/877 of 3 April 2020 amending and correcting Delegated Regulation (EU) 2015/2446 supplementing Regulation (EU) No 952/2013, and amending Delegated Regulation (EU) 2016/341 supplementing Regulation (EU) No 952/2013, laying down the Union Customs Code, and the Commission Delegated Regulation (EU) 2022/1636 of 5 July 2022 supplementing Council Directive (EU) 2020/262 by establishing the structure and content of the documents exchanged in the context of movement of excise goods, and

establishing a threshold for the losses due to the nature of the goods. The first one is related to the cooperation in taxation among states and the other two are related to indirect taxation.

The implementing acts are non-legislative acts that are adopted if it is imperative that the implementation of a legal binding act of the EU is uniform. Normally, these implementing acts are adopted by the comitology process which basically refers to the control that committees, formed by representatives of Member States, have over the Commission while taking these implementing acts. However, not in every implementing act there is control by the committees, sometimes the basic act may allow the Commission to approve the adoption of these acts without the approval of the Member States (European Council, 2022).

There are two types of procedures following comitology rules: the advisory and the examination. The difference is that Member States in examination processes can block, under certain circumstances the adoption of the implementing act. However, on some occasions where there is urgency and it is justified the Commission may be given the power to adopt the act before consulting the committee (that still has to be consulted after), but the act will only be applied during a period of six months maximum, unless the basic act says otherwise, or the committee approves afterwards. Nevertheless, if the Committee rejects this implemented act that has been adopted the Commission must repeal the act in an immediate manner (European Council, 2022).

On the other hand, in the advisory procedure the committee gives its opinion, adopted by simple majority, to the Commission. And, as its opinion is non-binding, the Commission can decide to adopt or not the act considering the opinion given by the committee, but with the possibility to do the opposite (European Council, 2022).

However, the adequate procedure to approve an implemented act regarding taxation is the examination procedure as it is established by article 2.2 of Regulation 182/2011 of the European Parliament and the Council. These implementing acts have been used on both direct and indirect taxation.

In fact, there are a lot of implementing decisions from the Commission that are directed toward specific States regarding some special exceptions in the application of VAT, just like the 2012/815/EU, Euratom: Commission Implementing Decision of 19 December 2012 amending Decision 96/564/Euratom, EC authorizing Austria not to take into

account certain categories of transactions and to use certain approximate estimates for the calculation of the VAT own resources base (notified under document C(2012) 9539).

Nevertheless, there are also general VAT implementing acts just like the Commission Implementing Regulation (EU) 2021/1948 of 10 November 2021 on the treatment of repayments of VAT to non-taxable persons and to taxable persons for their exempt activities for the purposes of Regulation (EU) 2019/516 of the European Parliament and of the Council on the harmonization of gross national income at market prices (GNI Regulation) and repealing Commission Decision 1999/622/EC, Euratom and Commission Regulation (EC, Euratom) No 116/2005 (Text with EEA relevance).

In this matter, we must refer to the VAT Committee, which was set up under the article 398 of the VAT Directive to promote a uniform application of the directive. The Committee only has an advisory role which goal is to provide guidance, not having any legislative powers, and because of that it cannot take any legally binding decisions. However, some of the guidelines established by the VAT Committee have been transformed into binding implementing measures due to them being approved by the Council unanimously following the proposal of the Commission, since this is contemplated in the article 397 of the VAT Directive (European Commission, 2023).

The VAT Committee receives consultations from Member States because the VAT Directive requires them to before they make use in their national legislation of options provided to them by that Directive. However, sometimes instead of consulting the Committee beforehand the Member States have to notify the Committee once the legislation has been put in place. Nevertheless, the Committee can also receive any questions from the Commission or any Member State regarding the application of VAT provisions which result on guidelines (European Commission, 2023).

Barruso Castillo states that even though the VAT Committee helps to achieve a unanimous application of the VAT Directive since its resolutions are non-binding and were not published until the year 2013 there have been some problems and many taxpayers have had to take legal action. This is expensive, takes more time and generates a situation of uncertainty both for the Member States administration and the companies. And, that is why, the Commission argues that the VAT Committee should be transformed into a regulation committee (Barruso Castillo, 1999).

Regarding custom duties there are also implementing regulations from the Commission that review the custom duties such as the Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code; and many of those regulations are applicable to third states such as the Commission Implementing Regulation (EU) 2020/870 of 24 June 2020 imposing a definitive countervailing duty and definitively collecting the provisional countervailing duty imposed on imports of continuous filament glass fibre products originating in Egypt, and levying the definitive countervailing duty on the registered imports of continuous filament glass fibre products originating in Egypt.

On the other hand, we can also find implementing regulations regarding corporate taxation such as the Commission Implementing Regulation (EU) 2023/313 of 15 December 2022 amending the implementing technical standards laid down in Implementing Regulation (EU) 2016/2070 as regards benchmark portfolios, reporting templates and reporting instructions for the reporting referred to in Article 78(2) of Directive 2013/36/EU of the European Parliament and of the Council (Text with EEA relevance).

