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Editorial: A new international order? What international order?

We are not facing a new crisis in international Law. International Law is in permanent crisis, the natural state of a system of rules that seeks to subject the relations between subjects of an insufficiently institutionalized horizontal society to the rule of Law. A look at the bibliographic indices reports many articles that repeatedly speak of the crisis. In a changing society, it would be illusory to conceive ID as a peaceful, compact, and static order. We should not analyze the legal reality without entering into the uncertain and unstable process of its transformation, nor should we isolate the violation of the norms from the historical context in which they occur. Despite this, it should be noted that the members of that society have proclaimed the mandatory nature of norms that have been considered fundamental and qualified their violation as an international crime.

From the systematic bombing of Serbia by the United States and its allies to the invasion of Ukraine by Russia, going through the series of aggressions and interventions that we have briefly mentioned, the conclusion is drawn that the *New Order* of some and others is part of the deliberate infringement of the principles, bodies, powers, and procedures of the Charter of the United Nations and of the fundamental norms of International Law that have been developing, especially since decolonization. The *New Order* turns upside down a legal system and a universal and representative organization.

This is the terrifying scenario we face: the reversion to the 19th century with 21st century weapons. It causes melancholy to recall how optimistic we were about our future in 1989, when the recurring crisis was presented in terms of growth and progress. Now we can talk about the lost forty years—2022, a tragic event that can be added, for worse, to other outstanding years, such as 1648, 1815, 1914, or 1939.

Is there no reform without a cataclysm? It is sad to see the inability of the United Nations members to accommodate the purposes of the Charter, its organs, powers, and procedures to the new political and economic environment following their own reform forecasts. Significant changes have been linked to great conflagrations. The League of Nations emerged as a result of the Great War. The UN, from World War II. An early commentator on the right of veto in the Security Council (G.Day, 1952, p. 88) reported that Greece had voted in favour of this formula in the Charter of the United Nations "in the conviction that... the Charter is it will change with the times. According to the adage of the Greek philosopher, *everything will collapse*....". Well, the Charter has collapsed.

What kind of reform can inspire such a cataclysm? Without going so far as to see the horse riders of the Apocalypse riding or to identify Putin (or other adversary leaders) as the *Golden Beast* or *the Antichrist*, evil exists, and there are plenty of reasons to be

concerned. When the lords of evil rise to the surface, humans must seek refuge in the bowels of the Earth.

The (Nuclear) Power and the Law. Understanding that the mere enjoyment of power is a source of legitimacy for all kinds of actions pushes the formation of blocs attracted by force. It makes the international order a precarious concept, linked to the truce, not to peace, to the sect and not humanity—creating regional hegemonic orders (blocs) subject to great powers. The weakest are attacked. What if Ukraine had kept its nuclear arsenal instead of handing it over to Russia for agreements to respect the sovereignty and territorial integrity it had not complied with? Cold War or Cold Peace? The new darkness: The dark times. The problem of collective global security remains whole.

So, if it is already a nightmare to imagine that the New Order can settle on a mound of aggression and other criminal acts of the great powers, whatever the clothes they wear, that nightmare turns into a fatal glow when the conflict involves nuclear powers. Years ago (Civilized, Barbarians and Savages in the New International Order, 1996), I suggested that the inspiration for the New Order might lie in that of chimpanzees, a world in which the emergence of an undisputed victor heralds the improvement of a negative relationship. That suggestion no longer works in a conflict between atomic chimpanzees. There would be no survivors, and they would drag all kinds of bonobos and macaques with them.

From dystopian to utopian discourse. Think it is impossible? Take up the dreams of E. Kant? Save the UN, our Private Ryan? We must not save the UN just because, without it, everything would be worse. The Organization has taken advantage of scarce resources, was able to transcend what was initially a coalition of winners, launched plans and strategies for development, made a notable contribution to the codification and progressive development of the DI, and learned to be universal, respecting the formal sovereign equality of the Member States, the only opportunity for many to have a voice and a vote in problems that affect humanity as a whole, without prejudice to recognizing the statutory inequality of the permanent members in the Security Council in the fundamental task of maintaining and, where appropriate, restoring collective peace and security.

The International Law built from the Charter was a giant step in the history of international relations, which the *Cold War* could not quell. It is urgent to return to the Charter, clearly improvable, to rebuild the consensus on the institutions that must serve the constitutional principles we gave ourselves in 1945 and expand or complement such principles. Its potential is intact.

The primary need is the survival of human beings, peoples, states, and humanity. We need food, health, and education as the premises of our freedom and dignity. The people have to save their identity and their culture. The States remains the political unit that, sovereign and independent, makes up the primary international society. Humanity, which encompasses us all, is the holder of a

common heritage and creditor of the solution to today's planetary problems, such as the conservation of the natural environment, the sustainable use of resources, and human development. We are, ultimately, a *village in the universe*.

Our *unity of destiny should* lead us to an institutional articulation, increasingly democratic and vigorous, to face common problems considering the principle of solidarity. The most powerful must not be above international law, nor should their pretensions be imposed unilaterally. Will there comes a day when the international community becomes present and accumulates enough power to make its institutional reaction to aggression and its consequences fearsome? The unequal distribution of power, its accumulation and conservation as one of the essential objectives of the states to protect themselves and satisfy their own interests, continues to favour a soft and discriminatory articulation within which the *large ones* dispute the hegemony or try to neutralize themselves, the *small ones* are subjected to more or less benevolent domination, and the *weakest* are engulfed.

What was good for Afghanistan could be good for the planet: a broad-based, multi-ethnic, and representative government committed to maintaining peace; respectful of international norms and human rights, without distinction of gender, race, and religion; cooperative in the fight against terrorism and all kinds of illicit traffic; solidarity and assistance; and dedicated to the construction of a literate, healthy, and progressive society.

However, what has not been possible in Afghanistan? Will it be possible on a universal scale?

Let civil society push forward without Manichaeism. There is a citizen responsibility to deactivate illegal coercive policies assumed by those who represent the States. In non-democratic regimes, the risk is undoubtedly higher. In democratic ones, by exercising their rights and freedoms to oppose such policies, citizens uphold the law. Perhaps that is why there is no shortage of those who, from retrograde positions, even in democratic countries, propose to criminalize defeatist citizens who publicly demonstrate against participation in the wars committed by the lords.

Faith without hope. It insists on the wrong paths.

Antonio Remiro Brotons

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GENERAL AGREEMENT ON INTERNATIONAL TAX COOPERATION, TRADE, AND GLOBAL TAX GOVERNANCE:

A Proposal

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Review Article

General Agreement on International Tax Cooperation, Trade and Global Tax Governance: A Proposal (Part I & II)

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KEYWORDS:

International tax cooperation, global tax governance, international trade, codification and progressive development, United Nations Charter, sustainable development

ABSTRACT:

This article presents a proposal for a general agreement on international tax cooperation, trade, and global tax governance as a support for a neural system of international tax cooperation relations to make effective the channels of tax cooperation between the States of the world in the coming centuries, in a new global tax governance architecture design. In the current post-COVID 19 era, in an unstable framework marked by economic, health, military, migratory crises, etc., international tax cooperation, trade and global tax governance are critical sources towards a new world order inspired by new foundations of global tax governance that allows financing sustainable development.

It is a proposal open to debate and possible updates.

PALABRAS CLAVES:

Cooperación fiscal internacional, gobernanza fiscal global, comercio internacional, codificación y desarrollo progresivo, Carta de las Naciones Unidas, desarrollo sostenible

RESUMEN:

Este artículo presenta una propuesta de tratado general sobre cooperación tributaria internacional, comercio y gobernanza fiscal global como sistema neural de relaciones de cooperación tributaria internacional para hacer efectivos los cauces de cooperación tributaria entre los Estados del mundo en los próximos siglos, en un nuevo diseño de arquitectura de gobernanza fiscal global. En la actual era post-COVID19, en un marco inestable marcado por crisis económicas, sanitarias, militares, migratorias, etc., la cooperación fiscal, el comercio internacional y la gobernanza fiscal global son fuentes de financiación cruciales hacia un nuevo orden mundial inspirado en nuevas bases de gobernanza tributaria que permita financiar el desarrollo sostenible.
Constituye una propuesta abierta a debate y a posibles actualizaciones.

MOTS CLES :

Coopération fiscale internationale, gouvernance fiscale mondiale, commerce international, codification et développement progressif, Charte des Nations Unies, développement durable

RESUME :

Cet article présente une proposition de traité général sur la coopération fiscale internationale, le commerce et la gouvernance fiscale mondiale comme un système neuronal de relations de coopération fiscale internationale pour rendre efficaces les canaux de coopération fiscale entre les États du monde dans les siècles à venir, dans une nouvelle architecture de gouvernance fiscale mondiale. Dans l'ère post-COVID19 actuelle, dans un cadre instable marqué par des crises économiques, sanitaires, militaires, migratoires, etc., la coopération fiscale, le commerce international et la gouvernance fiscale mondiale sont des sources du financement essentielles vers un nouvel ordre mondial inspiré par de nouveaux fondements de la mondialisation. Une gouvernance fiscale qui permette de financer le développement durable. Il s'agit d'une proposition ouverte au débat et à d'éventuelles mises à jour.

CONTENTS:

GENERAL AGREEMENT ON INTERNATIONAL TAX COOPERATION, TRADE AND GLOBAL TAX GOVERNANCE:

A Proposal

The parties to this General Agreement,

Emphasizing the necessity of international tax cooperation and global tax governance about the commercial, social and economic relations to achieve the optimal utilization of the world's resources, according to the objective of a sustainable economic development of States and the purposes of environmental and socially sustainable development.

Reaffirming the duty of cooperation in economic and social matters incorporated in the Charter of the United Nations (Article 1.3, Article 13, Articles 55-56 and 62), as well as in other recommendations, declarations and resolutions of the National Assembly and ECOSOC on international tax cooperation such as the Resolutions 1,495 (XV), 1,522 (XV), 1,516 1519 and 1526 (XV), 1815 and especially Resolution 2625 (XXV) of the General Assembly on International Cooperation.

Being desirous of contributing to achievement of the sixteen sustainable development goals (SDGs) of the United Nations 2030 Agenda and the future ones targets (twi 2050; EU 2050; 2063 African Union Agenda, etc.), as well as to the achievement of the Addis Ababa Action Agenda objectives; the Doha Declaration; the Monterrey consensus, and being desirous of contributing with the United Nations, the International Monetary Fund, the World Bank and the OECD, which conforming the platform for international fiscal cooperation, as well as with the rest of stakeholders and states involved in these issues.

Highlighting the necessity to make positive efforts to ensure that the developing countries maximize their possibilities of development through good tax and financial policies inspired by international cooperation and good global governance, that prevents aggressive unilateral measures, promoting inclusive frameworks for international tax cooperation (no one behind).[1]

Emphasizing the relevance of the taxation, international tax cooperation, international trade and global tax governance as crucial financial sources for sustainable development in a globalized world that leads to fair, inclusive, efficient and digitized tax systems.

Recognizing further that the states should make compensation efforts to balance the forces between efficient, digitized and robotic administrations in the face of the taxpayers, intermediaries' and stakeholders' rights, protecting the confidentiality of information, privacy and the flow of personal data, enhancing tax compliance models and tax risk management processes in the framework of the digitalization of tax administrations. Achievements that must be specifically reinforced in environments of health (COVID-19, …), military (WARS) and/or economic crisis.

Resolved to observe the principles and purposes of the global legal order, the legal sources of international tax law and international economic law.

Resolved to preserve the commitments assumed by any of the States derived from the bilateral or multilateral instruments that the parties have taken in these subjects, and,

Convinced to advance in the people's mentality shift, enhancing the international tax cooperation between the states and the international tax governance on the path of global sustainability,

[1] United Nations International Tax Cooperation Committee target.

Have agreed:

Article 1

Set of the general agreement

The present agreement sets a new general agreement on “International Tax Cooperation, Trade and Global Tax Governance”.

This general agreement follows the last generation international economic cooperation treaties, with a holistic view, in line with the new generation of trade agreements (FTAs), dealing not only with economic aspects, but also cultural, social, ethical, and environmental ones.

Article 2

Principles

The respect for the democratic socio-economic principles and the fundamental Human Rights contained in the Universal Declaration of Human Rights, as well as in the Charter of the United Nations and in international tax law and international trade agreements, inspire the present general agreement.

The general agreement on international tax cooperation, trade and global tax governance is supported on the principles of tax justice, legal security, equity and efficiency, transparency, simplification, neutrality, proportionality and sustainability.

The parties shall act in accordance with the undertake international taxation principles, especially with the general principles assumed at the Ottawa Ministerial conference on electronic commerce: Neutrality, efficiency, certainty and simplicity, effectiveness and fairness and flexibility.

A new “Principle of International Tax Cooperation” is set as a new general principle of the global legal system for the promotion, strengthening and consolidation of international tax cooperation among the world States and stakeholders.

Article 3

Proposals

1. The purposes of the present general agreement are:

   a) To achieve international tax co-operation in solving problems of economic, social, technologic, environmental, educational, and humanitarian character.

   b) To acquire sustainable development promoting a new mentality shift of the peoples, as well as multilateral tax and financial policies to address global challenges, seizing the potential of financial innovation, new technologies and tax digitalization policies, protecting the taxpayers’ rights, intermediaries and stakeholders.

   c) To set the framework bases of a new global tax governance architecture design, strengthening "fairness & efficient" regional, national, and international financial and tax policies in the face of the changing global landscape, committed to combating any kind of tax avoidance/evasion and criminal tax, as well as improving tax compliance systems and tax risk management processes of tax administrations.

   d) To promote the mobilization of domestic resources and investments to achieve sufficient resources to provide the basic needs and services for developing countries still underfunded.

   e) To go on the new multilateralism consensus, promoting the effective participation of ministers and finance vice-ministers, tax authorities and representatives of civil society, private sector, SMEs, MNEs, academia, regional and global international organizations,

institutional tax associations, and the rest of the stakeholders, to achieve the objectives of sustainable development through international tax cooperation in a framework of good global fiscal governance.

Article 4

Scope

1. This general agreement contains the cross-cutting, inclusive, and sustainable bases for international tax cooperation-governance, trade tax keys and technological innovation, aimed at achieving efficient, fair-equitable tax systems for the sake of global sustainability. It is intended to contribute towards the efficiency, effectiveness, and fairness of international, national and regional taxation systems while protecting citizens' moral, human and social rights in the relations of the tax Administrations with the taxpayers and stakeholders, following the 2030 and Addis Ababa Agendas, the Monterey Conference and the Doha Declaration and being committed to the future agendas on these issues.

2. This general agreement assumes a wide-ranging global tax governance scope enhancing the necessity of: the international tax cooperation relations between tax administrations (international, national, and regional plans), and the tax administrations and taxpayers, intermediaries and stakeholders in the international and national fields (highlighting the need to further strengthen the protection of taxpayers' rights in cross-border tax transactions); the international administrative cooperation in tax matters; the international cooperation in administrative mutual assistance (tax credits); the international trade tax law issues; the customs tax cooperation; the digitization of tax administrations; the tax risk management models for tax administrations (compliance tax risk processes), the global guidelines for taxation of the digital economy and transfer pricing; Tax education and tax compliance; the environment taxation; the taxpayers rights in the domestic and international sphere; Taxation and Gender; Resolution of tax disputes; Systems for combating tax fraud in the fight against tax avoidance, tax evasion and aggressive tax planning, corrupt-free and transparent tax systems, and in general, environment, social and ethical tax policies.

Article 5

International Administrative Cooperation in Tax Matters

1. The parties of this treaty acquire the commitment to make possible all way of the international administrative cooperation - in matters related to taxes of any nature- with the following purposes:

   a) To redistribution of wealth for public wellbeing and to raise more revenue in an equitable way in the framework of a new social contract inspired on a more inclusive and equitable society.

   b) To get higher tax revenues that contribute to the reduction of the public sector deficit for benefit of all.

   c) To fight against tax evasion and tax avoidance and avoidance in the international market, regarding worldwide earnings.

   d) To maintain national tax sovereignty and the tax balances in a globalization world characterized by an expansion of cross-border transactions and the internationalization of financial instruments. In the global era, tax administrators must extend their reach beyond the borders of the Nation State.

   e) To collect of domestic financial resources to support the efforts for the achievement of the sustainable development and sustainable development goals.

   f) Cooperation between tax administrations is critical in an environment of global crisis for States to maintain their revenues. It must be taken into account especially in situations such as those that cause global pandemics.

2. The administrative tax cooperation may be specified in the following actions:

a) Exchange of tax information between tax administrations regarding the entire tax system. The parties will preserve the commitments assumed on international regulations created on the exchange of tax information between tax administrations, in coherence with the legal framework: Multilateral mutual assistance convention; Bilateral double taxation agreements (articles 25, 26, etc.); Bilateral agreements for the exchange of tax information; The common report standard and the multilateral Competent Authority Agreement on the Exchange of CbC Reports (CbC MCAA), as well as the other two OECD models of competent authority agreements for the exchange of CbC Reports (one for exchanges under Double Taxation Agreements and another for exchanges under Tax Information Exchange Agreements); the tangent actions of BEPs; the Community Directives and Regulations of the European Union and regulations on administrative cooperation in tax matters between the member states of the European Union; the domestic state regulations, etc.

   The parties assume to extend and promote the international cooperation on automatic information exchange and other tax information exchange systems.

b) Exchange of officials and senior officials of the tax and customs administrations. Presence of the officials (requesting country) in the offices of the administrations of the requested country.

c) Participation of officials (from the requesting country) in the investigations of the requested country (interviews with people and examination of files if the legislation of the other country allows it).

d) Simultaneous controls: two or more member states agree to control each one in their respective territory, simultaneously with two or more people in common.

e) Notifications.

f) Exchange of good practices (sharing and evaluation of administrative cooperation actions).

g) Simplification and standardization of administrative and customs procedures.

h) Cooperation in Technical Assistance.

3. The parties express their interest in proceeding in the future to adopt a Protocol of international fiscal cooperation that avoids the gaps and overlaps produced by the different international regulations that exist in this matter (OECD, UN, FATCA, EU, Nordic Convention, Andean pact, etc.). It should be necessary to develop common procedural standards and compatible information and communication technology. Standardization of formats is critical to the efficiency and effectiveness of the administrative cooperation in tax matter.

4. Costs: The States should work to minimize costs through standardized procedures valid for all countries, otherwise short and medium-term costs may be much higher than the benefits.

Article 6

International Cooperation in Administrative Mutual Assistance (tax credits)

1. The parties:

   a) Will cooperate in all possible forms of related to any nature taxes.

   b) Will cooperate in the collection of tax credits required by other states taking the necessary measures to ensure such result as if they were their own tax credits.

   c) Will facilitate the proper determination of tax obligations and help to ensure their rights.

   d) Will contribute to combating international tax evasion and avoidance in all spheres: regional, national and international.

e) Will establish as international framework the Multilateral Convention for Mutual Assistance modified by its last protocol and adjusted to the subsequent regulations created in the matter.

f) Will preserve the regulations established in international tax law on cooperation in administrative mutual assistance, with special monitoring of the commitments derived from the agreements signed of a bilateral and multilateral nature. They will also promote and facilitate any kind of administrative assistance in tax matters.

2. In the development of mutual assistance activities by the tax administrations, the national and international legislation will protect the rights of taxpayers, especially the protection of the confidentiality of information, privacy, secrecy of correspondence and industrial secrecy as well as the respect for the principle of non-discrimination.

Article 7

Cooperation in International Trade trough Commercial Tax Policies[2]

1. The parties will strengthen international cooperation through the establishment and application of commercial tax policies aimed at:

   a) To promote and diversify commercial exchanges, commercial flows and commercial cooperation projects.

   b) To promote international investments.

   c) To promote the transfer of improvements, technologies, technical training programs, the exchange of technologies and computer systems, experiences and good practices, advice and information systems....

   d) To reduce risks and distortions in trade relations and eliminate obstacles to cooperation in international trade.

   e) Boost cooperation between commercial agents involved and stakeholders.

   f) To promote the exchange of information and technology in the field of international trade.

   g) To open disclosure of national legislation and investment opportunities and benefits.

2. The parties will follow the International Trade Law included in the World Trade Organization and other international treaties and rules binding to them".

3. The parties will favour the celebration of multilateral and bilateral treaties to promote trade and investment and will respect the commitments derived from multilateral and bilateral agreements to avoid double taxation. In general, parties will refuse to use mechanisms such as double exemptions, double non-taxation and international tax fraud in international trade.

4. *Global value chains*: The parties will promote development by encouraging participation and improvement in global value chains, preventing developing countries from obtaining less profit from their participation in the global economy than more advanced ones. To this end, the parties will promote all kinds of initiatives such as the OECD Initiative on Global Value Chains (GVCs), Production Transformation and Development (hereafter Initiative): a global platform for peer learning, among others, trying to incorporate all continents and also the largest possible number of stakeholders.

[2] With the collaboration of Xavier Fernandez Pons, Public International Law's associate professor at the University of Barcelona.

Article 8

Customs Cooperation

1. The Parties will promote customs cooperation to improve and consolidate their trade relations, encouraging a customs tax law built based on customs cooperation that allows improving, consolidating and increasing trade relations between States. In addition, they may enhance the application of customs taxes applied to export operations as protection of internal supply.

2. The parties will strengthen their customs structures and improve their operation within the framework of inter-institutional cooperation.

3. Customs cooperation may take the form, among others, of:

   a) Information exchanges.

   b) Development of new techniques in the field of training and coordination of actions of international organizations competent in the field.

   c) Exchanges of officials and senior officials of the customs and tax administrations.

   d) Simplification of customs procedures.

   e) Technical assistance.

4. The parties to this treaty undertake to respect the customs duties and taxes contemplated in multilateral and bilateral treaties and agreements, economic integration treaties or agreements, and national legislation.

5. The parties express their interest in proceeding in the future, to consider, in the institutional framework provided in this Agreement, the conclusion of a Customs Cooperation Protocol.

Article 9

Cooperation in Environmental Taxation and Extractive Sector

1. The parties will promote a green taxation system that encourages the use of less polluting energies, reducing the negative externalities that harm the environment.

2. The Parties recognize that international tax cooperation shall be guided by the principle of a fair and equitable sharing of the world's primary commodities and other basic resources, with due regard to the needs of all Parties[3].

3. The parties will cooperate to establish environmental fiscal policies that promote sustainable development aimed at:

   a) Simplify the tax systems in terms of excise duties.

   b) Favour fiscal conditions for the promotion of renewable energies.

   c) Interregional and international cooperation for the protection of the environment and the use of renewable energies.

   d) The promotion of environmental educational policies.

   e) Contribute to achieving sustainable development goals number 13 (Climate action) and number 7 (Affordable and clean energy).

3 By Xavier Fernández-Pons. Professor of the Public International Law at the Faculty of Law of the University of Barcelona.

f) Financing sustainable development.

4. In general, the use of taxation for non-fiscal environmental purposes that promotes all types of cooperation, exchanges, experiences, practices, regulations and standards, technical assistance and instruments that contribute to global environmental sustainability will be promoted.

5. The parties agree with the Inter-agency Task Force on Financing for Development[4] regarding "Incentives set by the fiscal system can be used to effectively targe progress on SDG 13 (climate action). Climate change mitigation and adaptation policies, and disaster risk reduction, can be supported by incentives in the fiscal system Environmental taxation and the reform of energy and other subsidies have a critical role to play in transitioning the world to a low-carbon economy".

6. *The parties will collaborate and cooperate in creating a framework for the sustainable extraction and use of natural resources. In doing so, they will consider the impact of specific actions on the planet, society, and individuals*[5], as well as the developments made by the international tax cooperation committee of the United Nations in this matter[6] and other international organizations and international associations.