Finally, there also have been adopted implementing acts regarding State aid, some of them about the procedure to execute the acts. Some of the most recent State Aid implementing regulations are the following: the Commission Regulation (EU) 2015/2282 of 27 November 2015 amending Regulation (EC) No 794/2004 as regards the notification forms and information sheets, OJ L 325, 10.12.2015, p. 1–180; the Commission Regulation (EU) No 372/2014 of 9 April 2014 amending Regulation (EC) No 794/2004 as regards the calculation of certain time limits, the handling of complaints, and the identification and protection of confidential information, OJ L 109, 12.4.2014, p. 14; and the Commission Regulation (EC) No 1125/2009 of 23 November 2009 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, as regards Part III.2, Part III.3 and Part III.7 of its Annex I, OJ L 308, 24.11.2009 (European Commission, 2023).

Other regulations concerning State Aid are: the General Block Exemption Regulation, Council Regulation No 994/98 of 7 May 1998, amended by Council Regulation No 733/2013 of 22 July 2013, which enables the Commission to adopt so-called Block

Exemption Regulations for State aid. This regulation enables the Commission to declare specific categories of State aid compatible with the Treaty if they fulfil certain conditions, thus exempting them from the requirement of prior notification and Commission approval. The Enabling Regulation which allows the Commission to block exempt regional aid, aid for research and development. The de minimis regulation that exempts small aid amounts from the scope of EU State aid control since they are deemed to have no impact on competition and trade in the internal market (European Commission, 2023).

j. CITIZENS' PARTICIPATION

Article 11 in the TEU allows something alike popular legislative initiatives to reach the Commission if the initiative is proposed by a group of at least a million citizens which represent a significant group of Member States if think that a legal act has to be approved to achieve certain objectives contemplated in the treaties. However, it is not a direct popular legislative because they can only invite the Commission to define the proposal regarding the topic, they deem relevant, but they cannot write and establish the proposal by themselves. However, this initiative is not compulsory for the Commission, so, in the end, moving forward with this popular initiative is a political choice that depends on the Commission's interests. So basically, if a group of citizens wanted to make a proposal of a law regarding taxation matters, they could send it to the Commission if the specified requirements were met (Bou Franch, 2014).

However, referendums are not envisaged in the foundational treaties as a mechanism for involving the citizens in the passing of EU law. Nevertheless, some Member States like Denmark have held referendums in order to add legitimacy to decisions like the entering in the EU.

Direct democracy means are a known mechanism to improve procedural legitimacy and I do believe that including, for example, a referendum for some important decisions that the EU is going to adopt would cause a positive effect. Due to this, it would be possible that the EU citizens would feel closer to the EU and its institutions, that in a lot of ways seem foreign to them. However, this would also have some relevant drawbacks because of the higher number of resources that the EU would have to set in motion to make this work. In addition, this could also imply slower decision-making processes.

This lack of popular sovereignty causes a deep EU legitimacy deficit which is mainly caused by the lack of competence held by the European Parliament which impedes this institution to take the necessary actions regarding taxation. In this case, legitimacy does not always mean uniformity, but it refers to the adequation of the competent institution to the equality requirement that must be met when applying these measures. The solution should involve the conferral of competences and the acknowledgement to the competent institutions so they can exert those competences following a democratic and representative mandate.

k. LOBBIES

The EU has an article regarding the participation of lobbies in the TEU, the 11th article which establishes the following "*The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action; in addition, the institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society*".

The EU institutions establish dialogues with a wide range of associations and lobbies to achieve laws and policies which respect and reflect the preferences of all the EU citizens. This is a procedure that helps to legitimize the decision-making processes that undergo inside the EU because it allows the policies to reflect peoples' real needs (European Parliament, 2023).

Moreover, the EU is also pioneering in transparency methods regarding lobbying. So, the European Parliament, the Council of the European Union and the European Commission have a common Transparency Register showing with which entities and associations they interact. Any group with interest in influencing policies, policy-making and decision-making processes is allowed to register voluntarily. However, to participate in some influential processes such as obtaining an access badge to the EU Parliament or being invited as a speaker to public hearings of committees and support and participate in the activities of MEPs' intergroups and unofficial groupings it is compulsory to be inscribed in the Register (European Parliament, 2023).

What is more, to ensure that lobbying works out well each institution has rules which strengthen the framework in which negotiations and dialogues occur and the groups inscribed in the Register are obligated to follow the Code of Conduct for registrants (European Parliament, 2023).

To sum up, lobbying is an accepted and valuable activity in the EU used above all to ensure that citizens feel included in the decision-making processes which ultimately leads to an improved legitimacy of the EU legislation acts.

3.2. THE EU EXECUTIVE PROCESS

a. COMMISION'S EXECTIVE ROLE.

The Commission is one of the most relevant EU institutions due to its importance not only as the institution which has the legislative initiative but also because of the executive and budgetary powers that it possesses.

The principal powers that the treaties grant the Commission related to taxation are the execution of the budget, contemplated in the articles 17.1 TEU and 317 TFEU; the faculty of authorizing Member States to apply safeguard measures contemplated in the treaties, like the ones reflected in the article 201 TFEU; and the powers regarding competence, specifically the control of State aid control, power conferred in the article 108 TFEU (Mussa, 2022).

Moreover, the Commission is responsible for the management of the funds granted by the EU budget in the financial rescue packages related to the debt crisis that some Member States suffer (Mussa, 2022).

And, along with the European Central Bank, has the power to change the voting procedure in the Council of the European Stability Mechanism (ESM) from unanimity to special qualified majority, that requires the 85% of the votes. But only, in cases where both organisms agree on the fact that providing no aid would put in peril the economic and financial sustainability of the euro zone. This procedure is contemplated in the article 4.4 of the ESM treaty (Mussa, 2022).

b. COMMISION'S ROLE IN FISCAL STATE AID CONTROL.

State aid control has its legal basis in the article 107 TFEU which establishes that "*save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*". So, according to this any measure taken by any State, including fiscal measures, that falsifies or threatens to falsify competition will be incompatible with the internal market. These measures must favor certain companies or productions and in doing so interfere with the commercial transactions among Member States to be considered State Aid (Serrano Antón, 2019).

Therefore, fiscal State aid can consist in many measures such as a mitigation or reduction of charges normally imposed to undertakings, tax legislation that leads to aid schemes in which the law seems to provide benefits accessible to all but de facto being only beneficial for certain categories or groups of undertaking, tax administrations which assess tax obligations in a more favorable way only for certain categories of undertakings like tax rulings, tax administration giving undue support to certain undertakings or groups of undertakings through ex-post tax assessments using general rules in a more favorable way for the assessed, and, finally through tax enforcement when tax administration decides not to collect tax debts that were due according to the law this can occur in various forms such as tax deferment, tax cancellation and rescheduling of tax debts.

In the same treaty, the article 108.1 gives exclusively to the Commission the task of controlling if the States are complying with the article 107 TFEU. This article establishes that *"the Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market*".

So, to control state aid, the Commission needs to be notified of all the new measures that the Member States intend to apply in the foreseeable future. And then, after all the States have notified the Commission, they must wait until the Commission decides before they can make the measure effective (European Commission, 2023).

Each notification leads to the opening of a preliminary investigation by the Commission which has two months, 20 working days, to decide whether: the measure does not correspond with an aid in the meaning of EU law, so it may be implemented; the aid is a compatible measure with EU law due to the positive effects overpowering the possible distortions of competition, so, again, it may be implemented; and, confirm the dubiousness of the compatibility of the measure with EU State aid rules, which leads to the opening of an in-depth investigation (European Commission, 2023).

This in-depth investigation is a formal investigation procedure which is opened, as previously stated, if there are doubts of the compatibility of the State aid with the EU normative and if there is a lack of information regarding the aid. The first thing that the Commission must do is notify the Member State that this procedure is going to take place. In this notification the Commission summarizes the factual and legal bases for the investigation and the preliminary assessment, enumerating and outlining all the doubts regarding the State aid and its compatibility with EU law (European Commission, 2023).

Afterwards, this decision is published in the EU's Official Journal and the Member States and interested third parties can submit comments during the month after the date of publication. The Member State can also comment on the submitted observations published by interested parties (European Commission, 2023).

The investigation does not have an established deadline because its duration depends on the complexity of the case, the quality of the information that the Commission has and the level of cooperation of the Member State concerned by this investigation (European Commission, 2023).

Finally, at the end of the formal investigation the Commission makes a final decision regarding the state aid. This decision has three possible outcomes: a positive decision, which means that the measure may be applied because is not considered state aid or it is compatible state aid; a conditional decision, which means that the measure may be applied but, in the conditions, stated in the decision; and a negative decision, which determines the incompatibility and inapplicability of the measure. If the negative decision affects an existing aid the Commission cannot order the recovery of already given aid but can prevent the State from granting future aid. This procedure can also end if the Member State withdraws the notification of the State aid (European Commission, 2023).

There is another procedure in the most simple and straightforward cases that met some requirements: the simplified procedure. In this procedure, the Commission only has 20 working days to adopt a short-form approval decision from the date of notification (European Commission, 2023).

Moreover, regarding older aid which is pre-existing or has been approved in the past, but which may no longer be compatible with EU law, the Commission must inform the Member State affected so it can summit comments on this topic within a month. Later, the Commission analyses the comments and proposes different measures to get the aid in line with the current legislation and only if the State does not agree is a formal investigation initiated (European Commission, 2023).

Nevertheless, there are States that do not notify the Commission if they take a measure which could be considered incompatible state aid, this is qualified as unlawful aid as it is given without the prior authorization. If any information about unlawful aid reaches the Commission a preliminary investigation is initiated and if there doubts an in-depth investigation will follow. The Commission can use injunctions to force the State to share information about the measure, suspend the granting of the aid or impose a provisional recovery obligation. If the final decision is negative, the recovery of the aid that the state has already paid out will take place, and the third parties which have received this aid must return it with interest (European Commission, 2023).

We also must refer to the sector inquiries which were introduced by the 2013 revision of the State Procedural Regulation. In these inquiries the Commission uses its investigation tools to obtain the requested information from public authorities and market participants (European Commission, 2023).

After describing the process of State aid control done by the Commission, we must also establish the criteria that the Commission set out to determine if a measure taken by any Member State consists of State aid. The decisions of the Commission which establish that tax rulings are State aid are based on two pillars: the advantage and the selectivity requirements (Allevato, 2022).

On the one hand, the first pillar in the Commission's criteria is based on the use of an arm's length principle as a de facto counterfactual against which the existence of an advantage granted to a specific undertaking should be assessed. This position has been criticized by some authors which consider it inconsistent with the traditional

interpretation of article 107.1 TFEU. According, to the traditional interpretation the advantage should be assessed grounded on a counterfactual benchmark relating to the effective treatment under national law (Allevato, 2022).