7. The parties express their interest in evaluating the possibility of making a ***Framework Environmental Taxation Protocol*** that develops the conjunto de set of aspects related to environmental Taxation.

Article 10

Cooperation in Resolution of Cross-Border Tax Disputes[7] and Alternative Dispute Resolution

1. The parties shall cooperate to resolve disputes or doubts arising from the interpretation and application of agreements and conventions that provide for the elimination of double taxation of income and/or capital. They shall also cooperate to address issues referred to them by the agreement or the convention.

2. Where a person considers that actions of a state result or will result in taxation not in accordance with an agreement or a convention, he may, irrespective of the remedies provided by the domestic law of that State, present his case to the States party to the agreement or the convention affected by his case.

3. The states concerned shall acknowledge receipt of the complaint in a timely manner. They shall agree on the rules of functioning of the procedure. The rules of procedure may provide for the appointment of an advisory commission compound by a chair, their representatives and independent experts for the case where they fail to agree on a solution to the case after a reasonable period. The advisory commission shall deliver an opinion that will be compulsory if the States do not agree on a different solution in due time.

4. The parties shall communicate directly to solve the case. The person affected shall request to participate in a hearing or submit evidence or documents that shall be dealt with under the authority of the States. The person affected may appeal in accordance with national rules the decision of the States to reject his complaint, the non-appointment of the advisory commission or the absence of notification of a decision within a reasonable period.

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[4] (2019) Financing for Sustainable Development Report.

[5] Add by Susana Bokobo, October 2022. Former Professor of Financial and Tax Law at the Faculty of Law of the Autonomous University of Madrid. Attorney General of The Supreme Court of Spain (former), and International Tax Lawyer, Professor, Author and Creative Entrepreneur based in Madrid, Spain.

[6] (E/C.18/2022/CRP35) Taxation of the Extractive Industries. Committee of Experts on International Cooperation in Tax Matters. Twenty-Fifth session- October 2022 and previous; (E/C.18/2022/CRP35) Annex C.1. Tax incentives and the global minimum tax in the extractive industries; (E/C.18/2022/CRP20) Environmental Taxation. Co-Coordinators' Report. Committee of Experts on International Cooperation in Tax Matters. Twenty-Fifth session- October 2022 and previous.

[7] Article set by Juan López Rodríquez (paragraphs 1-4). Officer to the European Commission. Ph.D. in law, expert in tax law and policy, in its regional, national, international and European aspects, with more than 25 years of experience in bodies in charge of fiscal and tax policies (Economic and Finance Ministry of the Spanish Government and the Commission Services). Tax Policy Adviser at European Commission),

5. The parties will respect the requirements established in the international regulations for the resolution of amicable tax conflicts and other systems to resolve them, the treaties signed by the States and the regulatory domestic legislation framework of the States.

6. Notwithstanding the preceding, the parties will promote different ways of resolving cross border tax conflicts that may have: a preventive and discouraging nature of litigation, as well as an alternative dispute resolution system, friendly ways of resolving disputes, agreements and any kind of formulas to avoid and to prevent conflicts in cross border tax matters. To this end, the parties may consider instruments such as the European Commission Directive 1852/2017 on tax dispute resolution mechanisms in the European Union, which provide that, given the impossibility of reaching friendly agreements between the States, other channels may be established: resolving conflicts through the Consultative Commissions and the Alternative Dispute Resolution Commissions. In addition, the Manual on the prevention and resolution of tax conflicts of the United Nations, 2021 (by the International Tax Cooperation Committee of the United Nations) provides the possibility of establishing mechanisms for the prevention of disputes (technique of legislative improvements, guidance and advice, advance agreements, audits jointly), as well as Non-Binding Dispute Resolution Mechanisms (NBDR): The possibility of using NBDR in the context of the MAP and also the possible use of expert advice and mediation in the MAP, etc.

Article 11

Cooperation in Systems Combating Tax Fraud[8]

1. The parties will promote the concepts of good tax governance and the importance of a corrupt-free and transparent tax system for economic development, fighting against corruption, money laundering and tax crimes. Law enforcement agencies and tax authorities will cooperate to counter corruption and bribery.

2. The parties shall adopt minimum measures to combat tax avoidance and evasion, which aim not only to eliminate the tax advantages obtained through fraud, but also to identify and apply appropriate penalties and punitive action to the final beneficiaries, as well as to the professionals involved in the development and implementation of the corporate or financial structure for such practices[*].

3. The parties will reinforce the capacity of jurisdictions to meet and to implement in practice their legal obligations arising from international Standards such as Financial Action Task Force (FATF), the UN Convention against Corruption (UNCAC), the UN Office on Drugs and Crime (UNDOC), the Council of Europe Criminal Law Convention on Corruption, the OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions, the Standard for Automatic Exchange of Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) and exchange of custom authorities information, the World Bank and the IMF prescriptions, amongst others, to detecting, tracking, and preventing illicit financial flows and every action and all kinds of actions aimed at money laundering, tax crimes and corruption, towards to the overall global transparency framework, with the cooperation of the stakeholders: competent authorities, public bodies, financial institutions and designated nonfinancial businesses and professionals. In particular, the parties will work for further facilitation of inter-agency Cooperation and exchange between authorities, using the sources available to tax administrations and FIUs and the use of new technologies[*].

4. The States shall cooperate to eliminate legislative discrepancies which allow tax arrangements that result in double non-taxation, by fractionation of activities, profit shifting, or through the use of concept of tax residence for non-establish in any State where the company develop it activities.

5. The parties will promote the adoption of mechanisms and instruments to combat tax fraud, especially aggressive planning structures, included[9]:

[8] Jeffrey Owens, Good Governance and Transparency International Project (2019-2023).

[9] With the collaboration of Jorge Marcelino Junior. Doctor (summa cum laude) in Law and Political Sciences at Barcelona University; Invited researcher at *Centre d'études sur la fiscalité des entreprises*, in Paris; University Paris II; Attorney specialist in Wealth Planning, Offshore Centers Structures and Foreign Direct Investment.

a) Establishing a Common General Anti-Avoidance Rule allowing the authorities of a State Party to disregard corporate arrangements or legal acts practiced in another State Party that the sole purpose is remove or reduce the tax incidence.

b) Allowing the exchange of tax information about companies based in a State Party which regularly conduct business with companies or persons investigated for tax fraud in another State Party, upon the request of that State.

c) Establishing cooperation protocols in order to, pursuant to Article 4, obtain credits arising from sanctions or penalties imposed to the taxpayer of a State and that shall be executed by another Contracting State, jointly with their tax credits.

Article 12

Transfer Pricing and Taxation of the Digital Economy

12.1 Common rules

1. The parties will work to achieve a climate of legal security, transparency, fairness and justice that favours predictable investment and business security and equitable global income distribution, paying particular attention to the needs of the developing countries.

2. The parties agree to promote the adoption of regulations to prevent the erosion of tax bases and the transfer of profits, as well as to strengthen international tax cooperation between the States and to intensify the mechanisms to avoid any form of tax fraud, evasion and international tax avoidance.

3. The parties will act in accordance with:

   a) The international trade and tax principles, especially with the general principles assumed in the WTO [Trade without discrimination (most favoured nation clause and national treatment clause); Freer trade; Predictability, Fair competition and promotion of economic development]; The Work Programme on Electronic Commerce, adopted by the WTO General Council in September 1998, The regulatory framework of e-commerce legislation harmonization in the Economic Community of West African States (UNTAC, 2000); and the guidelines of Committee of Experts on International Tax Matters (E/C.18/2022/CRP.18). Relationship of tax, trade and investment agreements (note).

   b) The Ottawa Ministerial Conference on Electronic Commerce Principles: Neutrality, efficiency, certainty and simplicity, effectiveness and fairness and flexibility.

   c) The fiscal policies promoted by International Organizations, such as the UN (and other international organizations) with an impact on the principle of international cooperation, such as the one established in the Fourth High-Level Forum on Aid Effectiveness, held in Busan (2011), promoting practical cooperation for development.

   d) The set of bilateral and multilateral agreements that indicate on these issues.

   e) The new principle of International Tax Cooperation (art. 2.4 of this General Agreement on International Tax Cooperation, Trade and Global Tax Governance).

4. The parties will promote a global regulatory environment that favours the adoption of the "rules" and "standards" of taxation and international trade, following: The international treaties; The resolutions of the committee of experts of the international tax cooperation committee,[10] and others issued by ECOSOC; The instruments and other OECD proposals, The fiscal models of

[10] (E/C.18/2022/CRP.16) Transfer Pricing. Co-ordinator's Report. Committee of Experts on International Cooperation in Tax Matters. Twenty-Fifth session- October 2022 and previous

the International Monetary Fund and the World Bank, and other international institutions; Good practices; and, in general, all measures that favour trade, the economic development of countries and peoples and good global governance from economic and social perspectives, towards sustainable development according to the 2030 agenda of the United Nations and Addis Ababa Agenda, as well as the future agendas for global sustainability (EU Agenda 2050, S/Agenda/2057, etc.).

12.2. Cooperation in transfer pricing

1. The parties should take special consideration of the principles recognized in the multilateral trading system,[11] especially the principles established in the WTO[12] such as the principles of non-discrimination; Integrity and predictability; Flexibility; Needs of developing countries; Transparency; Encouraging the use of electronic means; Conditions for Participations; Failure to pay taxes.

2. The parties agree on the need to create specific transfer pricing guidelines under a list of approximate parameters:

   (a) Protection of international investment with particular emphasis on developing countries.

   (b) Promotion of cooperation with tax administrations.

   (c) We are eliminating/reducing the risk of imbalances and diversion problems of commercial flows.

   (d) Tax neutrality and elimination or reduction of economic double taxation and non-taxation.

   (e) Attention is discriminated according to the different productive sectors, for example, extractives, pharmaceuticals, etc.

   (f) Legal certainty for companies applying safe, contrasted, clear rules.

   (g) Equity between multinational companies and independent companies.

   (h) Instruments to combat the artificial transfer of profits outside their jurisdiction by multinationals.

   (i) Respect international transfer pricing principles.

   (j) Help to prevent fraud and international tax evasion.

   (k) Appropriate tax resolution systems, etc.

3. The States agree to strengthen international cooperation towards the regulation of transfer prices that do not hinder foreign direct investment or international trade by complying with the WTO rules and concordance international trade rules, as well as with the implementation of the regulations of international and national taxation. Compliance, transparency, and international cooperation established in multilateral and bilateral agreements, in the resolutions, multilateral instruments and standards derived from the United Nations, the OECD and other international organizations, as well as other centres/forums such as the African Forum of Tax Administrations (ATAF), CIAT for Latin America, etc.

4. The States agree to converge their domestic regulations with international regulations on transfer pricing matters so that there are no significant divergences and, in any case, to comply with the principles of information, legal certainty and transparency, following the latest advances made by the OECD (2022); The transfer pricing guidelines for multinational enterprises and tax administrations; The *Transfer Pricing Manual of the United*

[11] X. Fernández Pons. Professor of Public International Law and A. Olesti-Rayo. Professor of Public International Law Annex ***Multilateral Trading System***.

[12] Where a plurilateral agreement on public procurement was included (GPA 1994).

Nations International Tax Cooperation Committee *(updated 2021)*[13]*;* The OCDE *International Compliance Assurance Programme (ICAP): Handbook for tax administrations and MNE groups, among others.*

5. The parties undertake to look after the interests of developing countries by trying to develop solutions, programs and good practices for their specific needs in the field of transfer pricing, as well as cooperative tax policies, help, technical assistance and understanding.

6. The parties assume cooperation to make possible the transfer of technology, technical training programs, establishing networks, promotion of support through offices, capacity-building performances, etc.

7. The parties express their interest in considering the opportunity to develop a **future protocol: Global guidelines on transfer pricing taxation** (hard law regulation) that distinguishes between types of companies, as well as introducing simplified procedures with special consideration of the interests of developing countries. This Protocol could be extended to the main lines of **taxation of the Digital Economy.**

12.3 Cooperation in taxation of the digital economy

1. The parties agree to promote an inclusive environment for tax cooperation in the digital economy that leaves no one behind in line with the considerations established by the UN Committee on International Tax Cooperation and Financing for Sustainable Development Office, the OECD, among other international organizations.

2. The parties undertake to seek consensus solutions on taxation of the digital economy, which in no case allow double non-taxation, double tax, double exemptions, and other weird situations.

3. The parties will avoid creating artificial corporate structures to achieve low or zero taxation by transferring their profits to jurisdictions with low or no tax rates.

4. The parties will collaborate to promote a **Global Tax Governance**[14] inspired by justice, equity and an efficient global tax system, which takes into account the following bases:

4.1. The taxation of the digital economy is a crucial vector to seek global tax justice within the framework of good global tax and economic governance, in line with the aforementioned international principles.

4.2. The taxation of digitized businesses and cross-border activities constitutes a source of financing for global sustainable development, for the mobilization of domestic and international resources, with particular emphasis on developing countries.

5. In the development of the previous point, the parties agree to ***tax the profits derived from large multilateral companies and automated digital services and in general, the profits derived from digitized and highly digitized businesses.***

5.1. Regarding **multinational companies,** the parties could agree to tax the income derived from cross-border operations carried out by digital companies where the value is generated and to establish compensatory tax measures for the source country in which the company operates through international consensus strategies that minimize the risk of unilateral aggressive actions.

To be assertive with the new BEPS project (BEPs 2.0) and its inclusive forum for the taxation of multinationals, the parties could agree on their willingness to commit to tax the profits of multinational companies in the market country, following the criterion of the jurisdiction of use or consumption (for example, the **Pillar I BEPs model**) with the

[13] The current Subcommittee comprises members from tax administrations and policymakers with vast and varied experience in dealing with transfer pricing, as well as from academia, international organizations and the private sector, including multinational enterprises and advisers.

[14] Eva Andrés-Aucejo (2018). "The Global Tax Model: building modernized tax systems towards to the international tax cooperation and global tax governance,,, (pp. 121-140)."

possibility of compensation in the country of residence of the multinationals (**Pillar II** BEPs), if the tax rates of the lower states are to a global minimum standard that the parties will set and that could be assessed at 15% (**Globe**), or agreed by consensus, which could be raised or lower.

5.2. For global tax justice, the parties could promote consensus solutions for the taxation of income derived from highly digitized business, automated digital services and digitized businesses in general**,** through different techniques as follows:

A) The introduction of new articles in their respective **"Model Conventions to avoid international double taxation"**.

In this sense, the different international organizations and agents, creators of the other model conventions (UN, OECD, United States, Andean Pact, etc.), would have the possibility of including new articles in said model conventions to make effective the taxation of this type of income, choosing the type of taxation they prefer. For example, the incorporation of **article 12 B, 2021 (section 3.2) in the United Nations model** (via withholdings at source regarding automated digital services) [15] undoubtedly favours developing countries. It leaves a wide margin of the decision to the States about its incorporation (E/C.18/2021/CPR.28 & E/C.18/2022/CPR.19).

B) Another formula could be the consolidation of the **virtual permanent establishment** to be introduced in the Model Conventions to avoid double taxation (OECD, UN, USA, etc.) as well as in the bilateral treaties.

C) Or, aside from the models conventions, the establishment of **other unilateral formulas** such as: **Taxation of the digitalized services; Withholding tax at the source; the compensation tax, (*equalization levy*),** (R. Bansal, South Centre, n. 16, July 2021, p. 2), etc.; always thinking that, in terms of gross global collection, they should represent similar volumes of income, and always taking into account the unilateral measures that have already been adopted by the States, or that they want to adopt in the future, so that "there is no superimposition of income, either through the elimination of such unilateral taxes or through compensation or reduction of tax rates, etc.

6. The signing of this *General Agreement on International Cooperation, Trade and Global Tax Governance*, by itself, would provide sufficient legal coverage so that:

6.1. Consensus solutions on the taxation of digitalized businesses of multinational companies (5.1) could be applied by the signatory parties of this General Agreement, with legal coverage for the network of bilateral treaties already signed, without prejudice to the OECD regulatory acquis.

6.2. Consensus solutions on the taxation of digitized and highly digitized companies get in the present General Agreement (5.2), could be incorporated into previously signed bilateral treaties and, where appropriate, into multilateral treaties. And the same, respect to any agreements that the parties adopt based in this General Agreement or the future Protocols.

6.3. The signing of this framework agreement and its development future protocols, in addition to providing legal coverage to adapt bilateral agreements, constitutes a legal certainty, transparency and generality source, preventing interpretation issues on the regulations applicable between multilateral conventions, multilateral instruments, domestic legislation and bilateral treaties.

[15] Article 12B of the UN Model Convention was incorporated in Session 23 of the Committee on International Tax Cooperation, Geneva, 2021 (E/C.18/2021/CRP.28). Its scope of application is projected to *automated digital services* and admits two taxation ways, at the choice of the taxpayer: i) Withholding at source on the gross income of each payment; ii) Annual net income of the foreign entity equal to 30% of the net income of the automated digital services. The UN regulation of article 12 B complements article 12 A) (created in 2017) of the same UN Model, referring to the taxation of digital consulting, management, and technical services.

Article 13

Taxpayers' Rights in the Domestic and International Arenas

1. The parties assume the commitment to reconcile the agent's interests in the tax system, seeking a balance between the rights of taxpayers and intermediaries with the capacities, functions, and competencies of the tax administrations. The parties undertake to protect the rights and guarantees of taxpayers in the international and domestic arenas so that rights do not represent an obstacle to the actions of the tax administrations (Owens 1990, Intertax).

2. The parties subscribe to a model inspired by the balance between both sides of the weight scale, not only in the field of the domestics' regulations but also in the framework of cross-border tax transactions, whether on exchanges of tax information or of another type of international tax assistance and, in general, any action that involves the crossing of borders taxing more than one State.

3. The parties will seek more efficient and comprehensive protection of the taxpayers' rights, domestically and in international areas, working together to improve the insufficient protection of taxpayers' rights in the collection of international standards issued for protecting taxpayers' rights in the international tax information exchange and other procedures.

4. The parties undertake their interest in evaluating to promote a new development Protocol on taxpayers' rights***: Protocol on Global Taxpayers' Rights and Guarantees Charter*** **to be included in the international tax law order**, consisting of an international Agreement between the signatory parties, with legal binding (hard law), *erga omnes*, about the rights and guarantees of taxpayers in the global sphere (national and international).

5. By the preceding, the parties agree to consider a new protocol to approve a global model of the Bill of Rights for Taxpayers that includes both, the national and international arenas. At the international level, this would improve the incomplete global legal framework that currently regulates the taxpayers' rights in cross-border tax transactions, for instance, on exchange of tax information: art. 26 Model Conventions to avoid double taxation (- OECD Model Convention, UN MC, US MC, etc.); - Bilateral agreements to avoid double taxation (art. 26); - Multilateral Agreement on Mutual Assistance (art. 4.1, art. 22.1 and art. 21.2); - Model Tax Information Exchange Agreement (MTIEA), art. 1; Art. 5.3; - OECD Model Agreement between Competent States (section 5 and annexe IV); - FATCA (lack of regulation in this regard)[16]; - Scope of application of the European Union (Directive 2011/16/EU, DAC II art. 16.1 and 25 and updated versions).

6. The possible new Protocol on Global Taxpayers' Rights and Guarantees will regulate, among others, aspects such as the following:

   (a) Establishment of the Principles of "Proportionality", "Reciprocity", "Confidentiality", "Data protection" and correct and limited use (material scope, subjective scope and temporal scope) of the "Use of Data".
   (b) Guarantee taxpayers' rights in "Notification", "Hearing/Audience" and "Claim/Appeal".
   (c) Personal and family privacy rights.
   (d) Data protection right and the confidentiality right. The right to secrecy.
   (e) Ensure a compatible regulation between the exchange of international tax information and the right to non-incrimination of taxpayers.
   (f) Guarantee and protection of the principles of transparency and legal certainty, among others.
   (g) Guarantees and rights on national and international dispute resolutions.

7. The parties will base themselves on the hard law and soft law regulations for the elaboration of the protocol above:

   a) *Hard Law:* - The Universal Declaration of Human Rights of 1948 (art. 12 on the Right to primary and family life and art. 11 right to a defence); - The specific Conventions or Treaties that regulate the rights to personal and family privacy and data protection, such

[16] The IGA 1 model refers to the confidentiality rules provided for in the OECD Models.

as, - The European Convention on Human Rights of the Council of Europe (art. 6: the right to judicial guarantees; art. 8: the Right to respect for private and family life); - Convention 108, of the Council of Europe on the Right to personal and family intimidation; The European Union Directive 95/46/EC of the European Parliament and the Council on the protection of personal data. Regulation (EU) 2016/679 on the protection of the processing of personal data, etc. The Taxpayer Charters (Australian, UK, France, Sweden, etc.), whether listed as hard laws or soft laws, etc.

Soft Law: The Charter of Fundamental Rights of the European Union (articles 7, 8, 47); - A Model Taxpayer Charter. Towards greater fairness in taxation by the *Confederation Fiscale Europeenne* (2012), and *The Confederation Fiscale Europeenne at 50 years*, CEF (Servaas van Thiel, ed.); OECD (1990) Taxpayers' Rights and Obligations – Practice Note Prepared by the OECD Committee of Fiscal Affairs Forum on Tax Administration; OECD (2022). *Building Tax Culture, Compliance and Citizenship*, 2002, A global source Book on Taxpayer Education, among others; The observatory on the protection of taxpayer's rights (2020, IBFD); *Modelo de Codigo Tributario del CIAT* (2015); *Carta de atributos mínimos para una sana y eficaz Administración Tributaria* (CIAT, 1996, *República Dominicana),* etc.

Article 14

Cooperation in Tax Education and Tax Compliance

1. The parties undertake to promote new tax culture in a climate of reciprocity, help and understanding between all the subjects involved: citizens, taxpayers, tax administrations, and tax advisories, states, international agents and the rest of the stakeholders.

2. The parties assume the role of tax education and voluntary compliance as **new international taxation PRINCIPLES** since these matters are subject to the range of principles of international taxation, in line with the postulates issued by the new generation treaties inspiring in a holistic vision.

3. The parties will promote social impact policies at a regional, national and international level for the establishment and reinforcement of tax education and teaching in the tax field.

4. The parties will adopt the necessary measures to promote and, where appropriate, encourage a new culture of tax education and voluntary compliance as essential instruments to achieve tax justice within the framework of global tax governance, the reduction of all forms of tax evasion, avoidance and fraud, promoting an increase in the volume of tax collection and mobilization of national and international resources.

5. The parties agree to strengthen the figure of the new culture of tax education as a necessary instrument that will bring positive consequences to make other sustainable development objectives effective, such as objective 10 of the SDGs (reduction of inequality within and between countries (Indicator 10.4); Strengthen the mobilization of domestic resources, including through international support to developing countries, to improve domestic capacity for tax and other revenue collection (Indicator 17.1), The "Proportion of the national budget financed by domestic taxes" (Indicator 17.1.2), etc. and to achieve the goals of the Addis Agenda Ababa, where it can be read that the mobilization of internal resources is above all generated by economic growth.

6. The parties will cooperate in the exchange of technology, computer systems, good practices and any type of assistance in tax education and methods of voluntary compliance with tax regulations.

7. The parties will strengthen the monitoring of tax education and tax compliance systems to promote voluntary compliance with tax obligations by taxpayers and intermediaries in the field of national and international taxation, taking into account the initiatives of the organization's international ones, such as those developed by the OECD, the IMF, among others, as well as regional ones such as the EU.