On the other hand, the second pilar consists in a combination of the advantage and the selectivity requirements. According to this automatically if the economic advantage is provided only to multinational enterprises and not available to standalone undertakings the selectivity requirement is met. This pillar has also been criticized and deemed inconsistent with the interpretation of article 107.1 TFEU arguing that there should be separate assessments regarding the granting of an advantage and its selective nature. Determining, that a proved deviation of the arm's length principle can be deemed proof of the existence of an economic advantage, but it cannot directly determine the selectivity of the measure (Allevato, 2022).

However, the Commission is not the only EU Institution implicated in this control of state aid, the Court of Justice of the European Union also has it say if a Member State has ignored the Commission's decision regarding the abolition of a state aid which is incompatible with the internal market. In this particular case, following article 108.2 TFEU, the Commission or an interested Member State may refer the matter to the Court which will have to emit a sentence. Furthermore, all the decisions made by the Commission can be reviewed by the General Court and the ECJ, which has the final word about determining if the measure is State aid or not (European Commission, 2023).

As it has been stated, the ECJ has a role in determining if the Commission's decision about a fiscal measure that can consist of State aid is correct or not. So, it has also an important role in determining if a fiscal measure consists of State aid as it has the final say confirming or annulling the Commission's decision. In fact, the ECJ has already decided in five cases in which only one decision of the Commission was entirely confirmed (Case T-755/15, Fiat) (Allevato, 2022).

Moreover, also contemplated in article 108.2 TFEU, the Council may decide unanimously, after a Member State makes an appeal, that the aid the State is granting or intends to grant shall be considered compatible with the internal market, if this decision is justified by exceptional circumstances. If the Commission has initiated the procedure that decides on the abolition of the aid the process shall be suspended until the Council makes its opinion clear, however this suspension will have a deadline of three months. If

in this period, the Council has not yet given its opinion the Commission shall decide on the case (European Commission, 2023).

In addition to all, the Commission also published a Notice on the notion of State aid in 2016 grounded on the article 107.1 TFEU. This notice aim is to give guidance to Member States on what can be considered illegal State Aid under the Treaty rules (EUR-Lex, 2019).

Noted all of the above, the European legislator has articulated a control mechanism which allows to determine if a measure consisting of State Aid vulnerates the principle of free competition before it is implemented and when the measure has already been implemented, declares it illegal and forces the Member State to retrieve it. As Días Gómez states, this control mechanism is a fundamental instrument that helps guarantee the principle of free competition in the internal market and the achievement of the competitiveness in the European industry (González Aparicio, 2022).

What is more, the Spanish legislator decided to reform the existent general tax law in order to include a title regarding the retrieval of State Aid which affects the taxation area. In this law it is established that the Tax Administration is the one charged with the role of acting to ensure the execution of the decisions regarding the retrieval of State Aid which affect taxation (García de Pablos, 2020).

c. THE INFRINGEMENT PROCEDURE

The infringement procedure is applied by the Commission if national authorities from a Member State fail to implement properly EU laws. The Commission identifies these infractions of EU law through its own investigations or if a complaint is presented by citizens, businesses, or other stakeholders (European Commission, 2023).

This formal procedure is started if the EU country fails in communicating measures that lead to the full transposition of the directive provisions or does not correct the suspected violation of EU law. This procedure has different steps which end with a formal decision (European Commission, 2023).

Firstly, the Commission sends a letter of formal notice demanding more information from the country concerned by the procedure, which usually has a two-month deadline to forward a detailed reply. If after receiving the country's reply the Commission concludes

that the country is failing to comply with its obligations under EU law the Commission sends a formal request to the State, so it follows the law and also justifies its decision. In the same request, the Commission demands that the country informs about the measures taken to achieve that command, usually in a two-month period (European Commission, 2023).

However, if the country fails to comply one time again the Commission may refer the matter to the Court of Justice. If the country does not communicate measures that allow the implementation of the legal provisions of a directive in time the Commission can demand to the Court, the imposition of penalties. Finally, if the Court decides that there has been a breach of EU law perpetrated by the State, the national authorities must act to comply with the EU Court judgement (European Commission, 2023).

If a country is still determined to fail in the implementation of EU law and does not rectify after the Court has established that it must, the Commission has the possibility to refer the country back to the court for a second time. This time, the Commission makes a proposal, so the Court ends up imposing financial penalties consisting in a lump sum or a daily payment. These penalties take three things into account for their calculation: the significance of the breached rules and its impact on general and particular interests, the period when the EU law has not been applied and the country's ability to comply with the payments. Nevertheless, the final amount may not be the same as the one proposed by the Commission, due to the possibility of the Court changing it in its ruling (European Commission, 2023).

Furthermore, the Commission's task regarding this matter includes the publication of information regarding these processes and an annual report reviewing crucial aspects of the application of EU law and presenting infringement cases differentiating by policy area and country (European Commission, 2023).

So, according to Nocete Corrrea, the European Commission has a relevant role in controlling if tax national laws are adequate in terms of respecting the European legal system. Its role is quite remarkable regarding direct taxation due to its confrontation with the principles of no discrimination and respect of the European freedoms. Nevertheless, this role played by the Commission complements the role that the CJEU plays with negative harmonization. The Commission's role consists of a continued work of analyzing national legislations in which it tries to identify those aspects that can be

considered against community requirements, just like the violation of the fundamental freedoms, proceeding to the opening of the infringement procedure when a State has breached an obligation contained in the foundational treaties. So, because of that the European Commission can be considered the guardian of the treaties and the freedoms contained within them (Nocete Correa, 2014).

d. THE COUNTRY REPORTS

The Country reports are a part of the European Semester, which is the framework introduced in 2011 where Member States' economic policies are coordinated. This allows all the EU States to debate their economic and budgetary programs and to track each State's progress during some concrete times of the year.

This cycle starts in November with the preparatory phase when the European Commission announces the priorities of the European Semester for the upcoming year. Since that moment, EU Semester Officers start collecting data of every country contacting the administrations and different stakeholders. After the data is collected it is compiled and analyzed by the Commission which centers its attention in the progress achieved by each State.

Then, the first phase begins establishing the policy guideline at the EU level. During this phase the Council of the EU debates the annual growth survey, setting out policy guidelines and adopting conclusions. The Council also has the role of discussing all the different policy areas that are going to be affected by the Semester and also discusses or amends, if necessary, and approves the draft Council recommendation on the economic policy of the euro area (European Council, 2023).

However, the European Parliament also discusses the annual growth survey and also has the possibility to publish its own report. The European Parliament must issue an opinion on employment guidelines. Moreover, the European Parliament has the possibility to participate in the process through the economic dialogue in which it can invite the President of the Council, the Commission and, where appropriate, the President of European Council or the President of the Eurogroup to discuss issues related to the European Semester (European Council, 2023).

Following this analysis, the Commission usually publishes the country reports during the months of February and March. These country reports are made to monitor the economic and social progress of the States and to inform about the state of the EU global economy. The country reports also contain in-depth reviews of macroeconomic imbalances for those member states where the risk of such imbalances was estimated to be high. Based on them, the Commission may issue recommendations to correct the identified imbalances. During this phase the European Council provides policy orientations based on the annual growth survey and the Council of the EU analysis and conclusions (European Council, 2023).

Once this country reports are published, Member States can make consultations and are invited to consider these orientations and the country reports to prepare the stability or convergence programmes and national reform programmes, which outline the budgetary policies and policies for promoting growth and competitiveness (European Council, 2023).

After that the second phase starts, in this phase the country-specific objectives, policies and plans are set. Firstly, the Member States have to submit their policy plans during April. These plans are the stability and convergence programmes which outline the medium-term budgetary strategy and the national reform programmes which detail structural reform plans focused on promoting growth and employment (European Council, 2023).

In May the Commission evaluates national policy plans and presents draft country-specific recommendations. Afterwards, the Council of the EU discusses the proposed recommendations and agrees on their final version endorsing them. However, the recommendations are not adopted by the Council of the EU until July when the Member States are invited to implement them. Which ultimately will lead to each Member State to elaborate and publish a National Reform Program based on the Commission's recommendations by the end of the year, which is the implementation phase (European Council, 2023).

On Spain's 2022 country report the first thing that the Commission highlights it is the fact that its environmental taxes are lower than the average. Moreover, in the specific section dedicated to taxes the Commission refers to the lower tax revenues in relation to the GDP, reiterating again the lower revenue of environmental taxes. In terms of debt, even though

the Commission establishes that there is not a high financial sustainability risk currently, Spain does have a problem in the medium and long-term in which the risks are high and medium, respectively.

e. OTHER EUROPEAN INSTITUTIONS IN THE EU EXECUTIVE PROCESS.

In the executive process intervenes mainly the Commission, nevertheless there are other EU institutions which can participate in the process. The Council is the other more relevant institution regarding the execution of EU's policies. It is indeed the Council the institution with a main role in the PESC. Furthermore, it has the power to delegate non-legislative acts in the Commission and the control of the executive duties of the Commission (Ferrando Hernández, 2022).

Moreover, the Council also has the discretion to allow individual member states to deviate from the outcomes of a directive, this is a technique used with discretion and it must be sustained by its opportunity and necessity. This power that the Council holds manifests in forms of Decisions that serve as guides and allow determined States to be exempt of some effects of the directives. These Decisions are referred to VAT and its legal basis is found in the article 395 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax that establishes that "*the Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for collecting VAT or to prevent certain forms of tax evasion or avoidance (...)*". As an example, we can cite the Council Implementing Decision (EU) 2019/2244 of 16 December 2019 authorising Spain and France to apply a special measure derogating from Article 5 of Directive 2006/112/EC on the common system of value added tax.

The European Parliament, on the other hand, even though it does not have directly an executive competence, it is indeed true that it has a crucial role controlling the Commission's actions. This control is exercised with different instruments the Parliament has, the main ones are the following: it appoints the Commission's president, and it can also retire the confidence deposited in the Commission. In addition, the Parliament also examines the annual report presented by the Commission and supervises, along with the

Council, the delegated acts, and executive acts of the Commission (Ferrando Hernández, 2022).