8. The States should promote the Tax Compliance Systems from "Enhanced Relationship" to "Cooperative Compliance" following the international Forums and international regulations and recommendations: Cooperative Tax Compliance Framework: 2002. The Forum of Tax Administration (FTA); (2006) Final Declaration of Seoul; (2007) Communicated of Cabo, (OECD) "Study into Role of Tax Intermediaries"; (2009) OECD. Communicated of Paris. "Experiences and Practices of Eight"; (2009) OECD "General Administrative Principles". (2009) "Corporate Governance and Tax Risk Management"; (2010) OECD. "Tax compliance and Tax Accounting Systems"; OECD (2010b). Tax Compliance and Tax Accounting Systems. Forum on Tax Administration: Information Note. April 2010; OECD (2010c). Understanding and Influencing Taxpayers' Compliance Behavior. Forum on Tax Administration: Small/Medium Enterprise (SME) Compliance Subgroup. Information Note. November 2010; International Monetary Fund (IMF) (2015). Current Challenges in Revenue Mobilization: Improving Tax Compliance. IMF, Washington, D.C.; OECD (2016) Report Cooperative Tax Compliance. Building better tax control frameworks; OWENS/LEIGH (eds.). (2021) *Cooperative compliance;* (2022) OECD "Cooperative compliance: a framework; OECD (2022) Building Tax Culture, Compliance and Citizenship, 2002, A global source Book on Taxpayer Education, and especially *The OECD International Compliance Assurance Program (ICAP)* (2021), etc.

Article 15

Cooperation in Digitalization of Tax Administrations and Compliance Risk Management Systems

1. The parties adopt the commitment to promote the digitization of tax administrations within the framework of the new electronic administrations.

2. The parties announce their commitment to take on three simultaneous challenges on the digitization of tax administrations[17]:

    a) To create policies to address new digital business models and financial instruments in a global context.

    b) To adapt administrative processes and procedures to take advantage of promising digital technologies.

    c) To promote the path of big data analytics supplemented by machine learning to get benefits in reducing all forms of noncompliance including fraud, enhancing cybersecurity, secured systems and cooperative compliance.

3. The parties assume the commitment to contribute towards the digitization of tax administrations, with particular emphasis on developing countries, as an instrument to achieve the following goals:

    (a) Increased efficiency and effectiveness in tax collection and management systems with consequent cost savings.
    (b) Streamlining tax systems and procedures and immediacy of tax procedures and actions.
    (c) Reduction tax fraud and tax evasion.
    (d) Increased control with particular emphasis on the control of international tax planning operations and aggressive tax planning.
    (e) Increase in national and international tax cooperation about the exchange of tax information and other forms of tax cooperation.
    (f) Reduction of the tax gap.
    (g) Simplification of tax systems and processes.
    (h) Modernization of tax administrations with the incorporation of new extensive data analysis systems, electronic invoices (implement e-invoicing), or other systems such as the Public Digital Bookkeeping System of Brazil (with electronic

[17] By David Deputy. Director of Strategic Development and Emerging Markets, and Representative to International Organizations such as UN. Vertex Corporation. President, Accounting Blockchain Coalition: "United Nations: global digital economy and disruptive technologies to prevent the tax fraud and the tax noncompliance" in Global Tax Governance (Owens, J. Andrés-Aucejo, E., Nicoli, M, Sen, J., Olesti, A., López, J. Pinto, J. Dirs.).

documents: NF-e; NFS -e; CT-e; NFC-e and MDF-e and some ancillary obligations),[18] design of algorithms and virtual intelligence, blockchain, etc., taking into account the risks of these digitization processes of the Tax Administrations, as well as the protection of the guarantees and rights of taxpayers and other subjects involved.

(i) Reduction of the internal and external risks of the Tax Administrations through the introduction of Tax Risk Management systems for Tax Administrations and compliance risk management processes.
(j) Increased security and cybersecurity in big data and general tax management processes by tax administrations
(k) Increase in Tax Justice (income redistribution, progressive taxation systems, adjustment to the principles of economic capacity, legality, tax equality, non-administrative arbitrariness, etc.).
(l) Increased trust between taxpayers and tax administrations and application of the principles of transparency, proportionality, prudence, legal and administrative certainty in the processing and use of data and the direction of non-discrimination.
(m) In general, improvement of global tax governance.

4. *Protection of the Taxpayers' Rights and guarantees:* The parties agree that protection must be provided to taxpayers, intermediaries, and related parties in the process of digitalization of the administrations, whose rights and guarantees must be incorporated not only in the legislative framework but also collected and respected at the executive and administrative level of application of national and international law for global tax governance.

5. The parties assume to cooperate for exchange and transfer of technology, capacity-building programmes, technical training programs, digital networks, promotion of support through offices, as well as on all kind of mutual assistance for the digitalization of the tax administrations.

6. The parties assume to cooperate on cyber security and cyber intelligence processes of the tax administrations.

7. The parties agree to depth on the application of:

   a. Tax cooperative compliance programs" for taxpayers, intermediaries, and stakeholders in general, in their relations and obligations with the tax administrations (article 14) and,

   b. *Tax risk management processes and/or compliance risk management processes* for the tax administrations to avoid the internal and external tax administrations risks, strengthening the tax compliance systems/models created by international organizations; Tax Administrations, international associations, etc., such as: - OCDE (2004) Compliance Risk Management: managing and improving tax compliance; - EUROPEAN COMMISSION (2006). Risk Management Guide for Tax Administrations. The European Commission's Taxation and Customs Union Directorate General. 1.02, February 2006; - EUROPEAN COMMISSION (EC) (2010). Compliance Risk Management. Guide for Tax Administrations. Fiscalis Risk Management Platform Group; EUROPEAN COMMISSION. THE DIGITAL ECONOMY AND SOCIETY INDEX (DESI). https://ec.europa.eu/digital-single-market/en/desi; - EUROPEAN COMMISSION. (2018). Digital Tax Package, NOVE. https://nove.eu/wpcontent/uloads/2018/03/NOVE-Note-on-Digital-Taxation.pdf ICAEW. (2016); - IOTA. Tax Digitalization: international perspectives. https://www.icaew.com/en/technical/technology/technology-and-the-profession/digitalization of-tax-international-perspectives IOTA's e-book. 2016 - Revised Kyoto Convention; ISO 31000 Risk Management. A complete guid (by G. Blokdyk); HMRC (2007). HMRC Approach to Compliance Risk Management for Large Business. March 2007. [Online]. (URL: http://www.hmrc.gov.uk/lbo/riskupdate.pdf); AUSTRALIAN TAXATION OFFICE (ATO) (2009) Compliance Program 2008-2009. [Online]); - ATO (2021) Practical compliance guideline; - *The OECD International Compliance Assurance Program (ICAP)* (2021),- (2022) Guide to digitalization of revenue authorities, plan of the group on Digitalization and other opportunities to improve tax administration of the International Tax Cooperation Committee of the United Nations (E/c.18/2022/CRP.33), etc.

[18] Monica SCHPALLIR CALIJURI. Lead Sector Specialist in Tax administration at the Inter-American Development Bank (IABD). Former Tax officer at IMF and at Brazilian Tax Administration.

Article 16

Cooperation in Taxation and Gender

1. The parties will promote tax systems recognising and taking on the gender and social equality perspective.

2. The parties intensify their efforts to establish a new social contract based on more equitable and fair bases that contemplate equality in gender discipline.

3. The parties can adopt resolute actions against inequalities, considering gender tax policies as essential performance that can be promoted to reduce social and economic disparities through the inclusion of gender tax policies in government and regional tax policies, in the strategic lines of the Ministries of Finance. and Management of Public Finance.

4. The parties will strengthen and promote the consolidation of tax systems that do not hide gender inequalities, as well as tax systems that correct and remove discriminatory gender tax provisions.

5. The parties will promote actions, programs and performances that encourage more excellent female representation in tax administrations, such as "The woman leaders in tax transparency" Program by the Secretariat of the Global Forum on Transparency and Exchange of information for tax purposes of the OECD (2022), promoting "higher female representation at international events on tax transparency and diverse views across decision-making spheres".[19]

6. The parties will cooperate to make it possible to achieve objective number five (and its goals) of the United Nations 2030 Agenda through multilevel fiscal/tax policies.

[19] (OECD) Building a network of women officials championing tax transparency in their tax administrations. Pilot Programme 2022). (OECD) Tax policy and gender equality. February 2022.

SOME PROCEDURAL ASPECTS

(a) The present *General Agreement on International Tax Cooperation, Trade and Global Tax Cooperation* is an unclosed proposal open to debate and possible following updates.

(b) *Developing*: The most typical way of developing framework treaties or framework agreements in Public International and European Law is through protocols. The protocol is a bindging act with obligatory force (hard law). In this sense, it is proposed that this *Framework Agreement on International Tax Cooperation, Trade and Global Tax Cooperation* can be developed through protocols.[20]

(c) *Regarding the final rules* of the treaties, such as: monitoring commissions, entry into force and other final clauses, it has not been considered necessary to include them, because the present *General Agreement* is a proposal with substantive content (with a preamble and operative part) open to debate. However, if a strong recommendation for a future treaty were successful, it would be included in the agreement treaty text.

(d) *Concerning the form* of this Framework Agreement, the following three alternatives were considered to give it form:

- Multilateral Treaty
- Multilateral Framework Agreement
- Programmatic statement

Perhaps, the possibility of reaching a multilateral treaty would be optimal; however, this could probably generate more reluctance at the time of its approval by the States. For this reason, we favour the formula of a multilateral framework agreement, drafted under the premise of regulating the main bases and general aspects of international tax cooperation, trade and tax governance.[21]

It seems complicated to understand that in the XXI century when so many treaties have been signed worldwide on cooperation in many areas, particularly tax cooperation and tax governance, none have yet been created. This would undoubtedly represent a very advanced first step towards global tax cooperation to get sustainable global targets and goals as we have defended throughout the pages of this framework agreement.

Note 1: We have not considered the need to include definitions of treaty terms because it is a General Agreement and therefore, unnecessary. Instead, we follow the criteria of the expert Professor A. Remiro Brotons (II Preparatory Work. International Congress 2021)[22], whom we really thank for his collaboration.

Note 2: We have not considered the need to divide the text into chapters following the expert criteria of Prof. Franco Roccatagliata (XVIII session of International Tax Cooperation Committee, New York, 2019, 23-26 April and ECOSOC 29 April 2019), whom we really thank for his collaboration.[23]

(e) Iter for the possible approval of this Framework Agreement.

About its elaboration:

1.- *Document made by experts*. For the approval of a Framework Agreement to be possible, probably the best way is to start from a document containing the base project prepared by experts.

Note: This would also prevent what happened with the Third Conference on the Law of the Sea of the United Nations, which, due to the absence of a basic project, took thirteen years to adopt the convention.

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[20] Protocols, in international law are norms of hard law, authentic agreements approved by the parties, which develop specific aspects of the Framework Agreements or the General Agreements. For example, the European Convention on Human Rights was developed by protocols; The General Convention against climate change was developed by protocols (ex. Kyoto, etc.); The convention on Civil and Political Rights also developed the framework agreement through Protocols.

[21] Nowadays, in the phase in which we find ourselves, we do not believe that the clauses of the most favored nation style and others that, however, have been so successful for international trade, are an excellent formula for the codification of international tax cooperation. However, in the future, once we have achieved a general framework, we could think of protocols that include developed clauses with rights, especially obligations, and responsibilities in terms of cooperation, etc. for the parties. Generally, the framework agreements regulate the general bases, while the protocols develop the details and more specific regulations with obligations for the parties.

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2. Its elaboration can be carried out in other different ways too, for example by the *International Law Commission* of the United Nations or, for example, by a decision of the General Assembly, through the *Legal Commission VI* of the United Nations (or on the contrary), and there is the posibility that the General Assembly gets the proposal from States or other members.[24]

However, it is difficult for the International Law Commission to achieve this goal since it is generally limited to legal issues without many specific technical aspects. On the other hand, the initial alternative of the proposal by the General Assembly itself is very complicated (although not impossible).

3. Possibly, the most agile way to carry out the codification and progressive development of international tax cooperation relations in a matter as technical as international taxation, would be by the experts to present a proposal for a Framework Agreement. This would speed up the process extraordinarily. In this way, a base text could already be available for future deliberations, study and approval.

4. Regarding the iter to follow, the following procedure could be considered:

- Presentation of a version of the framework agreement under the Committee on International Tax Cooperation Committee of the United Nations.
- The International Tax Cooperation Committee of the United Nations (the technical experts) could proceed to the study and deliberation and making of proposals, remarks, considerations, etc., to conclude in a Framework Agreement proposal aproved by the members of the United Nations International Tax Committee.
- Elevation of the work proposal to the ECOSOC of the UN.
- Assumed by the 51 members that make up the ECOSOC, it could be elevated to the National Assembly.

5. Once the text is in the seat of the General Assembly of the United Nations, there are different options for the approval of the Treaty:

i) Hold a convention within the General Assembly itself.

ii) A diplomatic conference (Plenipotentiary Conference) is convened to carry out a multilateral agreement.

Probably, in our case, the first route would be more appropriate, that is, through the General Assembly of the United Nations, the route for its negotiation and, where appropriate, adoption and opening for signature by the states, in the seat of the plenary session of the General Assembly.

Furthermore, in the case of projects elaborated by specific organs (political bodies) within the UN, practice shows that they are generally approved by the General Assembly (for example, the protection of human rights elaborated by the CHR), while projects of the IDC are generally presented to the Plenipotentiary Conference, subject to exceptions to this rule.

6. In addition, among the advantages of materializing the codification (negotiation and adoption) within the General Assembly of the United Nations, it is worth mentioning:

- The process is facilitated because the General Assembly has a headquarters, technical and administrative infrastructure
- The application of its Internal Regulations avoids prior debates on the procedure and decision-making method (art. 18 of the Charter).

7. As is known, for the treaty to prosper, it must have the support of at least two thirds of the States (art. 9.2 of the Vienna Convention) or else with a broad consensus.

[24] For example, the global environmental pact was elevated to the General Assembly by the President of the Republic of France Emmanuel Macron.About this matter: BONET PÉREZ, J. The organization of the preparatory work for a Framework Agreement on international cooperation in tax matters: general ideas, Review of International and European Economic Law, n. 1, 2022.

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Review Article

CONSIDERACIONES (CASI) INTEMPESTIVAS SOBRE LA GOBERNANZA FISCAL (In Spanish)

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KEYWORDS:

tax good governance; harmful tax competition; tax compliance; tax cooperation; co-operative compliance; corporate compliance; right to good administration; information exchange; aggressive tax planning; corporate social responsibility.

ABSTRACT:

Following the path of the requirements applicable to corporate governance, the need arose for good fiscal governance, based on increased legal certainty and reciprocal cooperation between tax administrations and citizens.

As a result of this, the comprehensive notion of "fiscal governance" has been completed with other elements, among which corporate social responsibility, co-cooperative compliance in tax matters, the BEPS project, in particular its action 12, which requires disclosing aggressive tax planning mechanisms, and the International Tax Compliance Assurance Programme, which aims to assess the tax risks of large multinational company groups.

In the abstract, all these measures can be considered positive. However, in their specific application, they can generate a taxation requirement that does not comply with the principle of legality, as well as a difficulty in developing an adequate relationship of cooperation between public administrations and citizens, fundamentally due to the excessive scope given to the corporate social responsibility, and the lack of clarity of the concept of aggressive tax planning.

This has already been shown in other countries, and also in Spain, where, in addition, there are other added factors that have a very negative impact on the achievement of good tax governance. Among them, the serious defects of our tax legislation stand out, which is causing a degradation of the concepts and principles that must inform it within the framework of the Rule of Law, and the attitude of the Spanish Tax Administration, occupied, in general, in obtaining of resources more than in tax justice, which does not favor the development of correct collaborative relationships with citizens

PALABRAS CLAVES:

buen gobierno fiscal; competencia fiscal nociva; compliance tributario; cooperación fiscal; cumplimiento cooperativo; cumplimiento corporativo; derecho a una buena administración; intercambio de información; planificación fiscal agresiva; responsabilidad social corporativa

RESUMEN:

Siguiendo la senda de las exigencias aplicables al gobierno corporativo surgió la necesidad de un buen gobierno fiscal, basado en el incremento de la seguridad jurídica y de la cooperación recíproca entre las administraciones tributarias y los ciudadanos.

A raíz de ello, la noción integral de "gobernanza fiscal" se ha completado con otros elementos, entre los que merecen resaltarse la responsabilidad social corporativa, el cumplimiento cooperativo en materia tributaria, el proyecto BEPS, en particular su acción 12, que exige revelar los mecanismos de planificación fiscal agresiva, y el Programa de garantía de cumplimiento tributario internacional, que pretende evaluar los riesgos fiscales de los grandes grupos de empresas multinacionales.

En abstracto, todas estas medidas pueden considerarse positivas. No obstante, en su aplicación concreta, pueden generar una exigencia de tributación no conforme al principio de legalidad, así como una dificultad para desarrollar una adecuada relación de cooperación entre las administraciones públicas y los ciudadanos, debida, fundamentalmente, al excesivo alcance dado a la responsabilidad social empresarial, y a la falta de claridad del concepto de planificación fiscal agresiva.

Así se ha puesto ya de relieve en otros países, y también en España, en donde, además, existen otros factores añadidos que inciden muy negativamente en la consecución de una buena gobernanza fiscal. Entre ellos destacan los graves defectos de nuestra legislación tributaria, que está ocasionando una degradación de los conceptos y principios que tienen que informarla en el marco del Estado de Derecho, y la actitud de la Administración tributaria española, ocupada, en general, en obtener recursos más que en la justicia tributaria, lo que no favorece el adecuado desarrollo de unas relaciones de colaboración con los ciudadanos.

MOTS CLES :

bonne gouvernance fiscale; la concurrence fiscale dommageable ; conformité fiscale; coopération fiscale; conformité coopérative; conformité d'entreprise; droit à une bonne administration; échange d'informations; planification fiscale agressive; responsabilité sociale des entreprises

RESUME :

Dans le sillage des exigences applicables au gouvernement d'entreprise, s'est fait sentir le besoin d'une bonne gouvernance fiscale, fondée sur une sécurité juridique accrue et une coopération réciproque entre les administrations fiscales et les citoyens.

En conséquence, la notion globale de "gouvernance fiscale" a été complétée par d'autres éléments, parmi lesquels la responsabilité sociale des entreprises, la conformité coopérative en matière fiscale, le projet BEPS, en particulier son action 12, qui exige la divulgation des mécanismes de planification fiscale agressive, et l'International Tax Compliance Guarantee Program, qui vise à évaluer les risques fiscaux des grands groupes de sociétés multinationales.

Dans l'abstrait, toutes ces mesures peuvent être considérées comme positives. Cependant, dans leur application spécifique, ils peuvent générer une exigence fiscale non conforme au principe de légalité, ainsi qu'une difficulté à développer une relation de coopération adéquate entre les administrations publiques et les citoyens, essentiellement en raison de la portée excessive accordée à la la responsabilité sociale des entreprises et le manque de clarté du concept de planification fiscale agressive.

Cela a déjà été mis en évidence dans d'autres pays, ainsi qu'en Espagne, où s'ajoutent d'autres facteurs qui ont un impact très négatif sur la réalisation d'une bonne gouvernance fiscale. Parmi eux, les graves défauts de notre législation fiscale se distinguent, ce qui entraîne une dégradation des concepts et des principes qui doivent l'informer dans le cadre de l'État de droit, et l'attitude de l'administration fiscale espagnole, occupée, en général, dans l'obtention de ressources plus que dans la justice fiscale, ce qui ne favorise pas le bon développement de relations de collaboration avec les citoyens.

CONTENTS:

1 EL BUEN GOBIERNO FISCAL COMO TRASUNTO O REMEDO DEL GOBIERNO CORPORATIVO

Como han señalado Canelo Álvarez y Cubillo Pérez de Ayala (2020, p.91), desde hace unas décadas las instituciones financieras y los gobiernos, así como las empresas o personas que desean invertir, tienen en consideración si se cumplen las directrices y normas del buen gobierno en las organizaciones, siendo en este contexto en el que comenzaron a surgir ciertas recomendaciones, pautas y normas encaminadas a fomentar y regular el buen gobierno de las sociedades.

A este respecto, en el plano internacional son destacables las aportaciones de diversos actores que se embarcaron en la importante tarea de desarrollar unas bases de gobernanza con carácter global.

Así, la OCDE[1] agrupó los principales puntos en común del gobierno corporativo en sus países miembros y publicó en el año 1999 los "Principios de Gobierno Corporativo de la OCDE", cuya finalidad fue la de constituir un referente internacional para legisladores, inversores y otros actores interesados en este proceso[2].

1 Como ha indicado CARBAJO VASCO "El Informe BEPS y el nuevo paradigma de la fiscalidad internacional", *Carta Tributaria-Monografías*, núm. 5, 2014, Ed. CISS, que cito por LA LEY 2606/2014, pág. 3, la OCDE ha desbancado a potenciales competidores en la materia fiscal internacional; como, por ejemplo, a la ONU, como demuestra el abandono casi generalizado de los países iberoamericanos del modelo de Convenio de Doble Imposición sobre la Renta y el Patrimonio (en adelante, CDI), modelo ONU, como estrategia negociadora en sus Convenios de Doble Imposición Internacional, frente al modelo de CDI propugnado por la OCDE, siendo igualmente relevante que esta última haya sido propuesta por el G–20 desde el inicio de la crisis sistémica como el órgano de apoyo técnico y el impulsor de sus medidas para luchar contra la evasión fiscal internacional y los territorios y jurisdicciones no cooperativas. Todo esto ha conllevado que la OCDE se haya convertido en la creadora e impulsora de un Derecho Internacional Tributario que, si bien basado en el consenso y el desarrollo de medidas de *"soft law"* (recomendaciones, declaraciones, sistemas de revisión o *"peer review"*, etc.) han ido creando una red de acuerdos internacionales en materia fiscal y de expansión de instrumentos y modelos jurídicos que suponen la clave de bóveda de mencionado Derecho Internacional Tributario. Esto no supone, como ha resaltado este mismo autor, ob. cit, pág. 4 y sigs. que la UE no esté jugando también un papel sobre estas cuestiones, pero su alcance es, desde luego, menor y más limitado, toda vez que la misma es una institución *"europea"* y la problemática de la gobernanza fiscal es internacional, por lo que la solución de ella tiene que ser también de la misma naturaleza, esto es, debe desenvolverse en un plano mundial, en el cual se maneja mucho mejor, dado su ámbito de actuación la OCDE.

2 Como ha escrito HERRERA MOLINA "Gobernanza fiscal: de las empresas a la Administración", en *Gobernanza fiscal: una aproximación equilibrada*, ob. cit., pág. 28 la noción de buen gobierno se desarrolló primero en el ámbito de las ciencias empresariales (*corporate governance*) y después en la ciencia política (*public governance*), en el acertado entendimiento de que es necesario implantar mecanismos de vigilancia dirigidos a controlar las desviaciones del interés público que los gobernantes y la burocracia puedan llegar a cometer, tal y como se resaltó con claridad tanto por la OCDE: *Governance in Transition. Public Management reforms in OECD Countries*, Paris, 1995, pág. 48, como por la Unión Europea: *La Gobernanza Europea. Un libro blanco*, Bruselas, 25.7.2001 COM (2001) 428 final --cuyo texto ha sido analizado por CANDELA CASTILLO "La buena gobernanza comprendida como integración de los principios de legitimidad, eficacia y justicia. (Especial referencia a la Unión Europea)", *Revista Española de Derecho Europeo*, núm. 14, 2005, que cito por Thomson Reuters Aranzadi Insignis BIB 2005\1087, pág. 2 y sigs., quien pone de relieve que los distintos elementos que integran la noción de gobernanza adoptada por la Comisión europea son la participación, la apertura, la responsabilidad, la coherencia y la eficacia, siendo la aplicación de estos cinco principios la que refuerza los de proporcionalidad y subsidiariedad--, y por la ONU: Resolución 671/1, aprobada por la Asamblea General el 24 de septiembre de 2012 (Declaración de la reunión de alto nivel de la Asamblea General sobre el Estado de Derecho en los planos nacional e internacional, aptdos. 12, 16, 35 y 36. En esta línea, CASTILLO BLANCO "Garantías del derecho ciudadano al buen gobierno y a la buena Administración", *Civitas, Revista española de Derecho Administrativo*, núm. 172, 2015, que cito por Thomson Reuters Aranzadi Insignis BIB 2015\4386, pág. 18, ha indicado que el "buen gobierno" es algo más que un nuevo conjunto de instrumentos de gestión como, en su momento, propuso el *management*, pues también consiste el alcanzar una mayor eficiencia en la producción de servicios públicos, reduciendo su coste; y, como es

Posteriormente, luego de efectuarse un amplio análisis de la forma en la que los distintos países miembros de la OCDE habían afrontado los desafíos que se les habían planteado en materia de gobierno corporativo, se realizó una profunda reformulación de estos principios en el año 2004, incluyéndose ya en esta revisión referencias a la gobernanza fiscal en lo que atañe a la responsabilidad de los administradores de las sociedades, al ser éstos los máximos responsables de la estrategia fiscal de las sociedades cotizadas como bien apuntó en su momento Gascón Catalán (2014, p.22), quien añadió que las sociedades con obligación de ser auditadas y, en especial, aquellas que no cumplen las condiciones para ser consideradas PYMES a nivel europeo, así como las que tienen que cumplir obligaciones específicas de prevención del blanqueo de capitales, tienen que asumir como buena práctica la aprobación expresa por su consejo de administración u órgano equivalente de su estrategia fiscal.

Una buena muestra de las prácticas adoptadas en España en esta línea vienen representadas por el "Informe sobre el gobierno de las sociedades cotizadas", publicado con fecha 26 de febrero de 1998, tras la convocatoria por parte del Gobierno de una Comisión Especial para el Estudio de un Código Ético de los consejos de administración de las sociedades, conocido como Informe OLIVENCIA, posteriormente complementado por el "Informe para la Comisión Especial para el fomento de la transparencia y seguridad en los mercados y en las Sociedades cotizadas", Informe ALDAMA, publicado el 8 de enero de 2003, y, tras la encomienda el 29 de julio de 2005, del Consejo de Ministros a la Comisión Nacional del Mercado de Valores para armonizar y actualizar las recomendaciones sobre gobierno corporativo contenidas en los Informes Aldama y Olivencia, por el "Código Unificado de Buen Gobierno de las Sociedades Cotizadas", también conocido como Código CONTHE, actualizado parcialmente en junio de 2013, aprobándose finalmente, en febrero de 2015, un nuevo "Código de Buen Gobierno de las Sociedades Cotizadas", elaborado con el apoyo y asesoramiento de una comisión de expertos en materia de gobierno corporativo, convocada para prestar apoyo y asesoramiento a la Comisión Nacional del Mercado de Valores[3].

Todo ello terminó cristalizando normativamente tras la aprobación de la Ley 31/2014, de 3 de diciembre, por la que se modificó la Ley de Sociedades de Capital para la mejora del gobierno corporativo, en la que se incluyó el riesgo tributario como un componente más del sistema de gestión del riesgo en las sociedades de capital, medida que, como ha escrito García-Herrera Blanco (2017, p.20), supuso un ascenso de la función fiscal al más alto nivel de la compañía, pasando a convertirse la fiscalidad de la empresa en un asunto clave que el consejo de administración ha de tomar en consideración, al tratarse de uno de los temas relevantes de la gestión de una sociedad[4].

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obvio, se refiere también a aspectos que conciernen a la ética pública, el denominado gobierno abierto y la transparencia que son finalmente los que lo singularizan. Acerca de las interrelaciones entre ambas nociones de gobernanza véase también GARCÍA-HERRERA BLANCO "Buen gobierno fiscal y cumplimiento cooperativo con las grandes compañías", *Revista Quincena Fiscal*, núm. 1, 2017, que cito por Thomson Reuters Aranzadi Insignis BIB 2016\86013, pág. 2 y sigs., quien señala, sin embargo, que ambos aspectos empiezan a contemplarse como pertenecientes al mismo ámbito jurídico, con una relación de género y especie.

3 Véase acerca del contenido y alcance de estos documentos CASTRO DE LUNA *Hacia un nuevo modelo de relación con la Administración tributaria*, Thomson Reuters Aranzadi, Cizur Menor, Navarra, 2020, pág. 143 y sigs.

4 Véanse sobre las consecuencias que la promulgación de esta Ley 31/2014 supuso las consideraciones de GASCÓN CATALÁN "Estrategias fiscales y marcos de control interno y de gestión de riesgos fiscales en las sociedades cotizadas. Impacto de la Ley 31/2014", *Crónica Tributaria*, núm. 155, 2015, pág. 87 y sigs.; de NASTRI, ROZAS VALDÉS y SONETTI "La dimensión fiscal en la gobernanza corporativa: entre Italia y España", *Crónica Tributaria*, núm. 166, 2018, pág. 193 y sigs.; de CASTRO DE LUNA *Hacia un nuevo modelo de relación con la Administración tributaria*, ob. cit., pág. 149 y sigs.; de BARRENECHEA ELORRIETA, GONZÁLEZ FERNÁNDEZ-MELLADO y GONZÁLEZ DE LUIS "La transparencia como exigencia de "buen gobierno". Definición y alcance de la transparencia para el contribuyente y para la Administración. La reputación ligada al cumplimiento tributario y a la transparencia", en *Gobernanza fiscal: una aproximación equilibrada*, ob. cit., pág. 208 y sigs., y de BERTRÁN ROCABERT, COTS MIR y DÍEZ NÚÑEZ "La respuesta de la empresa en términos de estructura de adopción de decisiones y procesos de "cumplimiento". La función de gestión y control del riesgo tributario en cada organización", en *Gobernanza fiscal: una aproximación equilibrada*, ob. cit., pág. 303 y sigs.

Los ya mencionados "Principios de Gobierno Corporativo de la OCDE" ya bajo la denominación "Principios de Gobierno Corporativo de la OCDE y del G20", fueron de nuevo revisados en el año 2016 para adaptarlos, como ha escrito Castro de Luna (2020, p.140), a los cambios en los sectores empresarial y financiero, bajo la premisa de que la finalidad del gobierno corporativo no es sino la de crear un clima de confianza y transparencia en el ámbito empresarial, tendente a favorecer la realización de inversiones a largo plazo, la estabilidad financiera, la credibilidad de los datos empresariales y la integridad en los negocios, fines todos ellos con los que es intentó reflejar la prioridad que los líderes del G-20 querían otorgar a la gobernanza corporativa en la agenda internacional, dado que la defendían como elemento fundamental en la generación del crecimiento y del desarrollo.

Para ello, como han resaltado Canelo Álvarez y Cubillo Pérez de Ayala (2020, pp. 97-98), se realzó el papel esencial de este marco del gobierno corporativo, y se defendió la absoluta necesidad de defender la transparencia y cooperación transfronteriza mediante sistemas bilaterales y multilaterales de intercambio de información, el establecimiento de un régimen sancionador ante posibles incumplimientos, y el diseño de un reparto claro de responsabilidad entre las distintas autoridades concernidas.

En paralelo a estos principios, el Comité de Asuntos Fiscales de la OCDE tuteló la creación, en 2002, del "*Forum on Tax Administration,* "Foro sobre la Administración Tributaria"[5], integrado por altos cargos representantes de las Administraciones tributarias de los países participantes, con la finalidad de intercambiar experiencias y de compartir información que permitan la adopción de una serie de prácticas comunes, y de desarrollar mecanismos para mejorar el funcionamiento de las Administraciones Tributarias, en aquellas cuestiones más conflictivas en materia de fiscalidad internacional.

Dicho "Foro sobre la Administración Tributaria" fue el que sirvió de modelo para la implantación en España del "Foro de Grandes Empresas", que se constituyó el 10 de julio de 2009 al amparo de lo previsto en el Plan de prevención del fraude fiscal de 19 de noviembre del 2008, como órgano de relación cooperativa entre la AEAT y veintisiete grandes empresas españolas previamente seleccionadas para "promover una mayor colaboración entre las grandes empresas y la Administración Tributaria del Estado, basada en los principios de transparencia y confianza mutua, a través del conocimiento y puesta en común de los problemas que puedan plantearse en la aplicación del sistema tributario", siendo uno de los grupos de trabajo integrados en este Foro el que elaboró, en 2010, un "Código de Buenas Prácticas Tributarias"[6] –que según su propio preámbulo "contiene recomendaciones, voluntariamente asumidas por la Administración Tributaria y las empresas, tendentes a mejorar la aplicación de nuestro sistema tributario a través del incremento de la seguridad jurídica, la cooperación recíproca basada en la buena fe y confianza legítima entre la Agencia Tributaria y las propias empresas, y la aplicación de políticas fiscales responsables en las empresas con conocimiento del Consejo de Administración"--, al que pudieron adherirse todas las empresas que lo deseasen, con independencia de que participasen, o no, en referido "Foro de Grandes Empresas" o de su tamaño.

5 Complementado con el denominado "Foro Global" "Global Forum on Transparency and Exchange of Information", que, como ha señalado CARBAJO VASCO "El futuro de BEPS: ¿aplicación uniforme, fragmentación o BEPS II?", Crónica tributaria, núm. 162/2017, pág. 12, tiene como meta introducir la transparencia y la buena gobernanza en materia fiscal en el mundo, a través de un complejo proceso de peer review y la expansión del intercambio de información tributaria.

6 Véase el análisis que efectúan sobre el contenido y alcance de este Código SANZ GÓMEZ "Hacia la relación cooperativa en España: el nuevo Código de Buenas Prácticas Tributarias a la luz de los estudios de la OCDE", *Revista Técnica Tributaria*, núm. 93, 2011, pág. 61 y sigs., y GARCÍA VALERA y RODRÍGUEZ PRIETO "Situación actual de la relación cooperativa en España y en países de nuestro entorno", en *Gobernanza fiscal: una aproximación equilibrada*, ob. cit., pág. 352 y sigs.

Como ha indicado Castro de Luna (2020, pp. 151-ss), para verificar en la actualidad el cumplimiento o no de las medidas incluidas en este Código se analizan las exigencias que se establecieron en la ya antes citada Ley 31/2014, de 3 de diciembre, por la que se modificó la Ley de Sociedades de Capital para la mejora del gobierno corporativo, extendiéndose dichas exigencias ya no solo a las sociedades cotizadas, sino también a las no cotizadas[7].

No son éstas las únicas medidas adoptadas, toda vez que, como bien ha puesto de manifiesto Herrera Molina (2020, p. 28), la noción integral de "gobernanza fiscal" es el resultado de un proceso de aluvión en el que han confluido otros factores además del concepto de buen gobierno, factores entre los que cabe citar la responsabilidad social corporativa (RSC o *corporate social responsibility*), el cumplimiento cooperativo en materia tributaria (*co-operative compliance*), el proyecto BEPS, en especial la acción 12, relativa al *disclosure of aggressive tax planning*, y el denominado cumplimiento corporativo en materia tributaria *(corporate compliance),* plasmado en España en la norma UNE 19602.

2 LA RESPONSABILIDAD SOCIAL CORPORATIVA

La RSC, que como han escrito Sanz Gómez (2011, p. 60) y Sánchez Huete (2010, p.5; 2017, p. 72), supone un compromiso de las empresas con la sociedad más allá del marco jurídico que regula su actividad, puede definirse, siguiendo a Davis (1973, p. 312), como "la obligación de una empresa de evaluar en su proceso de decisión los efectos de sus acuerdos sobre el sistema social externo del modo de lograr beneficios sociales además de las ganancias económicas tradicionales buscadas".

Esto implica, en palabras de Castro de Luna (2020, p. 138), dar entrada a la idea de que "las empresas no deben tener como único objetivo la maximización de sus beneficios, sino que, como agentes sociales que son, que se benefician de servicios públicos tales como la educación de sus trabajadores, la salud de los mismos, las mejoras de los medios de comunicación, … han de revertir a la sociedad parte de sus beneficios, potenciando o desechando, las actividades queridas o perniciosas para la sociedad, respectivamente".

Así se puso de relieve en el Pacto Mundial de Naciones Unidas sobre responsabilidad social de las empresas, de 26 de julio de 2000, adoptado en el marco del Foro Económico Mundial celebrado en Davos (Suiza) el 31 de enero de 1999, y en el Libro Verde de la Comisión Europea "Fomentar un marco europeo para la responsabilidad social de las empresas", de 18 de julio de 2001 [Bruselas 18/7/2001, COM (2001) 366 final] en el que se manifestó que la RSC es "la integración voluntaria de estas, de las preocupaciones sociales y medioambientales en sus operaciones comerciales y sus relaciones con sus interlocutores. Ser socialmente responsable no significa solamente cumplir plenamente las obligaciones jurídicas, sino también ir más allá de su cumplimiento, invirtiendo más en el capital humano, el entorno y las relaciones con los interlocutores"[8].

Todo esto está bien a nivel abstracto; pero constituye, a mi juicio, una muestra inequívoca del "buenismo" imperante, por desgracia, en la sociedad actual, ya que, como

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7 En cumplimiento de lo previsto en el epígrafe 1.2 de la actualización del Plan de Prevención del Fraude Fiscal de 2008 ("Nuevo marco de relación con los intermediarios fiscales"), se creó también, con una estructura similar al del citado "Foro de Grandes Empresas" como bien apuntó SANZ GÓMEZ "Entre el palo y la zanahoria: la comunicación obligatoria de esquemas de planificación fiscal agresiva y su interacción con las iniciativas de cumplimiento cooperativo", *Crónica Tributaria: Boletín de Actualidad*, 1/2016, pág. 49, el "Foro de Asociaciones y Colegios de Profesionales Tributarios", que en el pleno celebrado el 2 de julio de 2019 aprobó los Códigos de Buenas Prácticas de Asociaciones y Colegios Profesionales Tributarios, y de Buenas Prácticas de Profesionales Tributarios.

8 Como ha escrito GASCÓN CATALÁN "Estrategias fiscales y marcos de control interno y de gestión de riesgos fiscales en las sociedades cotizadas. Impacto de la Ley 31/2014", ob. cit., pág. 90, nota 5, según el Observatorio de RSC (organización sin ánimo de lucro que nace en el año 2004 de la mano de varias organizaciones de la sociedad civil con el objetivo de trabajar en el impulso de la correcta aplicación de la RSC), la responsabilidad social corporativa es una forma de dirigir las empresas basada en la gestión de los impactos que su actividad genera sobre sus clientes, empleados, accionistas, comunidades locales, medioambiente y sobre la sociedad en general.

acertadamente han puesto de manifiesto Galindo Jiménez y Matas Espejo (2020, p.408), el principio de legalidad debe considerarse la base del cumplimiento tributario, y el mismo también constituye su delimitación, en el sentido de que no se puede pedir a las empresas ir más allá del cumplimiento de las normas. Es decir, a los contribuyentes no se les puede pedir nada más, y tampoco nada menos, que el cumplimiento de las leyes tributarias[9].

3 EL CUMPLIMIENTO COOPERATIVO

A través del cumplimiento cooperativo (*co-operative compliance*) se busca crear, como apunta Herrera Molina (2020, p. 32), una relación de confianza mutua entre las empresas, en particular las de mayor tamaño, y la Administración tributaria, con un intercambio anticipado de información y criterios por una y otra parte, aspecto que ya había sido resaltado por Sanz Clavijo (2015, pp. 2-3) cuando señaló que la relación cooperativa es concebida como un nuevo modelo de relación entre la Administración Tributaria y ciertos obligados —las grandes empresas— basado en la colaboración y en la confianza entre ambas partes, de forma que si éstas son transparentes y comunican recíproca y reactivamente la información relevante, lograrán una mayor seguridad jurídica en la aplicación del sistema tributario, con la obtención de respectivas ventajas para las mismas.

Así se han pronunciado también, entre otros autores, Gascón Catalán (2015, p. 106), quien ha escrito que "las ventajas del cumplimiento cooperativo son evidentes: una mejor relación entre las grandes empresas y la Administración tributaria, una gestión del riesgo más eficaz por ambas partes, el refuerzo de la seguridad jurídica, la solución rápida de las incertidumbres que surjan y la posibilidad de identificar problemas normativos o de aplicación"; Rozas Valdés (2016, p. 8), quien ha señalado que en los "foros tributarios internacionales, y en algunas Administraciones tributarias, se lleva trabajando de plano, desde hace unos años, en el desarrollo de nuevos modelos de configuración de los sistemas tributarios, de organización administrativa y de gestión de las relaciones con los contribuyentes basados en la premisa de que el llamado "poder financiero" ya no es tanto poder y que, para conservar su identidad, es preciso reformularlo en términos cooperativos"; García-Herrera Blanco (2017, p. 16), quien ha señalado que "gracias a la existencia de un adecuado y buen marco de control fiscal, la Administración tributaria podrá «confiar» en el contribuyente, aspecto clave de la relación cooperativa. Dicho en otros términos, dicho marco es el fundamento de la confianza y buena fe de la Administración tributaria hacia las empresas. Ese marco de control fiscal fiable es también la razón que justifica que las comprobaciones e inspecciones a dicha sociedad por parte de la Administración sean de mucha menor intensidad, otro de los principales beneficios que las empresas pueden recibir de esta relación cooperativa, que deja de ser intrusiva al modo tradicional. Por otra parte, en beneficio de las Administraciones cabe citar una mejor gestión de sus recursos", y Sanz Gómez (2016, p. 210), quien ha escrito que con este sistema la Administración tributaria

9 Indica a este respecto NOCETE CORREA "¿Es posible una planificación fiscal lícita y socialmente responsable en la UE?. (Acerca del concepto europeo de planificación fiscal agresiva)", *Revista Quincena Fiscal*, núm. 5, 2016, que cito por Thomson Reuters Aranzadi Insignis BIB 2016\810, pág. 34, que la mera obtención de un ahorro fiscal derivado de la pluralidad de normativas tributarias existente en los Estados no implica su carácter antijurídico; y SÁNCHEZ HUETE "La planificación potencialmente agresiva y el nuevo deber informativo de los intermediarios", en *Revista Quincena Fiscal*, núm. 12, 2020, que cito por Thomson Reuters Aranzadi Insignis BIB 2020\33413, luego de señalar, pág. 5, que a nadie se le puede exigir tributar de acuerdo con un deber ético no normativizado, añade gráficamente, pág. 9, que "En un Estado de Derecho, en donde la ley ha de pautar los comportamientos, no resulta admisible ni la objeción fiscal por parte del contribuyente ni el fundamentalismo fiscal por parte de los Estados exigiendo comportamientos tributarios más allá de los imperativamente fijados", criterio que ya había mantenido este autor en su precedente trabajo "Hacia una planificación fiscal socialmente responsable. La planificación ultrafiscal", ob. cit., pág. 24, cuando indicó que si bien sería admisible que, desde la perspectiva ética, fuera exigible una mayor tributación que la legal, tal exigencia es ética, que no jurídica; y los poderes públicos tampoco pueden exigir aquello que está más allá de la ley, ya que esto sería una intromisión intolerable en la esfera de la libertad individual. En esta misma línea GARCÍA NOVOA "Una nueva fiscalidad nada lampedusiana. Algo está cambiando y ya nada será igual", *Taxlandia, Blog fiscal y de opinión tributaria*, 28 de enero de 2020, www.politicafiscal.es, págs. 1 y 2, ha escrito con acierto que este proceder ha supuesto la introducción de un inaudito componente moral, impropio de un sector del derecho tan condicionado por la legalidad.

busca el acceso a información tributaria relevante, y las empresas que se adhieren a este tipo de programas esperan cinco compromisos de la Administración: comprensión basada en conocimientos del mundo de la empresa, imparcialidad, proporcionalidad, apertura/transparencia, y agilidad, precisando, en máxima síntesis, que toda experiencia de cumplimiento cooperativo implica un intercambio de transparencia (proporcionada por las empresas) por seguridad jurídica (que proporciona la Administración), palabras que recuerdan a las que se emplearon en el Informe de la OCDE *Co-operative Compliance: A Framework-From Enhanced Relationship to Co-operative Compliance*, de 2013, en el que se indicó que la relación cooperativa supone la transparencia a cambio de la certeza[10].

4 EL PROYECTO BEPS. ESPECIAL CONSIDERACIÓN DE LA OBLIGACIÓN DE REVELAR LOS MECANISMOS DE PLANIFICACIÓN FISCAL AGRESIVA

El proyecto BEPS[11], liderado por la OCDE, y apoyado por el G-20 y la UE, para combatir la erosión de bases imponibles y el traslado de beneficios, tuvo como objetivo fundamental el de redefinir el sistema tributario internacional, con la voluntad, como han puesto de relieve Canelo Álvarez y Cubillo Pérez De Ayala (2020, p. 113), de que las empresas, y en concreto, las multinacionales, contribuyesen de una forma justa al mantenimiento de los gastos públicos.

Como ha señalado Patón García (2016. p. 2), los distintos niveles impositivos y los beneficios fiscales reconocidos en las legislaciones fiscales de los Estados permiten un margen de maniobra para los contribuyentes que intentan aprovecharse de ello valiéndose en algunos casos de legítimas economías de opción; pero en otros muchos de estructuras o construcciones jurídicas de planificación fiscal agresiva, fundadas en comportamientos artificiosos difícilmente conciliables con la justicia tributaria. Por ello, como esta autora indica más adelante (p. 8), uno de los grandes retos que plantea BEPS es el incremento de la legitimidad de la imposición de las empresas multinacionales en mayor medida en los países donde se crea el valor y la exigencia del gravamen de las empresas en correspondencia con ello.

En esta misma línea, Lampreave Márquez (2016, p. 3), ha escrito, tras poner de relieve que la competencia fiscal lesiva está constituida por los comportamientos inamistosos o ilícitos por parte de ciertos Estados, en perjuicio de los intereses fiscales de otros, que el proyecto BEPS surgió con el propósito de cambiar las reglas de juego que había permitido durante décadas a las multinacionales el poder trasladar artificialmente los beneficios imponibles de la jurisdicción fuente a otra de mejor tributación; Barreno, M et al. (2016, p. 8), han señalado que la planificación fiscal internacional agresiva de las grandes multinacionales se apoya en distintos elementos, como la utilización de mecanismos

10 En esta línea, NASTRI, ROZAS VALDÉS y SONETTI "La dimensión fiscal en la gobernanza corporativa: entre Italia y España", ob. cit., pág. 192, manifiestan que la política fiscal organizativa (*co-operative compliance*) está presidida por el propósito de dar forma a un nuevo modelo de relaciones entre las Administraciones tributarias y los contribuyentes, fundamentalmente a través de los representantes de estos últimos, construido no sobre las premisas de la confrontación conflictiva de intereses sino sobre la base de una razonable confianza recíproca; y ello con el objetivo de prevenir, minimizar y resolver de forma eficiente y equilibrada las eventuales controversias que entre ambas partes se puedan ir suscitando; de conseguir sistemas tributarios más predecibles en sus consecuencias, y más eficaces en su aplicación, construidos sobre la base de un nivel generalizado de cumplimiento espontáneo aceptable en sus resultados. Véase también, en similares términos, SÁNCHEZ LÓPEZ "Seguridad jurídica y producción normativa en materia tributaria. Incidencia sobre el cumplimiento cooperativo", *Crónica Tributaria*, núm. 175, 2020, pág. 189, y MARTÍNEZ MUÑOZ "C*ompliance* fiscal y responsabilidad por ilícitos tributarios", *Crónica Tributaria*, núm. 179, 2021, pág. 41.