3.3. THE EU JUDICIAL PROCESS.

a. THE COURT OF JUSTICE OF THE EUROPEAN UNION

The European Union Court of Justice is formed by two jurisdictional organs: the Court of Justice of the European Union and the General Court. Both courts must guarantee the rightful interpretation and application of EU law in all Member States. They also serve as a control mechanism of the legality of EU law. Moreover, they must determine if the different Member States obey the law and if national judges request it they must provide an interpretation of EU law.

Next, it is going to be described the adjudication of cases on tax matters between the two courts. On the one hand, the Court of Justice of the European Union has jurisdiction in preliminary rulings, which lead to a binding interpretation of EU tax law; in actions for failure to fulfill obligations, meaning that either the Commission or a Member State can initiate the procedure to determine if a Member State is following EU tax law; in actions for annulment, the applicant seeks the annulment of a measure (in particular a regulation, directive or decision) adopted by an institution, body, office or agency of the European Union; and in actions for failure of the institutions, bodies, offices or agencies of the European Union to act (Court of Justice of the European Union, 2023).

Whereas, on the other hand, the General Court has jurisdiction in actions brought by the Member States against the Council relating to acts adopted in the field of State aid, trade protection measures (dumping) and acts by which it exercises implementing powers. The General Court is also competent in actions brought by natural or legal persons against acts of the institutions, bodies, offices or agencies of the European Union (which are addressed to them or are of direct and individual concern to them) and against regulatory acts (which concern them directly and which do not entail implementing measures) or against a failure to act on the part of those institutions, bodies, offices or agencies. So, if a Member State fails to apply an EU tax law any citizen who might be affected negatively by the lack of application of the law can use this action (Court of Justice of the European Union, 2023).

The General Court following the article 256.3 TFEU could have jurisdiction in the preliminary ruling described in the article 267 TFEU in specific areas established in the Statute. However, till this day the Statute does not include any reference regarding this topic, so the Court of the European Union has all the jurisdiction regarding preliminary rulings, including the ones related to taxation (Manko, 2017).

b. NEGATIVE INTEGRATION.

Even though tax positive harmonization has been promoted to some extent with the approval of law pieces, nevertheless, tax negative harmonization is also relevant. The concept of negative integration refers to the role that the Court of Justice of the European Union plays solving different case laws regarding tax matters, that will be applied afterwards in the same way to similar situations that arise in the EU. The process of negative integration has been more common and relevant in direct taxation, due to the lack of legislation in this matter provoked by the inexistence of a clear competence conferral (Collado Yurrita, 2013).

This negative integration consists of the coordination or approximation of Member States' taxation legislations through the case laws emitted by the CJEU in application of the clause of fundamental rights and non-fiscal discrimination. Following this, the CJEU's task in terms of direct taxation is to interpret the mentioned clause in order to declare against EU law every national measure or disposition that blocks the achievement of the Interior Market (Collado Yurrita, 2013).

Member States are free to design a taxing system as they deem convenient, but they always must respect the EU law in doing so; and EU's law interpretation is tasked to the CJEU that must guarantee its compliance when it is being threatened by national tax laws. And this is what has transformed the CJEU negative integration in the main factor of tax reform in the Member States, mainly on direct taxation (Collado Yurrita, 2013).

That is the main reason why the referral has become the main mechanism to judge if national law is compatible with EU law. And this procedure has contributed in a fundamental way to achieve progress in direct taxation EU law. Being one of the main achievements in direct taxation the recognition of the right not being discriminated

because of nationality or residence if the individual is using his fundamental economic liberties (Collado Yurrita, 2013).

However, direct taxation is an area linked to national sovereignty and sometimes this has led the CJEU to sacrifice the achievement of the Interior Market in benefit of the national interest of some countries (Collado Yurrita, 2013).

Although this negative integration has attained more relevance in the area of direct taxation, it has also had an important role in indirect taxation. In fact, through some case-laws regarding indirect taxation the Court broadened the information that the national courts should refer allowing that the ECJ could appraise the particular facts on each case, which in theory was not possible. Establishing that the level of detail of the indirect taxation regulations within the relevant EU law requires the Court to examine carefully the file of the case in order to formulate a proper reply, confirming that the CJEU cannot merely give an abstract interpretation of EU law. This, in fact, determines that in practice it is the EU Court the one resolving the case, because its ruling is directly applicable, even though the national court is the only one which can implement the ruling (García Antón, 2013).

Moreover, we are going to determine the interpretative criteria that the CJEU has established regarding two directives about indirect taxation: the VAT directive and the Capital duty directive (García Antón, 2013).

In the case of VAT, the court reaches a decision following hermeneutic criteria. Firstly, as the directive is drafted in multiple languages and there may be no univocal meaning the Court's role is to communaritize the term to overcome the contradictions that have been encountered. This communaritized concepts have acquired a relevant role because it helps to achieve the better functioning of the internal market. So, this terms that the CJEU defines have to be defined according to the policies and objectives of the EU. Secondly, this autonomous concept has to be built upon these two criteria: the systemic and contextual criteria, which determines that the VAT directive has to be interpreted coherently, and the dynamic criteria, which indicates that not only is necessary the definition of the autonomous terms but is also important to shape them into the objectives, principles and aims defined in the directive (García Antón, 2013).

However, on the case of indirect taxation on the raising of capital the court approaches each case law taking into consideration the transaction in question or as the court has

established it is guided by the "economic point of view". So, in this case the Court examines carefully the facts portrayed by the national court to determine if the transaction comes within the scope of the Capital Duty directive (García Antón, 2013).

The Spanish legal doctrine in analyzing taxation harmonization has declared that fiscal competition reinforces the idea of negative harmonization promoted by the CJEU. For these authors, negative harmonization does not try to develop a community mandate which forces progress in a determined direction. Negative integration's objective is reducing progressively the autonomous taxing policies that can influence or have an impact in any common policy or fiscal discrimination (Cordón Ezquerro & Gutiérrez Lousa, 2006).

From this point of view, the reduced amount of harmonization provokes that the CJEU analyses the fiscal national laws in terms of efficiency and non-discrimination without taking into account the equity that should inform any taxation system. Moreover, authors like Caamaño and Calderón point out that the reasoning of the CJEU when determining the compatibility of a national law with the EU law bears more in mind economic reasons than legal-taxation foundations implicit in the taxation rule which sustains the lawsuit (Cordón Ezquerro & Gutiérrez Lousa, 2006).

c. THE PRELIMINARY RULING

This procedure is useful when there is a case before a national court and there is a new matter of general interest related to EU law which requires a uniform and clear interpretation or when the existing case-law does not provide the necessary guidance to solve the new legal situation. The goal of this procedure is to achieve an effective and homogeneous interpretation of EU law in all the states to avoid any divergence in the application of EU law. There are a set of recommendations that apply in this procedure, the latest ones were established in 2019 (EUR-lex, 2022).

The referral must refer to the interpretation or validity of EU law, it should never be about the interpretation of the Member States national law or about facts related to the main proceeding. The CJEU may only give a ruling if EU law is appliable to the case in the main proceedings. Nevertheless, the CJEU does not directly apply its interpretation, its only goal is to aid the national court resolving its doubts. Therefore, the national court is

the one drawing conclusions from the CJEU's ruling and applying them to the main proceeding. Moreover, the rulings do not only apply to the national court which initiates the request, but it is also applied to all the courts in all the Member States (EUR-lex, 2022).

This referral must be initiated when it becomes clear that a CJEU ruling is compulsory for a national court to solve a case. To present the referral the national court must be able to define in sufficient detail the legal and factual context that surrounds the case and the legal issues that it raises. Until the ruling is emitted by the CJEU the main proceeding must be suspended. The national courts must inform the CJEU of any procedural step that may affect the referral, particularly, of any withdrawal, discontinuance, or amicable settlement of the dispute of the main case. The national court also has the obligation to inform about any appeal related to the main proceeding and the outcome of it explaining the possible consequences in the decision for the request for the preliminary ruling (EUR-lex, 2022).

However, article 94 of the CJEU's rule of procedure specifies the content of the request that should accompany the referring courts' questions and if one requirement or more are not met, the CJEU may decline the jurisdiction or dismiss the request for a preliminary ruling as inadmissible. The content that should be annexed is the following: the facts which caused controversy, national law and case law, EU law which should be interpreted, an explanation of the reasons why the referral is necessary and the concrete questions (Adan Domènech, 2023).

Analyzing the process for emitting a referral we must differentiate between the acts that the national courts must carry out and the acts that take place once the referral has been sent to the CJEU. In Spain there is not a specific piece of legislation that indicates how to initiate a referral; however, it is suitable to follow the following phases. First, the judge must pass a ruling notifying the interested parties of the reasons why the referral is necessary. Afterwards, there should be a court hearing celebrated in a reasonable period of time, depending on the circumstances surrounding the case. Finally, the judge must issue a court order agreeing on referring the question to the CJEU. Besides all that, the prosecutor is also legitimated to demand a referral in the cases that is part of, but only if the State Attorney General agrees (Adan Domènech, 2023).

The referral proceeding in the CJEU consists of three phases: a written phase, an oral phase, and a decisive phase. In the written phase, the referral coming from the national court is translated into all the official languages of the EU and it is published in the Official Diary of the European Union. In this phase, it is also necessary to notify the interested parties, the Member States, and the EU institutions; all the parties, the Member States and the institutions can submit their observations. Then, the speaker judge writes a preliminary report and afterwards a general meeting is held with both the judges and the general lawyers. After the meeting, the issue is assigned to a section of the court and the evidence trial is celebrated. Then there is the oral phase consisting of a hearing and after that, the decisive phase ends when the CJEU issues its judgement (Adan Domènech, 2023).

In addition, we must also analyze the doctrine of the clear act and the clarified act which establishes that the judge or the last instance court has not the obligation to emit a referral when there has already been an equal or similar referral or when there is no reasonable doubt about the interpretation of the law. So, national judges are not in the obligation to refer a case law even if EU law must be interpreted if the act is clear or clarified (Serrano Antón, 2019).

On the one hand, an act is clarified in two situations: if the interpretation needed to solve the case or the doubt about European law coincide and are materially identical to decision about a question that was referred previously and if the answer is already in the CJEU's case law, even if the issues debated are not exactly the same. This doctrine of the clarified act states that if the question has already been answered more than two occasions, not only in preliminary rulings, there is no obligation to refer the case (Serrano Antón, 2019).