11 *OECD, Action Plan on Base Erosion and Profit Shifting*, OECD Publishing, Paris, 2013. Como ha escrito CARBAJO VASCO "El Informe BEPS y el nuevo paradigma de la fiscalidad internacional", ob. cit., pág. 6, sorprende en este documento, frente al tono melifluo y contenido de muchos documentos anteriores de la propia OCDE en materias similares (como, por ejemplo, sus trabajos en materia de "competencia fiscal dañina", "harmful tax competition"), su carácter directo y su lenguaje franco y contundente: la erosión fiscal de las bases imponibles (las siglas BE del acrónimo) y el establecimiento planificado y querido de sus beneficios en territorios de baja tributación por parte de las empresas multinacionales (las siglas PS del acrónimo), con el importante problema, agravado por la globalización económica, que ello conlleva para los sistemas tributarios de los países miembros de todo el mundo.

híbridos, la existencia de reglas de transparencia fiscal internacional débiles, deducciones abusivas de gastos financieros y otros tipos de pagos equivalentes, las llamadas «prácticas fiscales perniciosas», la utilización indebida de los convenios para evitar la doble imposición, la evitación artificial de la condición de establecimiento permanente, o la utilización artificiosa de las reglas de precios de transferencia; todo ello además agravado por la complejidad adicional que introduce el desarrollo de la actividad económica en el contexto de la llamada «economía digital»; y Lago Montero, JM (2021 p. 119), ha indicado que la planificación fiscal agresiva, además de agujerear la recaudación, privilegia a las multinacionales, que compiten deslealmente con las empresas que no lo son[12].

No obstante, no es justo atribuir en exclusiva a las empresas multinacionales todos estos males. Ciertamente ellas han contribuido en gran medida a que esta situación se haya producido; pero tampoco debemos olvidarnos, como ha escrito Carbajo Vasco (2015, pp. 50-51 y 61), que asimismo han coadyuvado a ello las propias Administraciones tributarias nacionales, que no sólo han sido incapaces de articular autónomamente una reacción coordinada ante este problema, sino que han contribuido al mismo con sus políticas fiscales erráticas, descoordinadas y, en particular, por permitir, y alentar, el ejercicio de una competencia fiscal nociva, *harmful tax competition*, tendente a atraer hacia sus territorios las actividades económicas de dichas empresas, mediante la conocida política *race to the bottom*; y ello, sin hablar de la proliferación de Estados y jurisdicciones de diferente categoría que se han aprovechado conscientemente de esta ausencia de reglas de competencia fiscal ordenada, actuando como *free riders* en la esfera internacional, buscando atraer rentas, inversiones y transacciones de residentes en otros Estados, ofreciendo regímenes fiscales opacos y de nula transparencia[13].

Hay que indicar, además, como bien señaló en su momento Pérez de Ayala (2006, p. 6), refiriéndose a las economías de opción, que LARRAZ, autor nuclear y esencial sobre el alcance y contenido de este concepto, ya puso de relieve en su momento, con acierto, que el ahorro fiscal, por sí mismo, no va contra el espíritu de la ley tributaria, porque ésta última no impone que el administrado deba elegir el comportamiento más caro fiscalmente, ni prohíbe que opte por el más barato, en el caso de que ambos comportamientos sean, como

12 Este proceder ya había sido oportunamente criticado por BARCIELA PÉREZ "La implementación del Plan de Acción BEPS en la UE", *Carta Tributaria. Revista de Opinión*, núm. 32, 2017, que cito por LA LEY 14337/2017, pág. 2, cuando afirmó que las empresas que operan en mercados internos (generalmente empresas pequeñas y medianas), tienen dificultades a la hora de competir con las multinacionales, pues carecen de los recursos que éstas tienen para trasladar sus beneficios más allá de sus fronteras para eludir o reducir sus impuestos, viéndose con ello perjudicada la competencia por las distorsiones inducidas por la erosión de la base imponible y el traslado de beneficios.

13 Insiste en esta idea este mismo autor en sus posteriores trabajos "Reflexiones, ciertamente escépticas, acerca del post-BEPS", en *IV Encuentro de Derecho financiero y tributario* (3ª parte), VV.AA., Coordinadora: GARCÍA-HERRERA BLANCO, C., Documento de Trabajo del Instituto de Estudios Fiscales, núm. 15, 2016, pág. 37; "Algunas reflexiones sobre la era post-BEPS", *Revista de Fiscalidad Internacional y Negocios Transnacionales*, núm. 2, 2016, que cito por Thomson Reuters Aranzadi Insignis BIB 2016\2716, pág. 21, y "La lucha contra la planificación fiscal agresiva y las obligaciones de información tributaria", *Crónica Tributaria*, núm. 158, 2016, págs. 120 y 121. Similares consideraciones pueden encontrarse en el trabajo de GUERVÓS MAÍLLO "Buenas prácticas y transparencia fiscal", *Revista Quincena Fiscal*, núm. 22, 2020, que cito por Thomson Reuters Aranzadi Insignis BIB 2020\37475, págs. 5 y sigs., cuando se refiere a las reformas fiscales realizadas por los Estados que incentivan la atracción de mayores flujos de inversión extranjera a través de sistemas tributarios caracterizados por promover bajos o nulos niveles de gravamen a la renta societaria, por establecer regímenes impositivos preferenciales y por otorgar beneficios fiscales a la inversión o a sus actividades afines, contribuyendo de esta forma a otorgar un trato fiscal preferencial para disminuir los costes de producción y aumentar la rentabilidad de las empresas, buscándose con ello hacer atractivo y competitivo a un país frente a los demás para llevar a cabo las actividades de la cadena de valor global. Así lo apunta también SÁNCHEZ ARCHIDONA HIDALGO "La delimitación conceptual de la «erosión» de las bases imponibles: un problema internacional", *Nueva Fiscalidad*, núm. 2, 2017, pág. 154 y sigs., si bien este autor se centra sobre todo en la conducta de los Estados, que, a su juicio, "se han preocupado en exceso por la atracción de flujos de capital e inversión extranjera directa, sin valorar las consecuencias económicas para el resto de Estados, ya que en muchas ocasiones incurren en prácticas de competencia fiscal perjudicial", exculpando a las Administraciones tributarias, sobre todo por la carencia de medios económicos de las que las mismas han podido disponer desde 2008 en los países occidentales, lo que ha propiciado una significativa reducción de los instrumentos a su disposición para luchar contra el fraude fiscal, pág. 156.

se ha dicho, opciones negociales lícitas, según el Derecho privado[14]. Esta configuración, que comparto plenamente, ha quedado, sin embargo, preterida en gran medida por obra y gracia de la OCDE, por medio de la utilización que la misma hace de un concepto como el de planificación fiscal agresiva que, como bien ha escrito García Novoa (28 de enero 2020, pp.1-2), no es jurídico sino político, y que, como ya puso de relieve este mismo autor (31 de diciembre de 2018, p. 2), ha laminado nuestra tradicional tríada conceptual evasión-elusión-planificación fiscal lícita, lo que, a mi juicio, es reprobable.

Especialmente relevante a los efectos que se vienen considerando es la acción 12ª de BEPS, cuyo informe se aprobó en octubre de 2015, encaminada a establecer la exigencia de que los contribuyentes revelen sus mecanismos de planificación fiscal agresiva (*mandatory disclosure rules for aggressive tax planning schemes*), asunto para cuyo desarrollo se partió de la importante base del Informe de la OCDE de 2011 sobre *"Tackling Aggressive Tax Planning through Improved Transparency and Disclosure",* en el que, como han apuntado Martín Jiménez, A y Calderón Carrero, JM (2014, p. 17) y García Novoa (2015, p.75), se habían analizado las experiencias existentes al respecto en determinados países: EE.UU. y Reino Unido, fundamentalmente, con sus regímenes de *"Tax shelters disclosure"* y de *"Disclosure of tax avoidance schemes"* o DOTAS, respectivamente.

Como ha escrito Patón García (2016, p. 5), el Plan de acción de BEPS contiene 15 acciones, organizadas en torno a tres pilares fundamentales: a) la coherencia del impuesto sobre sociedades a nivel internacional; b) una realineación de la imposición y la sustancia económica, y c) la transparencia, junto con la seguridad jurídica y la previsibilidad, pilar este último en el que se incardina, entre otras acciones, la destinada a revelar las planificaciones fiscales agresivas, noción ésta que, como bien apuntan Martín Jiménez, A y Calderón Carrero, JM (2014, p. 17-18), sería completamente necesario que se precisase y aclarase con el mayor detalle posible, al no existir una definición cerrada acerca de qué es "agresivo" o "abusivo", lo cual es fundamental para saber qué objetivo se busca con esta acción, ya que la falta de un concepto único sobre qué puede ser "agresivo" genera distorsiones y conflictos innecesarios que debieran a toda costa evitarse, idea a la que también se suman Sanz Clavijo (2015, p. 9), Sánchez López (2017, p. 93) y Carbajo Vasco (2016b, pp. 116-117), quien critica con acierto que dejar la interpretación de lo que es o no legal en una estructura de planificación fiscal en manos exclusivamente de las Administraciones tributarias es desconocer, por un lado, la realidad diaria y la existencia de interés nacionales enfrentados entre los diversos Estados e, incluso, en el seno de los burócratas encargados de esta calificación, además de violar el principio de legalidad tributaria y generar perpetuos conflictos de intereses y de interpretación[15].

En esta misma idea de lucha contra esta planificación fiscal agresiva se enmarca, por citar algún documento más de los múltiples existentes, imposibles de reproducirlos siquiera someramente en este trabajo, el paquete fiscal *EU Commission, Fair and Simple Taxation: Commission proposes new package of measures to contribute to Europe's recovery and growth*, aprobado el 15 de julio de 2020, que se enmarca dentro de la

14 En esta línea LAGO MONTERO "Planificación fiscal agresiva, *BEPS* y litigiosidad", *Ars Iuris Salmanticensis*, vol. 3, núm. 2, 2015, págs. 67 y 68, se cuestiona dónde comienza la planificación fiscal agresiva por terminar la legítima planificación tendente a cumplir con las obligaciones tributarias de la manera menos onerosa posible, previendo de antemano la selección de las opciones económicas más convenientes dentro de las legítimas. La propia Comisión Europea, en su Comunicación de 6 de diciembre de 2012 [C(2012)8806]), estableció como premisa la legitimidad de la planificación fiscal, siendo ésta la dirigida a evaluar las alternativas y a elegir las fórmulas jurídicas más convenientes en orden a reducir el impacto fiscal, señalando, en este sentido, que "los países de todo el mundo han considerado tradicionalmente la planificación fiscal como una práctica legítima".

15 Las recomendaciones formuladas por la Acción 12 del Plan BEPS adquirieron carácter obligatorio tras la aprobación de la Directiva 2018/822, del Consejo, de 25 de mayo de 2018, que modificó la Directiva 2011/16/UE por lo que se refiere al intercambio automático y obligatorio de información en el ámbito de la fiscalidad en relación con los mecanismos transfronterizos sujetos a comunicación de información (la denominada DAC 6 "Directiva de intermediarios fiscales"), transpuesta parcialmente a nuestro ordenamiento jurídico por la Ley 10/2020, de 29 de diciembre, por la que se reformó la LGT.

agenda fiscal europea en materia de transición a una realidad más "verde" y digital, y en el contexto de la crisis generada por la pandemia del Covid-19, siendo uno de sus objetivos el de hacer frente al abuso y a la competencia fiscal perjudicial.

Como bien ha puesto de manifiesto De Abiega Valdivielso (2020, p. 13) los principios sobre los que se basa todo este paquete de medidas, y que se han convertido en los principales objetivos de política fiscal de la Comisión, son los de "*fair taxation*", y "*tax good governance*", a través de los que se busca conseguir que los Estados incrementen su capacidad recaudatoria, para así estar mejor preparados para afrontar los desafíos económicos de la crisis, a través de medidas y mecanismos de lucha contra el fraude y la evasión fiscal, de prevención de la competencia fiscal perniciosa y de intensificación de la transparencia fiscal, sin que ello suponga un mayor esfuerzo para los contribuyentes honestos.

Esto último es importante resaltarlo adecuadamente en un sistema como el actual, en el que buena parte de las tareas que en principio corresponden a la Administración tributaria se encomiendan al contribuyente, ya que parece lógico y justo que no se otorgue el mismo reproche a los contribuyentes que simplemente han cometido un error ocasional que a aquellos otros que normalmente tratan de incumplir sus obligaciones tributarias.

Así lo han señalado con acierto, entre otros autores, Sanz Gómez (2019, p. 314), quien indica, tras referirse a la *Loi nº 2018-727 du 10 août 2018 pour un Etat au service d'une société de confiance*, reguladora del derecho al error en Francia, que es oportuno preguntarse si este traspaso de responsabilidades no tendría que impactar también en el régimen sancionador o, en otros términos, hasta qué punto es sostenible incrementar progresivamente los costes de cumplimiento y, al mismo tiempo, mantener invariable el nivel de diligencia exigido; Castro de Luna, MJ (2020, p. 97), quien ha escrito que no debe tratarse igual a un contribuyente que cumple regularmente sus obligaciones y que colabora con la Administración, y que puntualmente ha podido cometer un error aritmético o de calificación en sus hechos con transcendencia tributaria, que a aquel otro que está al margen del sistema, por lo que sería oportuno y conveniente la introducción de alguna forma de ponderación del comportamiento o historial del contribuyente, que ahora solo se tiene en cuenta a efectos de agravar la posible sanción, "relajando" la aplicación de las sanciones en aquellos casos en los que el contribuyente simplemente ha cometido un error (Castro de Luna, 2020, p. 55); y Chico de la Cámara, P (2021, p. 9), quien afirma ha llegado el momento de implementar en el mundo de las relaciones administrativas la técnica metafórica del "palo y la zanahoria", donde al contribuyente modélico y ejemplar se le premie al igual que cuando uno se empeña en no serlo, es de justicia que descanse todo el peso de la Ley sobre ese incumplidor endureciendo los castigos[16], añadiendo que dadas las limitaciones de recursos por parte de los órganos de gestión e inspección sería deseable que la mayor parte del personal de la Administración se centrase en aquellos contribuyentes que de acuerdo a su histórico hayan sido sancionados sistemáticamente por sentencia firme, precisando que las medidas de alivio para los contribuyentes cumplidores de acuerdo a un histórico de su expediente deben conjugarse con medidas coercitivas y sancionadoras para aquellos que con cierta habitualidad dispersan rentas a la Hacienda Pública (Chico de la Cámara, 2021, pp. 22-23).

5 EL PROGRAMA INTERNACIONAL DE GARANTÍA DE CUMPLIMIENTO

Otro elemento vertebrador, en fin, gestado asimismo en la esfera de la OCDE, de la relación cooperativa entre Administraciones y contribuyentes, está constituido por el

16 Así se ha pronunciado también SOTO BERNABEU *Los programas de cumplimiento voluntario como estímulo a la regularización tributaria*, Tirant Lo Blanch, Valencia, 2020, pág. 44.

Programa Internacional de Garantía de Cumplimiento (*International Tax Compliance Assurance Programme*), más conocido como "ICAP"[17], que constituye, en palabras de Canelo Álvarez y Cubillo Pérez de Ayala (2020, p.114), un programa voluntario para grandes grupos multinacionales, surgido en el Foro sobre la Administración Tributaria de la OCDE, con la intención de coordinar y evaluar los riesgos fiscales internacionales de dichos grupos de empresas[18].

Se trata, como ha puesto de relieve Ribes Ribes (2022, p. 93), de un sistema voluntario, multilateral y cooperativo de análisis y aseguramiento de riesgos fiscales internacionales, tendente a incrementar la seguridad jurídica y a reducir, por ende, las controversias entre los grupos multinacionales y la Administración Tributaria, idea ya mantenida precedentemente por Castro de Luna (2019, p. 2), quien había señalado que estamos en presencia un programa voluntario tanto para las Administraciones tributarias como para las empresas multinacionales, que trata de beneficiarse de las nuevas obligaciones de información estandarizadas a nivel internacional (Informe fiscal de país por país o *Country by Country Reporting* y documentación de precios de transferencia y complementaria, resultante de la Acción 13 del proyecto BEPS), para adoptar un marco relacional de naturaleza colaborativa con grupos de empresas multinacionales, en el que valorar los riesgos de éstas de forma coordinada a nivel multilateral y poder segmentar a tales empresas y sus operaciones en función de su riesgo fiscal, de forma que las Administraciones focalicen sus comprobaciones en los casos y operaciones que entrañen mayor riesgo de incumplimiento tributario[19].

6 LA NORMA UNE 19602

La necesidad del cumplimiento corporativo en materia tributaria se ha plasmado en España en la Norma UNE 19602, de "Sistemas de Gestión de *Compliance* Tributario. Requisitos con orientación para su uso"[20], que, como ha escrito Martínez Muñoz (2021, pp. 46), va más allá de los modelos de *compliance* penal que, de acuerdo con el artículo 31 bis del Código Penal pueden implantar las empresas para evitar la comisión de delitos, entre ellos, el delito contra la Hacienda Pública, en la medida en que el sistema de *compliance* tributario no busca solamente evitar la comisión de delitos fiscales, sino también infracciones administrativas o regularizaciones por parte de la Administración tributaria,

17 El mismo nació en Washington, en 2018, primero con el carácter de programa piloto, transformándose en un programa de carácter estable y permanente, luego de haberse celebrado un segundo programa piloto, el denominado el denominado ICAP 2.0, que tuvo lugar en el año 2019, el 18 de febrero de 2021.

18 Como han escrito GARCÍA NOVOA y CABALLERO PERDOMO "El *Compliance* tributario, la relación cooperativa y las nuevas relaciones fiscales. Su implantación en España y en América Latina", *Revista de Fiscalidad Internacional y Negocios Transnacionales*, núm. 12, 2019, que cito por Thomson Reuters Aranzadi Insignis BIB 2019\9530, pág. 4, el programa ICAP, sintetizado en el *Working Document* de 2019, aprobado en el *Forum on Tax Administration* de la OCDE, se refiere, fundamentalmente, a grupos empresariales con presencia internacional y pretende escalonar los controles coordinados de los mismos en una relación permanente basada en una evaluación inicial del riesgo fiscal del grupo.

19 Así se ha pronunciado también este mismo autor en su trabajo, ya citado, *Hacia un nuevo modelo de relación con la Administración tributaria*, en el que, tras indicar que todavía es pronto para valorar el éxito o el fracaso del ICAP, se decanta, sin embargo, pág. 204, por mantener una opinión favorable sobre su existencia, al señalar que el mismo se alinea con el multilateralismo fiscal, sin el cual no es posible abordar en la actualidad los problemas de la fiscalidad internacional, y supone, asimismo, un avance en la instauración de un modelo más cooperativo de relaciones con los contribuyentes, permitiendo a los grupos multinacionales relacionarse de forma multilateral con distintas jurisdicciones y plantearles en una fase muy temprana su política fiscal global con el fin de conocer el parecer de dichas Administraciones sobre los riegos fiscales que entrañan.

20 La misma se publicó el 28 de febrero de 2019 por la Asociación Española de Normalización (Aenor), partiendo del modelo de normalización y de los estándares internacionales recogidos en la Norma UNE-ISO 19601:2017, de sistemas de gestión de *compliance* penal, e incorpora buenas prácticas de *compliance* ya establecidas en la Norma UNE-ISO 19600:2015, de sistemas de gestión de *compliance* y en la Norma UNE-ISO 37001:2017, de sistemas de gestión antisoborno. **Es aplicable a cualquier organización,** con independencia de su tipo, tamaño, naturaleza o actividad en los sectores privado, público, con o sin ánimo de lucro, y su finalidad primordial es ayudar al diseño o al diagnóstico de los sistemas de gestión de *compliance* tributario para la prevención, detección, gestión y mitigación de contingencias y riesgos tributarios.

mediante la promoción del cumplimiento voluntario de la normativa tributaria y el fomento de políticas fiscales de la empresa no agresivas.

Tal Norma presenta, sin embargo, algunas incógnitas en lo que atañe, sobre todo, a si la certificación de acuerdo con la misma puede ser, o no, un elemento de prueba para demostrar, ante la Administración o ante los Tribunales, la voluntad de la organización de cumplir con sus obligaciones fiscales, circunstancia ésta de incertidumbre que proviene de que nos encontramos en presencia de una mera recomendación, ya que su naturaleza tiene un mero alcance *soft law*, por lo que, como ha señalado Herrera Molina (2020, pp. 33-34), nos encontramos en esta ámbito en una fase inicial, toda vez que la certificación derivada de la Norma UNE 19602 tiene un carácter privado, voluntario y no garantiza ningún trato particularmente favorable por parte de la Administración.

Estamos, en suma, como ha escrito Chico de la Cámara (2021, p. 10), ante una situación embrionaria que requiere de un reconocimiento por parte del legislador otorgándole valor jurídico tras su incorporación de alguna forma en la normativa tributaria, para que sirva como atenuante o eximente de la responsabilidad tributaria, tal y como ha sucedido en la esfera del Derecho Penal[21], añadiendo este autor (pp. 11) que una vez implantada la primera fase del *compliance* tributario, por el que se convierte en un mecanismo de "autodefensa interna" frente a posibles riesgos de incumplimiento, habría que dar un decisivo paso más, permitiendo que este sistema también actúe como instrumento de "autodefensa externa" a fin de reducir el importe de las sanciones que una empresa podría llegar a sufrir siempre que la misma acredite que la irregularidad cometida por ella se debe a una mera situación puntual, puesto que fuera de ello todas las actuaciones de dicha empresa han estado presididas por una total "transparencia" y "diligencia debida" en la órbita fiscal.

Así se han pronunciado también, con mayor o menor énfasis, autores tales como, por ejemplo, García Novoa (2019, p. 121)[22], Campanón Galiana (2019, pp. 6 y 11), Calvo Vérgez (2019, pp. 226 y 232), Guervós Maíllo (2020, p. 27), Martín Fernández y Rodríguez Márquez (2020, p. 57), Sánchez López (2020, p. 194), Galindo Jiménez y Matas Espejo (2020, p. 435), y Castro de Luna (2020, p. 271), quien ha señalado que en la medida en que los contribuyentes se comprometan firmemente con el cumplimiento de las leyes tributarias, y demuestren que ponen todo de su parte para el cumplimiento de las mismas, siendo los incumplimientos tributarios consecuencia de simples errores y no de estrategias buscadas de propósito con el objetivo de defraudar, la Administración debería tener en cuenta adecuadamente esta circunstancia, para lo cual, y en aras a la seguridad jurídica, lo que procedería si se quiere que los programas de *compliance* sean efectivos es que se reconozcan de manera expresa en la LGT como causa de exoneración o atenuación de la responsabilidad por la comisión de una infra cción tributaria.

La misma orientación sigue también Martínez Muñoz (2021, pp. 55-56), quien pone de relieve que si bien es cierto que la LGT no incluye un precepto similar al artículo 31 bis del Código Penal para exonerar de responsabilidad administrativa en estos casos, también lo es que en su artículo 179.2.d) establece la exclusión de responsabilidad para quienes "hayan puesto la diligencia necesaria en el cumplimiento de las obligaciones tributarias", supuesto éste que podría ser perfectamente aplicable a aquellos contribuyentes que

21 En él, los programas de *compliance* se impulsaron a través de dos reformas sucesivas del Código Penal: la Ley Orgánica 5/2010, que introdujo la responsabilidad penal de las personas jurídicas, y la Ley Orgánica 1/2015, que clarificó bajo qué circunstancias la existencia de programas de *compliance* eximen a una persona jurídica de responsabilidad penal por las actuaciones realizadas por sus trabajadores, para cuya interpretación sobre su alcance y contenido ha sido muy relevante la Circular 1/2016 sobre la responsabilidad penal de las personas jurídicas conforme a la reforma del Código Penal efectuada por dicha Ley orgánica 1/2015, apartado 5.3, al impartirse en ella instrucciones a los fiscales para valorar la eficacia de dichos modelos de prevención de delitos.

22 Lo mismo ha señalado este autor, en su trabajo conjunto con CABALLERO PERDOMO "El *Compliance* tributario, la relación cooperativa y las nuevas relaciones fiscales. Su implantación en España y en América Latina", ob. cit., págs. 8 y 9.

afrontan el cumplimiento de su deber de contribuir implantando un sistema preventivo de gestión de riesgos fiscales para evitar el incumplimiento tributario, por lo que favorecer el cumplimiento tributario mediante la exoneración de la sanción en aquellos casos de implantación de un sistema de *compliance* tributario adaptado a las exigencias de la norma UNE 19602 debería considerarse adecuado desde el punto de vista de los principios de justicia tributaria (Martínez Muñoz, 2021, p. 58)[23].

7 CRÍTICA A LA CATEGORÍA DE LAS NORMAS UTILIZADAS PARA INTENTAR CONSEGUIR LA GOBERNANZA FISCAL

Todos los mecanismos expuestos en las páginas precedentes están muy bien. No voy a desconocer, ni a minusvalorar, los avances que la implantación de todas las medidas apuntadas, y de algunas otras aquí no citadas para no alargar en exceso este trabajo, han supuesto en la búsqueda de una adecuada gobernanza fiscal; pero también hay que tener muy presente que muchas de ellas, como reiteradamente se ha puesto de relieve a lo largo de este trabajo, son meramente normas *soft law* o "legislación blanda"[24], como oportunamente han apuntado numerosos autores[25], por lo que se hacen precisos instrumentos más contundentes, y soluciones más enérgicas, para conseguir tan loable objetivo como el del buen gobierno en general y en materia fiscal, en particular, toda vez que estas normas de *soft law* no tienen efectos jurídicos vinculantes.

Pese a ello, entiendo que tampoco cabe sostener, como ha sustentado Roche Laguna (2000, p.120), que estas normas de *soft law* carecen de efectos jurídicos, y que limitan sus efectos a la órbita meramente política.

Considero que no es así, puesto que, como ya puse de relieve en un trabajo anterior (Checa González, 2012, p.699), estas normas sí que tienen algunos efectos jurídicos, tales como influir la conducta de los Estados, según han indicado numerosos autores[26] e

23 Así se había sustentado también por LACUNZA y ZARRAONANDIA "La cultura *Compliance* en general en la empresa. La llegada del *Tax Compliance*", *Revista Forum Fiscal*, núm. 258, que cito por LA LEY 13211/2019, pág. 11.

24 O, en expresión de GARCÍA PRATS "La Ley General Tributaria y el Derecho Comunitario atípico", *Civitas, Revista española de Derecho Financiero*, núm. 132, 2006, pág. 758, siguiendo a GUTIÉRREZ ESPADA "La contribución del Derecho Internacional del medio ambiente al desarrollo del Derecho Internacional contemporáneo", *Anuario de Derecho Internacional*, (XIV) 1998, *derecho en agraz.*

25 Véanse, por ejemplo, GARCÍA NOVOA "La necesaria modificación de la documentación de las operaciones vinculadas", *Revista Quincena Fiscal*, núms. 1-2, 2010, pág. 104; SÁNCHEZ HUETE "Hacia una planificación fiscal socialmente responsable. La planificación ultrafiscal", ob. cit., pág. 6; SANZ GÓMEZ "Hacia la relación cooperativa en España: el nuevo Código de Buenas Prácticas Tributarias a la luz de los estudios de la OCDE", ob. cit., pág. 61, "Entre el palo y la zanahoria: la comunicación obligatoria de esquemas de planificación fiscal agresiva y su interacción con las iniciativas de cumplimiento cooperativo", ob. cit., págs. 41, 44 y 47, y "Cumplimiento cooperativo tributario y grandes empresas en España" ob. cit., págs. 215 y 222; CARBAJO VASCO "El plan de acción de la iniciativa BEPS. Una perspectiva empresarial", ob. cit., pág. 54, "Reflexiones, ciertamente escépticas, acerca del post-BEPS", ob. cit., pág. 34, y "Algunas reflexiones sobre la era post-BEPS", ob. cit., pág. 11; PATÓN GARCÍA "La documentación sobre precios de transferencia y el informe «Country by Country» en el escenario Post-BEPS", ob. cit., pág. 1; NASTRI, ROZAS VALDÉS y SONETTI "La dimensión fiscal en la gobernanza corporativa: entre Italia y España", ob. cit., pág. 195; BARCIELA PÉREZ, "La implementación del Plan de Acción BEPS en la UE", ob. cit., pág. 4; MANCILLA I MUNTADA "Breves reflexiones sobre la buena administración y el buen gobierno", *Diario La Ley*, núm. 9689, 4 de septiembre de 2020, que cito por LA LEY 9003/2020, pág. 6; MARTÍNEZ MUÑOZ "*Compliance* fiscal y responsabilidad por ilícitos tributarios", ob. cit., pág. 42, y SÁNCHEZ LÓPEZ "Seguridad jurídica y producción normativa en materia tributaria. Incidencia sobre el cumplimiento cooperativo", ob. cit., pág. 192.

26 Así se han pronunciado, entre otros, ALONSO GARCÍA "El *soft law* comunitario", *Revista de Administración Pública*, núm. 154, 2001, pág. 63 y sigs.; RUIBAL PEREIRA "La fiscalidad de las empresas en la Unión Europea. La necesidad de una cierta coordinación de la imposición sobre sociedades y la lucha contra la competencia fiscal", *Revista Quincena Fiscal*, núm. 17, 2002, pág. 47; DEL TORO HUERTA "El fenómeno del *soft law* y las nuevas perspectivas del Derecho internacional", *Anuario Mexicano de Derecho Internacional*, Vol. VI, 2006, pág. 519 y sigs.; GARCÍA PRATS "La Ley General Tributaria y el Derecho Comunitario atípico", ob. cit., pág. 761; MARTÍN LÓPEZ *Competencia fiscal perjudicial y ayudas de Estado en la Unión Europea*, Tirant lo Blanch, Valencia 2006, pág. 142 y sigs.; CALDERÓN CARRERO "Una introducción al Derecho Comunitario como fuente del Derecho Financiero y Tributario: ¿Hacia un ordenamiento financiero 'bifronte' o 'dual'?", *Civitas, Revista española de Derecho Financiero*, núm. 132, 2006, pág. 721 y sigs.; MCLURE, Jr. "Método legislativo, judicial, de *soft law* y cooperativo para armonizar los impuestos sobre sociedades en los Estados Unidos y en la Unión Europea", *Civitas, Revista española de Derecho Financiero*, núm. 136, 2007, pág. 851 y sigs.; FRANCH FLUXÀ "La necesaria armonización de la fiscalidad empresarial como respuesta a la europeización

impregnar la conducta de los Tribunales bajo la idea de modular sus criterios jurisprudenciales en una determinada dirección[27].

En esta apuntada línea de que no bastan las normas de *soft law* para conseguir eficazmente los objetivos que se buscan se ha pronunciado también, por ejemplo, Sánchez López (2020, pp.192-193), quien refiriéndose a nuestro ordenamiento jurídico ha escrito que la transparencia y cooperación perseguidos a través de los sistemas de cumplimiento cooperativo quizá deban pasar, al menos en buena parte, por un modelo de *hard law,* esto es, de normas legalmente vinculantes, y, por tanto, con poder coercitivo, ya que ello es lo que posibilitaría una mejor consecución de la seguridad jurídica, fruto de que obrando de este modo la normativa reguladora de este modelo aportaría certidumbre y claridad.

8 PROBLEMAS ESPECÍFICOS QUE DIFICULTAN EL PODER ALCANZAR EN ESPAÑA UNA ADECUADA GOBERNANZA FISCAL.

En abstracto, y como línea de principio general, estoy de acuerdo con SÁNCHEZ LÓPEZ; pero aplicando esta pauta al ordenamiento tributario español me asaltan, sin embargo, muchas dudas, de que aun procediendo de esta forma se pueda conseguir el fin pretendido, y ello es así porque, desafortunadamente, la forma de legislar en España, y la normativa que de ello se deriva, no puede ser elogiada en absoluto.

Antes al contrario, es merecedora de múltiples reproches, bien sintetizados por Iglesias Gómez y Solera Morales (2020, pp.131-ss), cuando señalan que los principales defectos predicables de nuestra legislación tributaria son: a) la proliferación legislativa, b) la inestabilidad normativa, que se encuentra en directa conexión con dicha profusión de normas, c) la dispersión de las normas con contenido tributario, debida, básicamente, a dos factores, por una parte, a la pluralidad de organismos con competencias normativas: Estado, Comunidades autónomas, Diputaciones forales y entes locales, a los que se deben añadir, y cada vez con mayor trascendencia los Convenios y tratados internacionales firmados por España y, sobre todo, la potestad legislativa de la UE, y, por otra, a la transversalidad de la materia tributaria, que conlleva en no pocos casos la incorporación de medidas tributarias en normas que regulan otras materias y la existencia de figuras y reglas especiales no

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de los mercados, empresas y economías", Revista de *Contabilidad y Tributación*, Centro de Estudios Financieros, núm. 302, 2008, pág. 72 y ss.; NOCETE CORREA "El diverso alcance del *soft law* como instrumento interpretativo en la fiscalidad internacional y europea" *Crónica Tributaria: Boletín de Actualidad*, 1/2011, pág. 58 y sigs.; SANZ GÓMEZ "Cumplimiento cooperativo tributario y grandes empresas en España", ob. cit., pág. 216, y GARCÍA NOVOA "El *Soft Law* en su sitio", *Taxlandia, Blog fiscal y de opinión tributaria*, 9 de diciembre de 2020, pág. 1. En el mismo sentido se manifestó el "*Informe del Consejo de Estado sobre la inserción del Derecho europeo en el ordenamiento español*", de 14 de febrero de 2008, al indicarse en él que la falta de fuerza vinculante de los actos de *soft law* no implica la carencia total de efectos jurídicos.

27 En este sentido, MUÑOZ MACHADO *Constitución*, Ed. Iustel, Madrid, 2004, pág. 251, ha puesto de relieve que incluso algunas sentencias han admitido la eficacia interpretativa del denominado *soft law*. Ilustrativas de esta afirmación son, por ejemplo, las SSTJCE de 13 de diciembre de 1989 (1990\75), as. 322/88, Salvatore Grimaldi, 11 de septiembre de 2003 (TJCE 2003\258), as. C-207/2001, Altair Chimica SpA, **ponente** SCHINTGEN, y 24 de abril de 2008 (TJCE 2008\94), as. C-55/06, Arcor AG & Co. KG, **ponente** ARESTIS, y las SSTJUE de 15 de septiembre de 2016 (TJCE 2016\388), as. C-28/15, Koninklijke KPN NV y otros, **ponente** JARASIUNAS, y 25 de marzo de 2021 (TJCE 2021\81), as. C-501/18, BT, **ponente** PIÇARRA, en las que se ha declarado que pese a que las Recomendaciones no estén destinadas a producir efectos vinculantes, los jueces nacionales están obligados a tener en cuenta las mismas a la hora de resolver los litigios de que conocen, sobre todo cuando aquéllas ilustran acerca de la interpretación de disposiciones nacionales adoptadas con el fin de darles aplicación, o cuando tienen por objeto completar las disposiciones de la Unión dotadas de fuerza vinculante, afirmándose lo mismo, si bien refiriéndose a las Directrices, por la STJUE de 3 de septiembre de 2014 (TJCE 2014\257), as. C-410/13, «Baltlanta» UAB, **ponente** LENAERTS. Más restrictivamente se ha pronunciado nuestro TS en sus sentencias de STS de 3 de marzo de 2020 (RJ 2020\1214), RC núm. 5448/2018, y de 23 de septiembre de 2020 (RJ 2020\4011), RC núm. 1996/2019, **ponente de ambas** NAVARRO SANCHÍS, al afirmarse en ellas que la interpretación dinámica de los convenios de doble imposición no puede fundarse exclusivamente en comentarios (en concreto, los referidos al Modelo OCDE), "que no hayan sido explícitamente asumidos por los Estados signatarios en sus convenios, sin perjuicio de que el criterio establecido pueda servir de orientación a los tribunales cuando el comentario o recomendación pueda coincidir con el resultante de interpretar el propio convenio u otros, o las demás fuentes del ordenamiento", por lo que, como ha escrito CALDERÓN CARRERO "Nueva doctrina del Tribunal Supremo sobre el beneficiario efectivo y los límites a la utilización del Soft-Law: el caso Colgate Palmolive", *Revista Quincena Fiscal*, núms. 1 y 2, 2021, que cito por Thomson Reuters Aranzadi Insignis BIB 2021\15, pág. 6, el TS ha rechazado que pueda fundamentarse una liquidación tributaria tomando como base jurídica principal el "*espíritu de los comentarios de la OCDE*", ya que éstos no son fuente del Derecho.

siempre ubicadas sistemáticamente en el ámbito normativo que le es propio, d) la deficiente técnica legislativa utilizada, apreciable, significativamente, en la esfera tributaria, y e) el desmedido, e injustificable en no pocas ocasiones, abuso de la figura del Real Decreto-ley, que implica una profunda degradación del principio de reserva de ley, que asimismo padece, en grado sumo, como bien han resaltado Andrés Aucejo (2013, pp.90-ss), y, más recientemente, Sánchez López (2020, p. 184), con la excesiva producción de reglamentos en materia tributaria[28].

Estas nefastas, y, por desgracia, muy frecuentes prácticas legislativas observables en España (denunciadas con contundencia en la *Declaración de Granada*, suscrita, el 18 de mayo de 2018, por un grupo de profesores (VV.AA., 2018, pp.22-ss), y que han conducido, como bien apunta Soler Roch (2019, p. 31), a la deriva del Derecho Tributario, que constituye un fenómeno de calado caracterizado por una preocupante degradación de los conceptos y principios que deben informar este sector del ordenamiento en el marco del Estado de Derecho) generan, como es obvio, una considerable incertidumbre e inseguridad jurídica[29], que dificulta sobremanera las relaciones entre las empresas, en general, y los ciudadanos, en particular, con la Administración tributaria, por lo que el caldo de cultivo para que florezcan las "relaciones cooperativas" no es, evidentemente, el más apropiado.

Antes bien, el mismo es claramente proclive al incremento de la litigiosidad, que perjudica a todo el mundo: a los contribuyentes de buena fe y deseosos de cumplir correctamente sus obligaciones fiscales, y también a la Hacienda Pública, porque tan ingente cantidad de reclamaciones y recursos como los que se producen origina una millonaria suma de euros embalsada, no cobrada por las correspondientes Administraciones tributarias, merced a las suspensiones decretadas por los órganos revisores, siendo éste un grave problema que, a la postre, es pernicioso para la sociedad en su conjunto, como bien han señalado, entre otros autores, Barrilao González (2015, pp.131-ss) y Lago Montero (2018, p. 26).

Y a todo ello contribuye, además, en muy buena medida la propia Administración tributaria española[30], más preocupada, siguiendo la estela de nuestro legislador, por la mera obtención de recursos que por la justicia tributaria, "confundiendo" así el interés general con el de carácter recaudatorio. Esto es grave que suceda, y por ello debiera ponerse coto inmediato a esta perniciosa práctica. Ello sin embargo, es, por desgracia, difícil que ocurra mientras no se modifiquen determinados extremos que militan en favor de la persistencia del actual sistema.

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28 Todos estos graves problemas se han puesto ya de relieve por numerosos autores, cuya cita es imposible en un trabajo de la extensión de éste, por lo que en aras a la imprescindible brevedad me permito remitirme a mi libro *Persiguiendo la sombra de la justicia tributaria*, Cuadernos Civitas, Civitas Thomson Reuters, Cizur Menor, Navarra, 2019, pág. 26 y sigs., en donde me ocupo más extensamente de estas cuestiones.

29 Vuelvo a remitirme a un trabajo mío, "La inseguridad jurídica en la esfera tributaria: causas de la misma y perniciosos efectos que genera", *Anuario de la Facultad de Derecho. Universidad de Extremadura*, núm. 36, 2020, pág. 165 y sigs., en particular, pág. 182 y sigs., en donde se recoge una abundante bibliografía.

30 Que presenta defectos intrínsecos desde su misma cúspide: la Agencia Estatal de Administración Tributaria (AEAT), creada como Ente de Derecho Público por el artículo 103 de la Ley 31/1990, de 27 de diciembre, ya que, como bien ha puesto de relieve HUELIN MARTÍNEZ DE VELASCO "Poder tributario y transparencia", *Taxlandia, Blog fiscal y de opinión tributaria*, 4 de marzo de 2021, págs. 2 y 3, si se prescinde de esta norma de creación, insertada en una Ley de Presupuestos Generales del Estado (los de 1991), y de algunas previsiones legales posteriores que la reiteran y complementan, la estructura interna y la distribución del trabajo en el seno de la AEAT se contienen en normas infralegales, la mayoría de ellas Resoluciones de su Presidente, de difícil seguimiento y de escasa vocación pública, pese a su inserción en el BOE. Las disposiciones adicionales 3ª y final 4ª de la Ley 40/1998, de 9 de diciembre, encargaron al Gobierno la aprobación del Estatuto Orgánico de la AEAT, mandato reiterado en el apartado 7 de la disposición adicional 28ª de la Ley 50/1998, de 30 de diciembre, pero el Estatuto no ha llegado a ver la luz. Seguimos pues navegando en un intrincado manglar de normas reglamentarias, resoluciones presidenciales e instrucciones y circulares internas. Poca transparencia hay aquí.

No es el momento de efectuar un análisis en profundidad de esta importante cuestión; pero si cabe referirse a dos aspectos concretos de la misma que enturbian considerablemente dicho sistema tal como está concebido el mismo en la actualidad.

Por una parte, como ya indicó en su momento Rozas Valdés (2016, p. 42), en un modelo, como el español, en el que la entidad responsable de la aplicación del sistema tributario se financia, en parte al menos, con un porcentaje de los actos de liquidación, es difícil que advierta como un reto estimulante el trabajar en régimen cooperativo con las grandes empresas, en aras de reducir los índices de litigiosidad, ya que el sistema retributivo de la Administración tributaria, basado en el éxito sancionador y de descubrimiento y propuesta de liquidación de supuestos incumplimientos de la normativa tributaria opera como freno a cualquier sistema de orden cooperativo[31]. Y, más recientemente, en esta misma línea Herrera Molina (2020, pp.54-55) afirma que el sistema de financiación de la AEAT constituye un *incentivo institucional* a un funcionamiento poco imparcial de la misma y, además, este sistema retributivo podría convertir esa desviación institucional en un incentivo perverso sobre la actuación del personal de la AEAT[32]; Girola Mariño, Romero Steensma y Medina Arencibia (2020, p. 392), señalan la necesidad de modificar el sistema de incentivos de los cuerpos de inspección para eliminar completamente cualquier indicador de remuneración que pueda estar ligado al nivel de regularizaciones efectuadas al correspondiente contribuyente, y Chico de la Cámara (2021, pp. 23-24) apunta que resulta controvertido que los órganos de la Administración tributaria puedan recibir incentivos económicos periódicos sobre la base del porcentaje de deuda sin declarar que *descubran* en su actuación, puesto que cualquier sistema de retribución salarial que gravite proporcionalmente en relación con las "cuantías no declaradas afloradas" puede comprometer la objetividad y profesionalidad con la que se realiza dicha labor pública[33].

Y, por otra, como bien ha escrito Soriano García (2012, pp. 120-ss), las Administraciones han contribuido decisivamente a atascar el contencioso-administrativo[34] por su abuso del poder de litigación, ya que con el criterio objetivo de condena en costas que rige en la esfera jurisdiccional aquellas están menos constreñidas que los ciudadanos a la

31 Así se había pronunciado ya ESPEJO POYATO "La conflictividad tributaria y los medios para combatirla", en Una propuesta para la implementación de medidas alternativas de solución de conflictos (ADR) en el sistema tributario español con especial referencia al arbitraje, VV.AA., Dir.: CHICO DE LA CÁMARA, Praxis, 2015, pág. 32, cuando afirmó que en el caso de la inspección "un sistema de incentivos en base a las cuotas descubiertas podría jugar un papel devastador si no se maneja adecuadamente".

32 Así se expresó este mismo autor en otro trabajo, redactado con TANDAZO RODRÍGUEZ "Justicia y claridad de las normas: la mejor estrategia global para prevenir la conflictividad en materia tributaria", en *VII Encuentro de Derecho Financiero y Tributario. Una estrategia global al servicio de la reducción de la conflictividad en materia tributaria*, ob. cit., pág. 194.

33 En todo caso, señala este autor en este mismo trabajo, pág. 24, parece también coherente que si se percibe un "incentivo" (a modo de complemento salarial) por acciones personales que tienen relación con el incremento que produce para la recaudación de la Hacienda Pública, en el supuesto de que los Tribunales anulen dicho acto administrativo del que trae su causa por sentencia firme, debería también modularse a la baja dicha retribución variable por no haber alcanzado su fin.

34 Este atasco también es apreciable en la órbita económico-administrativo. Aunque esta cuestión no la puedo tratar ahora con el detalle que se merece, estoy de acuerdo con aquellos autores que han entendido que sería deseable la conversión de la vía económico-administrativa en meramente facultativa o voluntaria, criterio sustentado, por citar solo a algunos de los más recientes, por HERRERA MOLINA "Gobernanza fiscal: de las empresas a la Administración", ob. cit., págs. 45 a 48 (que también apunta la alternativa de convertir los órganos económico-administrativos en auténticos órganos jurisdiccionales de carácter especializado, y por GALINDO JIMÉNEZ y MATAS ESPEJO "Gobernanza fiscal: una aproximación equilibrada. Conclusiones generales", ob. cit., pág. 413. Así lo sostuve también, hace ya tiempo, en mis trabajos "La injustificable obligatoriedad de la vía económico-administrativa previa a la contenciosa en la nueva Ley General Tributaria", *Anuario de la Facultad de Derecho. Universidad de Extremadura*, Vol. 22, 2004, pág. 15 y sigs., y "Crítica del carácter obligatorio de la vía económico-administrativa en la nueva Ley General Tributaria española", *Revista de Derecho*, Universidad Austral de Chile, Facultad de Ciencias Jurídicas y Sociales, Vol. XVI, 2004, pág. 147 y sigs. Sería oportuno plantearse ya con seriedad la necesidad de incorporar mecanismos transaccionales de resolución de conflictos tributarios como la mediación, la conciliación y el arbitraje tanto en la vía contencioso administrativa como en todas las instancias previas donde se manifieste la litigiosidad tributaria, como bien ha señalado ANDRÉS AUCEJO en múltiples trabajos. Sirva como muestra de ellos el titulado "Sistemas de Resolución Alternativa de Conflictos (ADR) en derecho tributario español y comparado. Propuestas para Latinoamérica y España", *Derecho del Estado* núm. 37, Universidad Externado de Colombia, 2016, pág. 3 y sigs.

hora de pleitear, puesto que si pierden socializan las pérdidas de dicha condena, no sucediendo lo mismo con éstos, para quienes la punición de las costas implica un claro efecto paralizador[35].