On the other hand, an act is clear when the correct application of the European law is that obvious that there is no reason to generate any doubt. In this case, the judge must arrive to the conclusion that the solution would be imposed as evidently before the courts of the other Member States and the CJEU itself. The CJEU has also established that this evident interpretation of EU law must be appreciated considering the traits of the European law and the particular difficulties of its interpretation. In Spain there have been few referrals because in most of cases the Supreme Court has determined that the act was clear with the argument that they already know the interpretation of community rules (Serrano Antón, 2019).

Looking into statistics on the matter, Spanish courts do refer questions or preliminary rulings. From 2017 to 2021 there have been issued 219 referrals to the CJEU by different Spanish courts, showing that it is a procedure widely used when it is deemed necessary. Analyzing the data more closely, we must point out that the referral is mainly used by lower courts in our country; however, the Supreme Court has also made several referrals. This difference is enormous, lower courts beat the Supreme Court in number of referrals, a total of 541 to 114 (in the data collected from 1952 to 2021). Nevertheless, we must consider that these are general data and do not specify tax related referrals. However, the Constitutional Court has only made a single referral since Spain's entry in the EU, and it was not related to taxation (Tribunal de Justicia de la Unión Europea, 2022).

Taking a closer look at the taxing related referrals emitted by Spanish courts we must cite a few examples. In the field of indirect taxation, we can find a referral made by the Superior Court of Justice of Galicia which asks for an interpretation of EU law regarding VAT. What is more, in 2022 the Supreme Court referred to the CJEU the interpretation of the Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity. This was referral was issued because the possible infringement of EU law by the autonomic tax rates of the special tax on hydrocarbons.

In the field of direct taxation, a relevant case was the referral made by the Superior Court of Justice of Comunidad Valenciana which was about the possible violation of EU law by the tax on the production value of electrical energy. In this referral the court asked, among other things, about the true nature of the tax, which was defined as direct by the law, but the court considered otherwise. However, the CJEU declared in its ruling that it was a direct tax. We can also find a referral emitted by the Supreme Court about the possible infringement of EU law by the tax on large commercial areas of some Autonomous Communities.

d. THE CJEU AND NATIONAL COURTS REGARDING FISCAL STATE AID CONTROL.

The Commission issued a notice in 2009 about the enforcement of State aid by national courts to provide guidance in how the Commission and national courts should interact and cooperate. In this notice it was again reaffirmed the exclusive role of the Commission in determining if the measures are compatible with the internal market. It was also established that National Courts task is protecting the interests of individuals affected by the granting of unlawful aid and putting into effect the Commission's negative decisions (Enodeh, 2018).

According to the Notice, the National Courts also have the power to interpret the notion of State Aid of article 107 TFEU. So, if a national court detects that that the Member State has granted aid without respecting the standstill clause or the notification obligation it has the obligation to protect the rights of the individuals affected. Indeed, this affected individuals can enforce their rights bringing legal action before the competent national court. Therefore, the national court depending on the national procedural law can adopt different solutions such as preventing the payment of unlawful aid, the recovery of the unlawful aid, the recovery of the interests generated while the illegality was implemented, imposing a compensation for the damages caused to competitors and third parties, and dictating precautionary measures against the illegal state aid. (Enodeh, 2018).

The European Court of Justice, on the other hand, has the ultimate power in terms of determining if a proposed measure qualifies as State aid or not. The ECJ also has the duty to assist the national courts in the task of interpreting EU law when they decide to issue a referral regarding State aid. However, there have been few referrals concerning State aid revealing how little do national courts review matters regarding State aid.

4. CONCLUSION.

As it has been shown, the EU tries at its best to establish decision procedures which ensure the democratic legitimacy. However, it needs to be highlighted that improvements should be made to increase this legitimacy in taxation. Since there are some important drawbacks that minimize the democratic and direct legitimacy, just like the special procedure to pass law proposals regarding tax matters. Mainly, because the unanimity rule only takes into account the Council opinion and turns the European Parliament in an irrelevant institution when, in fact, it should have something to say due to it being the only EU institution chosen directly by the citizens of the EU.

It is also true that the other institutions, like the Council are formed by members of the governments of each Member State and therefore they have indirect legitimacy, due to the fact that each government has been elected by democratic procedures in every single country. Nevertheless, giving the Parliament an irrelevant role in legislative proceedings such as the one related to taxation is a huge mistake due to the government's own interests playing a fundamental role in the approval of EU tax law. Instead, if the Parliament had the same power as the Council, the citizens' interest might be better guaranteed, providing more legitimacy in each tax related decision. Moreover, relegating the European Parliament to secondary role regarding taxation matters diminishes the procedural legitimacy of the European Union, as the only directly elected institution remains irrelevant.

What is more, the role of the Council regarding taxation can also be considered to have procedural legitimacy problems due to the fact that governments supposedly defend its citizens interests, but in reality the citizens do not really know which interests are those and there are few studies that explain which interest defend the states. In this matter, it is also relevant that the transparency regarding the Council decisions is limited, which also helps to diminish the legitimacy of the special legislative process used for taxation matters (Arregui, 2012).

So, in order to achieve a major procedural legitimacy in the approval off EU tax law the European Union should take the initiative getting rid of the unanimity rule and changing the special legislative procedure for the ordinary legislative procedure. This would ensure a more compromised harmonization freed from unilateral interests.

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