Así se ha resaltado también, entre otros autores, por Andrés Aucejo (2014, p.1986), quien ha escrito que la imputación en costas procesales a la Administración tributaria con derivación de responsabilidades hacia el inspector actuario como moneda de curso legal, sin duda ayudaría extraordinariamente en la lucha del contribuyente por hacer valer sus derechos en la práctica; por Chaves García (2016, p. 69), quien ha señalado que las costas desincentivan al particular, pero no a la Administración, ya que ésta, si media condena en su contra, carga las costas al presupuesto de la entidad, y por Iglesias Caridad (2018, pp.84-85), quien ha puesto de relieve que las costas no tienen el mismo efecto desestimulante para los obligados tributarios y para la Administración, pues en esta los funcionarios y autoridades que deciden pleitear no asumen con su propio patrimonio las costas, sino que éstas van a cargo del presupuesto de la Administración, por lo que el riesgo de litigar se diluye.

Esta apuntada conducta de las Administraciones tributarias españolas volcada más a la obtención de recursos, y a dar primacía al interés recaudatorio, casa muy mal con el "derecho a una buena Administración", expresamente reconocido por el artículo 41 de la Carta de los Derechos Fundamentales de la Unión Europea, que, desde la entrada en vigor del Tratado de Lisboa en diciembre de 2009, ha adquirido el mismo carácter jurídico vinculante que los Tratados comunitarios, tal y como se señala en el apartado 1 del vigente artículo 6 del Tratado de la Unión Europea[36], existiendo ya un nutrido elenco de sentencias, tanto del Tribunal General de la Unión Europea, sustituto del Tribunal de Primera Instancia de las Comunidades Europeas, como del Tribunal de Justicia de la Unión Europea (Tribunal de Justicia de las Comunidades Europeas en su primigenia denominación), que se han ocupado de descifrar el alcance y contenido de este derecho[37], cuya finalidad última es la de exigir buenas prácticas fiscales a las Administraciones tributarias, ya que esto contribuye a una más certera adecuación de los procedimientos para alcanzar una tributación efectiva

35 SORIANO GARCÍA, en su trabajo "El Derecho Administrativo y los desafíos del siglo XXI", *Civitas, Revista española de Derecho Administrativo*, núm. 150, 2011, que cito por Thomson Reuters Aranzadi Insignis BIB 2011\622, pág. 27, ya había señalado que "la condena en costas tiene que ser completamente re-examinada, so pena de acabar constituyéndose, si no lo es ya, en un límite real al ejercicio de los derechos y en definitiva al acceso a la justicia. Hoy, simplemente la apelación, que supone la condena en costas, implica que la Administración recurre siempre, dado que en su caso lo pagamos todos y además los Jueces son especialmente dulces y cautelosos con estas condenas a las Administraciones; sin embargo, para el particular, que soporta el solo frente a la Administración tales condenas y que no cuenta con el beneplácito de los jueces contenciosos, esa condena en costas es un claro límite a la tutela judicial efectiva".

36 Este derecho se halla implícito en los artículos 9.3 y 103 de nuestra Constitución, y en la actualidad está positivizado, en nuestro Derecho común, en el artículo 3.1.e) de la Ley 40/2015, de 1 de octubre, de Régimen Jurídico del Sector Público.

37 No es unánime su calificación, ya que junto a autores que así lo denominan, como, por ejemplo, GONZÁLEZ ALONSO "Los principios del Derecho administrativo comunitario", *Revista Aranzadi Unión Europea* núm. 6, 2011, que cito por Thomson Reuters Aranzadi Insignis BIB 2011\5234, pág. 6, RODRÍGUEZ-ARANA "La buena administración como principio y como derecho fundamental en Europa", *Misión Jurídica, Revista de Derecho y Ciencias Sociales*, Bogotá, D.C. (Colombia), núm. 6, 2013, págs. 24 y 38, CARRASCO GONZÁLEZ "El derecho a una buena administración: la exigencia de plazos razonables en los procedimientos tributarios", *en Derechos fundamentales y Hacienda Pública: una perspectiva europea*, VV.AA., Dir.: GARCÍA BERRO, F., Civitas, Thomson Reuters, 2015, pág. 170; CASAS AGUDO "Derecho a una buena administración y ordenamiento tributario", *Nueva Fiscalidad*, número monográfico dedicado a *Derechos Fundamentales y Tributación*, 2020, pág. 63, y GONZÁLEZ DE LARA MINGO "El derecho fundamental a la buena administración", *Actualidad Administrativa*, núm. 7, 2021, que cito por LA LEY 7853/2021, pág. 3; otros, como FUENTETAJA PASTOR "Del «derecho a la buena administración» al derecho de la Administración europea", *Cuadernos Europeos de Deusto*, núm. 51, 2014, pág. 25, LITAGO LLEDÓ "Eficacia práctica del «principio» de buena administración formulado por el Tribunal Supremo", *Revista Técnica Tributaria*, núm. 133, 2021, que cito por el texto recogido en la sección *Documentos de la AEDAF*, págs. 1 y 2, y SÁNCHEZ LÓPEZ "El principio de buena administración y el *compliance* fiscal: una relación necesaria", *Civitas, Revista española de Derecho Financiero*, núm. 193, 2022, que cito por Thomson Reuters Aranzadi Insignis BIB 2022\476, págs. 2 y 3, no se decantan abiertamente por afirmar si estamos ante un principio o ante un derecho; y otros, por último, hablan sin vacilación de que nos encontramos en presencia de un principio, incardinándose aquí autores como CARRILLO DONAIRE "Buena Administración, ¿un principio, un mandato o un derecho subjetivo?", en *Los principios jurídicos del Derecho administrativo*, VV.AA., Dir.: SANTAMARÍA PASTOR, J.A., La Ley, Madrid, 2010, pág. 1156, y ÁLVAREZ MARTÍNEZ "El principio de buena administración como nuevo paradigma jurídico y su aplicación en el ámbito tributario: régimen normativo, naturaleza y contenido", *Nueva Fiscalidad*, núm. 1, 2022, págs. 33 a 35.

y, por ende, a una materialización del deber de contribuir que se traduce en un mayor acercamiento a la capacidad contributiva real gracias a la participación del contribuyente[38].

Como acertadamente ha resaltado Sánchez López (2022, p. 6), la aplicación de este derecho a la buena administración en el ámbito del ordenamiento tributario español ha sido realizada fundamentalmente por el Tribunal Supremo, que a través de reiteradas sentencias viene configurando el contenido de este derecho, a través de interpretaciones favorables a los ciudadanos, partiendo de la idea de una mejor y más adecuada gestión y administración pública en beneficio de los contribuyentes[39].

Esto ha sucedido a partir, sobre todo, del año 2017[40], fecha en la que el Tribunal Supremo viene matizando cómo deben interpretarse distintas cuestiones, y diversos preceptos de nuestro ordenamiento tributario, bajo el prisma de este derecho a la buena administración, calificado por la STS de 15 de octubre de 2020 (RJ 2020\4069), RC núm. 1652/2019, ponente CUDERO BLAS, como un nuevo paradigma del Derecho del siglo XXI[41] referido a un modo de actuación pública que excluye la gestión negligente.

Una buena muestra de ello viene constituida por, entre otras, las SSTS de 17 de abril de 2017 (RJ 2017\1552), RC para la unificación de doctrina núm. 785/2016, ponente MONTERO FERNÁNDEZ; 5 de diciembre de 2017 (RJ 2017\5531), RC núm. 1727/2016, ponente MONTERO FERNÁNDEZ; 13 de diciembre de 2017 (RJ 2017\5758), RC núm. 2848/2016, ponente CUDERO BLAS; 13 de junio de 2018 (RJ 2018\3077), RC núm. 2800/2017, ponente CUDERO BLAS; 19 de febrero de 2019 (RJ 2019\677), RC núm. 128/2016, ponente MONTERO FERNÁNDEZ; 7 de mayo de 2019 (RJ 2019\2421), RC núm. 4570/2017, ponente BERBEROFF AYUDA; 18 de diciembre de 2019 (RJ 2019\5342), RC núm. 4442/2018, ponente TOLEDANO CANTERO; 18 de mayo de 2020 (RJ 2020\1225), RC núm. 4093/2017, ponente NAVARRO SANCHÍS; 28 de mayo de 2020 (RJ 2020\1480), RC núm. 3966/2018, ponente CUDERO BLAS; 28 de mayo de 2020 (RJ 2020\1756), RC núm. 5751/2017, ponente NAVARRO SANCHÍS; 11 de junio de 2020 (RJ 2020\1817), RC núm. 3887/2017, ponente CUDERO BLAS; 22 de junio de 2020 (RJ 2020\5740), RC núm. 3446/2017, ponente MERINO JARA; 23 de julio de 2020 (RJ 2020\3699), RC núm. 7483/2018, ponente CÓRDOBA CASTROVERDE; 17 de septiembre de 2020 (RJ 2020\3488), RC núm. 5808/2018, ponente DÍAZ DELGADO; 22 de septiembre de 2020 (RJ 2020\4018), RC núm. 5825/2018, ponente MONTERO FERNÁNDEZ; 15 de octubre de

38 Véase PATÓN GARCÍA "Cumplimiento cooperativo y buenas prácticas en los procedimientos de aplicación de los tributos: la conflictividad evitable y el principio de buena administración", en *Cumplimiento cooperativo y reducción de la conflictividad: hacia un nuevo modelo de relación entre la Administración y los contribuyentes*, VV.AA., Directores: MORENO GONZÁLEZ, S. y CARRASCO PARRILLA, P.J., Thomson Reuters, Aranzadi, Cizur Menor, Navarra, 2021, pág. 432. En esta línea es muy interesante la propuesta lanzada por ANDRÉS AUCEJO "Towards an International Code for administrative cooperation in tax matter and international tax governance", "Hacia un Código Internacional para la cooperación administrativa en materia fiscal y gobernanza fiscal internacional", *Derecho del Estado* núm. 40, Universidad Externado de Colombia, 2018, pág. 45 y sigs., de elaborar un Código de Cooperación administrativa internacional en materia fiscal y gobernanza fiscal internacional, que incluya tanto las relaciones entre las Administraciones tributarias como las relaciones entre las Administraciones tributarias, los contribuyentes y los agentes intermediarios, que podría proponerse por una organización internacional de la naturaleza del Banco Mundial o el Fondo Monetario Internacional o cualquier organización internacional o europea, y documentarse a través de un instrumento multilateral (*soft law*) para su firma por los Estados convirtiéndolo en un instrumento *hard law*.

39 Así lo indicó también IBÁÑEZ GARCÍA "La buena administración en materia tributaria", en el blog *Almacén de Derecho*, 20 de agosto de 2020, pág. 4, cuando afirmó que estamos en presencia de un poliedro de múltiples caras cuya pacífica aplicación redundará en beneficio del ciudadano contribuyente.

40 Antes de este año también existen algunos sentencias que se refieren a la buena administración, como, por ejemplo, las de 30 de abril de 2012 (RJ 2012\6446), RC núm. 1869/2011, ponente CONDE MARTÍN DE HIJAS, en la que se calificó el *derecho a una buena administración como un derecho de última generación;* 11 de julio de 2014 (RJ 2014\4320), RC núm. 5219/2011, 23 de julio de 2015 (RJ 2015\3613), RC núm. 2342/2013, y 20 de noviembre de 2015 (RJ 2015\6503), RC núm. 1203/2014, ponente de las tres SUAY RINCÓN, y 3 de noviembre de 2015 (RJ 2015\5171), Recurso contencioso-administrativo núm. 396/2014, ponente BANDRÉS SÁNCHEZ-CRUZAT.

41 Así fue denominado ya por PONCE SOLÉ "La lucha por el buen gobierno y la buena administración como vocación del Derecho administrativo del Siglo XXI. La discrecionalidad no puede ser arbitrariedad y debe ser buena administración", Civitas, Revista española de Derecho Administrativo, núm. 175, 2016, que cito por Thomson Reuters Aranzadi Insignis BIB 2016\776, pág. 4.

2020 (RJ 2020\4069), RC núm. 1652/2019, ponente CUDERO BLAS; 15 octubre de 2020 (RJ 2020\5208), RC núm. 1434/2019, ponente DÍAZ DELGADO; 29 de octubre de 2020 (RJ 2020\4247), RC núm. 5442/2018, ponente MAURANDI GUILLÉN; 15 de marzo de 2021 (RJ 2021\1285), RC núm. 526/2020, ponente CÓRDOBA CASTROVERDE, y 14 de octubre de 2021 (RJ 2022\870), RC núm. 1293/2020, ponente MONTERO FERNÁNDEZ[42].

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42 Analizo críticamente el contenido de las mismas en mi trabajo "El derecho a una buena administración en la esfera tributaria", que se publicará en el Libro homenaje al profesor José Eugenio SORIANO GARCÍA, que se halla en fase de elaboración.

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Article

Why does (almost) nobody read adhesion contracts? Historical evolution, information asymmetry and the bounded rationality of adherents

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ABSTRACT:

The vast majority of people do not usually read the clauses that make up the adhesion contracts they sign. We know that reading this type of contract is an extremely arduous task due to the length of the contract, the complexity of the language used and the difficulty of finding the relevant information among the whole universe of clauses that make up the contract.

It is a renunciation by individuals to bear the costs of reading, understanding and comparing the different adhesion contracts offered by the market in order to identify the one that maximizes their interests.

Throughout this paper we will develop the reasons why (almost) nobody reads adhesion contracts, analyzing them from the perspective of the Economic Analysis of Law, and then contrasting it with the behavioral economics approach.

PALABRAS CLAVES:

Antecedentes históricos del Contrato, Contrato de Adhesión, Análisis Económico del Derecho, Análisis Económico del Derecho de los Contratos, Equilibrio de mercado, Fallas de Mercado, Asimetría de Información, Economía Conductual, Racionalidad Limitada, Plataformas Digitales

RESUMEN:

La gran mayoría de las personas no suelen leer las cláusulas que integran los contratos de adhesión que suscriben. Sabemos que leer este tipo de contratos supone una tarea sumamente ardua debido a la extensión de los mismos, la complejidad del lenguaje utilizado y la dificultad de hallar la información relevante entre todo el universo de cláusulas que los integran.

Se trata de una renuncia, por parte de las personas, a asumir los costos de lectura, compresión y comparación de los diferentes contratos de adhesión que ofrece el mercado, a fin de identificar aquel que maximice sus intereses.

A lo largo de este trabajamos desarrollaremos los motivos por los cuales (casi) nadie lee los contratos de adhesión, analizando los mismos desde la perspectiva del Análisis Económico del Derecho, para luego contrastarla con el enfoque de la economía conductual

MOTS CLES :

historique du contrat, contrat d'adhésion, analyse économique du droit, analyse économique du droit des contrats, équilibre du marché, défaillances du marché, asymétrie de l'information, économie comportementale, rationalité limitée, Plates-formes numériques.

RESUME :

La grande majorité des gens ne lisent généralement pas les clauses des contrats d'adhésion qu'ils signent. Nous savons que la lecture de ce type de contrat est une tâche extrêmement ardue en raison de la longueur de ceux-ci, de la complexité du langage utilisé et de la difficulté de trouver des informations pertinentes dans tout l'univers des clauses qui les composent.

Il s'agit d'une renonciation de la part des personnes à assumer les coûts de lecture, de compréhension et de comparaison des différents contrats d'adhésion offerts par le marché, afin d'identifier celui qui maximise leurs intérêts.

Tout au long de ce travail, nous développerons les raisons pour lesquelles (presque) personne ne lit les contrats d'adhésion, en les analysant du point de vue de l'analyse économique du droit, puis en la comparant avec l'approche de l'économie comportementale.

CONTENTS:

1 INTRODUCTION

Throughout our lives, people seek to satisfy needs (eating, travelling, shopping). Businesses, in turn, through the production and marketing of goods and services, satisfy these needs. The market is the place where millions of people and companies voluntarily carry out these transactions, invisibly coordinated by a price system.

These economic exchanges, between people and companies, are materialised through contracts. The contract is an agreement of wills through which the contradiction and coordination of interests of the parties is manifested, where each one tries to achieve the maximisation of its profit. The company marketing goods or services tries to earn as much money as possible in each transaction, while the consumer tries to pay the lowest possible price to satisfy a certain need.

Through the *traditional contract*[1] the parties discussed not only the price of the product or service, but every term that was part of the agreement. In this negotiation there was a transfer of information between the parties.

Nowadays, most of the contracts we enter into on a daily basis are contracts of adhesion. When we sign up for a credit card, car insurance, when we apply for a bank loan or even when we install apps on our phone, we are entering into contracts of adhesion.

However, people do not usually read the terms and conditions of adhesion contracts, whether in paper or digital version, as it is an extremely arduous task.

The main objective of this article is to analyse and attempt to provide an answer from the perspective of the Economic Analysis of Law to the fact that most people do not read the adhesion contracts they sign, contrasting it with the approach of behavioural economics.

To conclude this introduction, I will make a clarification: the contracts of adhesion that I will analyse will be those entered into between a company producing goods or providing services, public or private, in the role of predisposer and a human person, in the role of consumer, purchaser or adherent, leaving aside those contracts of adhesion entered into between companies.

2 HISTORICAL BACKGROUND TO PARTY AUTONOMY.

The autonomy of private will is the possibility for all individuals to regulate themselves according to their own interests.

This power in contractual matters is recognised as a sphere of power belonging to individuals, where the state must limit itself to guaranteeing the fulfilment of these voluntarily accepted legal relationships.

The autonomy of private will has played a key role in Western legal systems. This principle had its apogee in the years of liberalism, materialising in the first codes that emerged through the rise of positive legislation with the French Code of 1804.

Liberalism promoted a greater level of individual freedom and sought to limit the coercive power of the state, allowing a space of sovereignty for individuals in which the state would not interfere. The central principles of this school of thought were developed as a consequence of social, political and economic events that had been brewing since the 18th century, mainly as a result of the French Revolution in 1789 and the Industrial Revolution in the 1750s and 1820s. In the former, the political scheme of liberalism was conceived, while

1 It is that type of contract by which two or more free parties, in a situation of formal equality, express their consent and will to create particular and concrete legal relations.

in the latter, liberalism was consolidated as an economic doctrine, thus giving rise to capitalism (Echeverri Salazar, 2010, p. 127-144).

This current of thought adopts as its central proposal the free play of economic forces, based on the doctrines enunciated by the so-called "classics" and fundamentally by Adam Smith in his work "The Wealth of Nations", published in 1776. Adam Smith's central thesis is that the key to social welfare is to be found in economic growth, enhanced through the division of labour, which deepens as the extension of markets and specialisation widens (Smith, 1976).

In this way, the dominance of a new economic-social ideology was affirmed, proclaiming the validity of the fundamental principles of equality and freedom, which were later enshrined in all the Constitutions and continental codifications of the 19th century, especially in Napoleon's Code of 1804.

Napoleon's Civil Code, a child of the French Revolution and the Industrial Revolution, was the first to normativise contract law, regulating it in a way that contributed to the post-revolutionary interests and needs of a society with a new form of economic-social organisation (Herrera Tapias & Álvarez Estrada, 2015).

Napoleon commissioned jurists to draft the rules, modelled on the Corpus Juris Civilis ("The Body of Civil Law"), published between 528 and 534 at the request of the Roman Emperor Justinian. Subsequently, Napoleon's armies spread the Code throughout much of Europe and then the world, an influence that persisted long after the collapse of the colonial empires (Cooter & Ulen, 1987).

The conception of a given moment of law in general and of contract in particular depends on the social, political and economic circumstances in the midst of which it is immersed. Law, in general, is not oblivious to what is happening in society (Echeverri Salazar, 2010).

In this sense, according to the type of contract enshrined at this stage, individual freedom had its application in the freedom to contract. The contract had to be the result of the free decision of the parties, who were free to decide whether or not to contract, with whom to contract and to choose the most convenient contractual figure or type, according to the interests of the parties. Furthermore, the parties were free to discuss the content of the specific clauses that formed part of the contract on an equal footing.

The State, for its part, has the sole function of guaranteeing the execution of the contracts entered into by the parties, in the exercise of individual freedom.

In this way, the contract conceived in the framework of liberal individualism became the final result of a process of offer and acceptance that was shaping the expression of two wills that seek to guarantee their interests, while at the same time seeking to materialise the agreement (Herrera Tapias & Álvarez Estrada, 2015, p. 26-41).

Thus, through this type of "*classical contract*", where the parties possess similar bargaining power to establish the content of the agreement, the most diverse purposes of economic life were realised, satisfying the particular interests of individuals.

3 CRISIS OF THE TRADITIONAL CONTRACT AND THE EMERGENCE OF THE CONTRACT OF ADHESION.

However, since the massification of contractual relations in the first half of the 20th century, contracting schemes by adhesion to general conditions, commonly known as "adhesion contracts", appeared, and in this way, the traditional conception of the contract began to give way to the latter.

In his 1943 article, "*Contracts of Adhesion - Some Thoughts about Freedom of Contract*", Fiedrich Kessler argues that the substantial changes in the way goods were produced and marketed through the explosion of industrialisation and the free market system, based on an unprecedented division of labour, meant that society needed a legal institution elastic enough to guarantee the exchange of goods and services. Thus, according to Kessler, the development of the large-scale enterprise with its mass production and distribution gave rise to the new type of standardised contract (Kessler, 1943).

This new type of contract eliminated the negotiation process for the parties. In this way, the company formulates its content and allows it to automate the conclusion of contracts, using it for each of the negotiations it carries out on the same good or service it markets.

This contract became a fundamental tool to homogenise contractual relations, allowing the company to calculate total costs in advance in order to maximise its profits.

The adhesion contract, according to Stiglitz, is one in which the internal configuration of the contract is arranged in advance by only one of the parties (predisposer, supplier, entrepreneur) in such a way that the other party (adherent, consumer), if it decides to contract, must do so on the basis of that content or not contract (Stiglitz, 1994).

From these definitions, we can affirm that the adhesion contract has two central elements: I) Predisposition of the content of the contract by one of the parties: The clauses that make up the contract are drafted by one of the parties, known as the predisposer, for the purpose of being used to carry out a plurality of contracts. These general clauses have the particularity that they are drafted unilaterally and before being presented to the adherent. II) Imposition of the contractual clauses: This means that the drafting of the clauses does not arise from a process of negotiation between the parties, but are born on the exclusive initiative of the predisposer and are offered on a "*take it or leave it*" basis. In this way, the adherent has only two options: to contract in accordance with the clauses previously drafted by the predisposer or not to contract. This is a rigid scheme predetermined by the predisposer.

In accordance with the above elements of the adhesion contract, it can be affirmed that the possibility of predisposing a contract presupposes bargaining power and this is only exercised by the professional. In the same way, adhering to a contract presupposes that one lacks this bargaining power. This lack belongs to the adherent/consumer (Stiglitz, 2013).

There are costs involved in entering into market transactions and drafting the contracts to carry them out. In this way, the adhesion contract is a fundamental tool to homogenise contractual relations, allowing companies to reduce their transaction costs, and thus maximise their profits.

The concept of "*transaction costs*" was introduced by Ronald Coase in his famous article "*The Nature of the Firm*" (Coase, 1937). The reduction of these transaction costs by companies is based on not having to negotiate the terms of the contract with each adherent with whom they wish to contract, as they simply present the general conditions to potential customers. This situation generates the following benefits for companies:

Reduction in the price of the good or service: The use of this type of contract speeds up market transactions, since it is not necessary to discuss and negotiate each time the parties try to reach an agreement. For this reason, this reduction in transaction costs in the stage prior to the conclusion of the contract means that companies allocate fewer resources and, therefore, there is a reduction in the price of the service or good that is the object of the contract.

Efficient use of the company's human resources: Taking into account that companies must allocate fewer resources for the conclusion of contracts, due to the fact that their content is not subject to modifications, a large number of contracts can be concluded by a small number of employees, whose clauses were drafted by the company's legal department, taking into account the particularities of each market, allowing for an efficient use of the firm's human resources (Bullard González, 2006).

Discipline of employee performance and reduction of agency costs: Since the content of adhesion contracts is not subject to change, they can be concluded by company personnel without in-depth legal knowledge. In this way, a small number of sales staff can conclude a significant number of adhesion contracts. In addition, many companies use profit-sharing as an incentive for their sales teams, which can sometimes result in employees entering into contracts in situations or under conditions that are not very beneficial to the companies, commonly referred to as "rebellious sales". Through adhesion contracts, by establishing a series of unmodifiable clauses, only agents will enter into agreements under the specific terms enshrined in the adhesion contract, drafted by the company's legal department, making internal control unnecessary in this aspect (Rakoff, 1983, p. 57-168).

Reducing risk and calculating contingency costs in advance: While it is impossible to identify and foresee all contingencies that may arise when drafting a contract, the adhesion contract allows companies to operate on the basis of clauses that have been drafted by specialist lawyers, analysing their legal consequences in advance and calculating risks and liabilities with as much certainty as possible, thus seeking to reduce the number of disputes and claims (Salazar, 2006).

4 ASYMMETRY OF INFORMATION IN ADHESION CONTRACTS.

Markets, given certain conditions, lead to an efficient equilibrium in the Pareto sense, which means that it is not possible to improve the welfare of one agent without harming the welfare of another.

However, there are situations where markets generate inefficient outcomes. In these cases, there are surpluses or potential exchange advantages that are not exploited by market participants, and efficiency in the Pareto sense is not verified (Stordeur, 2011).

These situations are called "*market failures*" and can occur due to different factors, such as the existence of externalities, monopolies, public goods, high transaction costs or asymmetric information.

One of the main conditions for the market to function efficiently is that traders have a good level of information. As Hayek points out, in a system where the relevant information is dispersed among several individuals, prices act as elements of coordination of individual actions carried out by different subjects, centralising the dispersed knowledge and allowing agents to make better decisions. In other words, the price system is a mechanism for communicating information and enabling uninformed market operators to make correct decisions (Hayek, 1945, p. 519-530).

However, there are situations where prices fail to transmit information. In these cases, there are problems of "asymmetric information", where information is too costly or poorly distributed between parties, which is why the extent of exchanges is limited to fewer transactions, with the consequent loss of surplus (Stordeur, 2011).

One of the main objections to the adhesion contract is the introduction of asymmetric information between the parties. The predisposer of the contract, when drafting the terms of the contract, has much more information than the adherent.

Schwartz and Wilde note that asymmetric information has three expressions: First, consumers are said to be uninformed about how contractual terms allocate risks between parties, thus preventing them from choosing those terms that correctly reflect their preferences. Second, consumers may be uninformed about the variety of prices and contract terms offered by different firms in the same market. In this case, consumers may accept bad deals without knowing that better options exist and therefore, firms lack the incentive to offer better terms in their contracts, as this will not increase their profit. Finally, consumers may simply not understand the scope of their contractual relationships

because they do not read or understand the language in which the terms are written. On this point, firms have incentives to take advantage of this ignorance by using technical language and hiding terms that are harmful to consumers (Schwartz & Wilde, 1983).

These objections highlight the existence of an unbalanced adhesion contract, where the parties have different levels of information. In this context of asymmetric information, the adherent cannot (or does not have the conditions to) acquire relevant information in order to compare and decide between different products or services (Cofone, 2015, p. 101-111).

5 ON THE POSSIBILITY OF THE MARKET ACTING (OR NOT) AS A CORRECTIVE.

Economic analysis suggests that in a competitive market where there is complete information, contracts between sellers and consumers will have only efficient terms.

Richard Posner, in his book "*The Economic Analysis of Law*", states that there are two explanations for the predisposer's decision to present the adherent with a contract of adhesion (Posner, 1998, p. 682).

The first, the "*innocent explanation*", is that the seller is just trying to avoid the costs of negotiating and drafting a separate agreement with each buyer. These costs would be too high for a company that enters into contracts on a daily basis.

The second, "*the sinister explanation*", is that the seller refuses to negotiate separately with each buyer because the buyer has no choice but to accept its terms. This implies an absence of competition. If one seller offers unattractive terms, a rival seller, wishing to win the sales, will offer more attractive terms. The process will continue in this way until the terms of the contracts are optimal.

In this way, for Posner, the market can ensure that the general conditions that end up being traded are those that maximise the utility of the adherents. As long as there is competition, the terms present in adhesion contracts will be optimal and, therefore, it does not need any regulation other than that carried out by the market itself.

In his thesis, Posner assumes that there is complete information between the parties, i.e. that both the adherent and the predisposer know the terms of the contract (Posner, 1998, p. 682). However, we know that this is not the case, since the adherents do not have all the necessary information to choose the right contract. The selection between the different contract options has costs of searching and understanding the clauses that are part of the contract, which adherents are often unwilling to bear.

On the latter, Stigler states that the decision to acquire information by rational agents depends on the cost of doing so not exceeding the expected benefits of doing so (Stigler, 1961, p. 213-225).

Schwartz and Wilde developed arguments to explain market equilibria when imperfect information exists, introducing the quality of the product offered by the firm as a variable (Schwartz and Wilde, 1979, p. 543-553).

These authors assume that the entrepreneur can choose to produce either high quality goods or low-quality goods. The costs associated with producing high quality goods are higher than the costs associated with producing low quality goods.

On the other hand, there are the adherents, who are imperfectly informed about the prices and quality of the products offered by the company. That is, they do not know which companies sell low quality products and which company sells high quality products and what price they charge for each of these.

Adherents, in turn, are divided into two groups according to their information search strategy. On the one hand, there are consumers who visit a firm randomly before deciding whether to buy the product or not. These consumers do not invest much time and effort in searching for the combination of price and quality most favourable to their interests. On the other hand, there are those who visit two firms randomly. These authors assume that once the *shopping* task is done, *consumers* are fully aware of the price and quality of the products offered and can thus choose which one maximises their utility. Consumers who are in the first group are called "*non shoppers*" and those in the second group "*shoppers*". (Salazar, 2006).

These authors determine market equilibria in two different cases: when all consumers prefer to buy high quality products and when all consumers prefer to buy low quality products. The market equilibrium reached depends mainly on the percentage of *shoppers*. Thus, when most consumers prefer high quality products, the market equilibrium reached is a competitive equilibrium if and only if the percentage of *shoppers* is sufficiently large. But if the percentage of *shoppers* is small, firms have a comparative advantage by selling high quality products, the market equilibrium will be high quality products but at a supracompetitive price. In case the pool of *shoppers* is small enough not to sustain a competitive equilibrium and firms have a comparative advantage selling low quality products, the market equilibrium will be low quality products at supracompetitive prices.

Gazal criticises this model, mainly because it assumes that adherents search for price and quality at the same time, without taking into account that the search for price is much more economical, since prices can be easily observable, unlike the quality of a product (Gazal, 1999).

The corrective role of the market on sub-optimal terms of adhesion contracts is based on rather restrictive formulations in theoretical terms. Comparing between products, in order to determine the quality of products, is not free of charge for the consumer, as it takes time and effort.

According to Goldberg, companies take advantage of adherents' information to establish a regulatory framework that maximises their interests at the expense of adherents. This happens mainly, according to this author, because the adherents who bear the cost of searching for better contracts are the minority in a market, due to the high costs they have to incur. The market would need a high percentage of adherents who bear the costs of seeking better contracts to influence and correct the inefficient terms that include predisposers (Goldberg, 1974, p. 461-492).

However, this does not happen because of the immense cost of acquiring and processing the information being compared. In this way, Goldberg refers, the market is unable to correct inefficient terms in adhesion contracts, so that adherents end up being regulated by provisions that represent the interests of the predisposer and not their own (Goldberg, 1974, p. 461-492).

George Akerlof, in his article "*The market for Lemons: Quality Uncertainty and the Market Mechanism*", published in 1970, showed that when in a market there is asymmetry of information between the different agents involved and a cost associated with the search

for this information, the quality of the products in this market will be sub- optimal. In these cases, generally, the seller has much more information about the quality of the goods than the buyer, who cannot easily find out the quality of the product before buying it (Akerlof, 1970).

Thus, when products cannot be evaluated by consumers, "low quality" products end up displacing "high quality" products.

That said, for the purposes of this article, let us imagine that there is a competitive market where the products offered are adhesion contracts. There are adhesion contracts with low quality terms for adherents and contracts with high quality terms for adherents. It could turn out that the information costs of checking the quality of the clauses for potential adherents would be very high, since adhesion contracts are often lengthy in their wording and the clauses complex for the average consumer, so they would be time- consuming to process and would probably require a specialist lawyer to assess the risks and likely consequences of entering into the contract. If these costs of acquiring information and processing it are too high, potential subscribers will not read the terms of the contracts when making purchases. This is unless the purchase they are making is sufficiently large or risky to justify reading them. If this happens, and consumers do not review the quality of contracts, contract drafters will have incentives to reduce their costs by reducing the quality of the terms. On the other hand, if a drafter is willing to offer high quality clauses, since consumers are unable to review the agreements, they will be unwilling to pay an additional price for the product in exchange for a clause that is supposedly of high quality but which they cannot verify. In this case, as the quality of the terms included in the contracts cannot be assessed, adherents will only be willing to pay for the premium corresponding to an average contract. This being the case, it would be too costly for providers of high quality contracts to maintain them and bear the additional cost involved, so that they would tend to reduce their contracts to the average quality in order to withstand competition and stay in the market. Obviously, this would redefine the quality of contracts, until there would no longer be high and low quality contracts, but all of the latter type (Cofone, 2015, p. 101-111).

The market for adhesion contracts needs a high percentage of adherents to bear the costs of *shopping* for contracts and comparing their quality, in order to influence and correct inefficient terms included in the predisposers. Of course, this does not happen because the costs of acquiring information and processing it are very high, even higher than the price adherents pay. The task of reading and analysing the full terms of the adherence contract is very costly.

6 LIMITED RATIONALITY OF ADHERENTS.

Traditional economic theory assumes that in the decision-making process people can process and analyse all available information in order to choose the option that best maximises their interests. It assumes that people make clear risk estimates, have the ability to compute the benefits and costs of available alternatives, and have information about the probability of each of the outcomes of possible courses of action, anticipating consequences of each alternative.

However, in recent years, psychologists and behavioural economics scholars have shown ample evidence that challenges the rationality principle proposed by economic theory.

In this way, the rational model would be limited given that in the real world, the optimal conditions for making decisions do not always exist and, in turn, the individual, when making decisions, is limited in time, cognitively limited, does not know all the alternatives

and is unable to process all the information required to make the decision that maximises his or her interests.

The theory of bounded rationality was first expounded in 1979 by Hebert Simon, who recognises the inability of rational theory to fully capture the decision process that individuals carry out. For this author, rationality is constrained due to external social constraints and internal cognitive limitations. The individual lacks full access to all information about the decision to be made in terms of options, risks, degree of certainty (Simon, 1979).

Another of the most important authors in this area of study is the Nobel Prize- winning economist Daniel Kahneman. For this author, contrary to what traditional economic theory maintains, people are not entirely rational, nor entirely selfish, and their tastes are anything but stable (Kahneman, 2012).

Research on decision-making provides a strong basis for the assumption that some of the terms included in adhesion contracts are often invisible to adherents. First, because of the length and complexity of adhesion contracts, adherents will be selective in considering and analysing some of the terms of the contract, making others invisible.

Nowadays, almost all products and services offered are accompanied by adhesion contracts that are characterised by a large number of clauses that are, in turn, complex to understand for the average consumer (Vieira & Barocelli, 2020).

The accumulation of information, in the case of adhesion contracts, has its origin in our market model and in the way in which transactions are carried out. This volume of information has a discouraging effect on the addressee since, as we pointed out above, its mere reading requires high levels of cognitive effort.

The distinction between visible and invisible terms in an adhesion contract is essential for the analysis of the efficiency of adhesion contracts. While market forces should ensure that sellers offer visible terms that are efficient, "invisible" clauses are inefficient due to the strategic behaviour of predisposers who try to increase their profits at the expense of the many non-reading adherents.

The implication of this analysis is that, while it is expected that the market will lead to the provision of efficient and visible contractual terms for the benefit of both adherents and predisposers as a group, this assumption will not be reflected in reality.

Having said all this, we are in a position to state that people do not read adhesion contracts because they are time limited, cognitively limited and unable to process all the information required to make the decision and choose the option that maximises their interests.

Some predictions, explanations and recommendations of orthodox economics lead to incorrect assumptions and assessments of the legal system, so it is essential to incorporate the descriptions provided by behavioural economics in order to improve and understand the limits of the traditional model.

From a behavioural economics perspective, mandating firms to provide more information is neither helpful nor does it reduce the tendency of consumers to act uninformed. That is, rather than being a problem of information asymmetry, it is a different problem, a "behavioural market failure" or the "failure to read contracts", whose causes are not related to firms' behaviour or the functioning of the market, but rather to consumers' cognitive limitations (Monroy, 2018).

7 IMPLICATIONS OF INFORMATION ASYMMETRY AND BOUNDED RATIONALITY IN THE DIGITAL PLATFORMS MARKET.

However, throughout this paper we have assumed that the price of a product or service is an attribute easily observable by the adherent or consumer, who only has to incur search costs in relation to its quality. In other words, the consumer does not have to incur large search costs to observe the price of a product or service.

Notwithstanding this, there are markets, such as the one we will analyse below, where the adherent must not only incur the costs of reading, analysing and comparing the terms and conditions that make up the quality of the product or service, but also the price to be paid as consideration for it is not easily observable to the consumer's eyes, since, in monetary terms, it is free and therefore imperceptible to the consumer.

That is to say that, unlike in traditional markets, in digital platforms, the consumer is not able to perceive the *price* paid for the product or service provided.

However, although the price cannot be observed by the user because it has no monetary value, this does not mean that the consideration for the service or product provided by the companies is *free*. There is a price that the consumer "*pays*", which of course, has a great economic value for the companies, on which their entire business revolves.

The objective or core business of digital platforms is the collection of consumer or user data. Data is essential for digital platforms such as Facebook, Uber, Google, just to mention a few. This information is extremely relevant for the development of these platforms, as it allows them to differentiate themselves from competitors and provide a better service.

The value creation by these companies is to connect people, with complementary needs. As the network grows, it becomes more attractive to potential users. This generates network effects[2], which are key to understanding the development of these platforms, since consumers will be attracted to the platform that offers the widest choice. Once a company gains a good number of consumers on both sides of the platform, it becomes much more difficult for a new competitor to emerge, acting as a barrier to entry for new competitors, thus inevitably generating market power.

Those companies that have a larger number of users will process more data and consequently provide a "better" service to users, generating in turn a competitive advantage over other competitors. In this way, companies can abuse their market power, preventing potential competitors from growing by taking advantage of their dominant position. This is made possible by the collection of consumers' personal data, which these firms carry out.

The accumulation of data by these companies, while promoting development activities and generating innovation, has put them at the centre of debate due to numerous data breaches or the violation of security policies.

Companies such as Facebook or Uber hide their data collection policy in terms and conditions of use that are long and complex to read for consumers, who end up accepting them mechanically.

A study by Visual Capitalist analyses the time it takes to read the terms and conditions of the top 21 digital platforms.[3]

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2 The network effect or network externality is used to describe situations in which one person's consumption directly influences another person's utility, whether positive or negative. Network externalities are a special type of externality in which the utility obtained by one person from a good depends on the number of individuals who consume it.

3 https://www.visualcapitalist.com/terms-of-service-visualizing-the-length-of-internet-agreements/

Visual Capitalist estimated that a person reads approximately 240 words per minute and based on that figure calculated how long it would take to read the terms and conditions of some of the most popular online platforms.

Reading the 15,260 words of Microsoft's terms and conditions would take just over an hour. Tik Tok and Spotify, on the other hand, would take 35:48 minutes and 31:24 minutes, respectively. YouTube, with 3,308 words, would take about 13:42 minutes and Facebook, with 4,132 words, would take 17:12 minutes. Overall, reading the terms and conditions of use of the 21 most popular apps, more than half of which we use on a daily basis, would require an average of 250 hours.

Similarly, the European Commission, in its report "Study on consumers attitudes towards Terms and Conditions (T&Cs)", counted words in the Terms and Conditions of well-known companies, and some of them are even comparable to Shakespeare's longest plays: Hamlet and Macbeth:

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Article

The European boards of Bank supervision and Bank resolution: Balancing independence with democratic accountability?

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ECB's Council of Supervision, Single Resolution Board, Independence, Democratic Accountability

ABSTRACT:

This paper reviews the complex balance between democratic accountability and independence of the European Boards of Bank Supervision and of Bank Resolution, within the core of the European Banking Union. For that purpose, it first examines the legal bases of such attribution of independence to each of these Boards. It also reviews the dialectics between independence and democratic accountability in the appointment and resignation regime of the members, and in oversight of the performance, of the respective Boards. The analysis differentiates between both organs because the ECB is not the independent body to which the SRM Regulation confers the managing and implementing of its provisions, but to an ad hoc body, the SRB, whose direct source of creation is the SRM Regulation itself. In this scenario, the balance between the independence unfolds in a different legal setting to that of the SSM, provided that such independence (like the ECB itself) is a direct creation of EU primary law. In addition to this peculiarity, another, no less significant, lies in the fact that the funding of the SRF is governed by an intergovernmental Treaty between the Member States participating in the SRM. Such difference concerning the SSM has specific implications for the SRM precisely from the standpoint of the European democratic legitimacy, in terms of institutional origin, but also of appointment and dismissal of its members, as well as of performance, all of which are also dealt with in this paper. Finally, the paper reaches the consequent legal conclusions, the main of those being the resulting imbalance between democracy and 'technocracy'.

PALABRAS CLAVES:

Consejo de Supervisión del Banco Central Europeo, Junta Única de Supervisión, Independencia, Rendición de cuentas democráticas

RESUMEN:

Este artículo examina el complejo equilibrio entre la legitimidad democrática y la independencia de las agencias europeas de supervisión y de resolución bancarias. Se examinan en primer lugar las bases jurídicas de tal atribución de independencia a cada una de estas instancias. También se aborda la dialéctica entre independencia y responsabilidad democrática en el régimen de nombramiento y dimisión de los miembros, y en la supervisión del desempeño, de las respectivas formaciones independientes. El análisis distingue entre ambas, ya que el BCE no es el órgano independiente al que el Reglamento del MUR confiere la gestión y aplicación de sus disposiciones, sino a un órgano ad hoc, la JUR, cuya fuente directa de creación es el propio Reglamento del MUR. En este escenario, el equilibrio entre la independencia se desarrolla en un marco jurídico diferente al del MUS, dado que, en este último, tal independencia (como el propio BCE) es una creación directa del Derecho originario de la UE. Además de esta peculiaridad, otra, no menos significativa, radica en el hecho de que la financiación del FUR se rige por un Tratado intergubernamental entre los Estados miembros participantes en el MUR. Esta diferencia con respecto al MUS tiene implicaciones jurídicas específicas para el MUR precisamente desde el punto de vista de la legitimidad democrática europea, en términos de origen institucional, pero también de nombramiento y destitución de sus miembros, así como del control de su actuación, que se abordan en este trabajo. Por último, se extraen las pertinentes conclusiones jurídicas, la principal de las cuales es el desequilibrio resultante entre democracia y tecnocracia en el MUS y en el MUR.

MOTS CLES :

Conseil de Surveillance de la Banque Centrale Européenne, Conseil de Surveillance Unique, Indépendance, Responsabilité démocratique

RESUME :

Cet article examine l'équilibre complexe entre la légitimité démocratique et l'indépendance des agences européennes de supervision et de résolution bancaires. Il examine d'abord la base juridique de l'attribution de l'indépendance à chacun de ces organes. Il aborde également la dialectique entre l'indépendance et la responsabilité démocratique dans le régime de nomination et de résignation des membres, et dans la supervision des performances, des formations indépendantes respectives. L'analyse distingue les deux, car la BCE n'est pas l'organe indépendant auquel le règlement MRS confie la gestion et la mise en œuvre de ses dispositions, mais plutôt un organe ad hoc, le CSR, dont la source directe de création est le règlement MRS lui-même. Dans ce scénario, l'équilibre entre l'indépendance s'inscrit dans un cadre juridique différent de celui du SSM, étant donné que, dans ce dernier, cette indépendance (comme la BCE elle-même) est une création directe du droit primaire de l'UE. En plus de cette particularité, une autre, non moins importante, réside dans le fait que le financement de la SRF est régi par un traité intergouvernemental entre les États membres participant à la SRM. Cette différence par rapport au SSM a des implications juridiques spécifiques pour le MRS, précisément du point de vue de la légitimité démocratique européenne, en termes d'origine institutionnelle, mais aussi en termes de nomination et de révocation de ses membres, ainsi que de contrôle de ses performances, qui sont abordés dans ce travail. Enfin, les conclusions juridiques pertinentes sont tirées, la principale étant le déséquilibre qui en résulte entre démocratie et technocratie dans le MSS et le MRS.

CONTENTS:

1 ORIGIN OF THE BANK SUPERVISION AND OF THE BANK RESOLUTION BOARDS

The EU's reaction to the economic and financial crisis unleashed in 2007 and 2008 promoted the Banking Union, what besides sped up the until then still-delayed implementation of the internal market of financial services (Teixeira, 2017, p. 536). After the Internal Market, the Monetary Union, and the Area of Freedom, Security, and Justice, the Banking Union is one of the most outstanding European achievements (Howard & Quaglia, 2014, p. 125) since it entails the 'Europeanisation' of bank supervision and resolution (not only 'communitization' for provisions of secondary EU law, but also intergovernmental instruments, are interwoven in the applicable legal framework), whose respective Single Mechanisms (SSM and SRM) were established almost at the same time (Busch, 2015: pp. 283-284; Georgosouli, 2021: p. 82; Timmermans, 2019: p.158).

For the euro area Member States and the other EU Member States that have signed a cooperation agreement with the SSM (which is also applicable to the SRM under Article 4 of the SSM Regulation), the decision of resolving a bank does not correspond to the ECB, in contrast to what happens in the SSM, but to a new Agency created for such purpose, the Single Resolution Board (SRB), albeit subject to the approval, or more precisely, the lack of positive opposition, of the Council and the Commission. However, the implementation of SRB decisions is attributed to the respective National Resolution Authority (NRA) in accordance with its domestic legislation (including transposing the Bank Recovery and Resolution Directive 2015/2019). But in the absence of enforcement by the NRA, such enforcement passes to the hands of the SRB (Lintner, 2017: p. 593).

2 DEMOCRATIC LEGITIMACY AND THE CHOICE OF FUNCTIONAL INDEPENDENCE OF THE ECB'S SSB AND THE SRB

From the standpoint of democratic legitimacy and accountability, the choice of THE EBC to lead the SSM is not trivial, due to the former's independence 'constitutionally' attributed by the TFEU. As far as the SRB is concerned, the problem is essentially the same, but the legal methodology followed to provide it with functional independence is different, since the leadership of the SRM is conferred on a new Agency (the SRB) created by

secondary legislation, and not by the Treaties. Let us now distinguish one case from the other.

2.1 THE TENSION BETWEEN SUPERVISORY INDEPENDENCE AND DEMOCRATIC ACCOUNTABILITY *EX ANTE* (APPOINTMENT) OR *EX POST* (FUNCTIONAL PERFORMANCE) OF THE ECB'S SUPERVISORY BOARD

Recital 13 of the Regulation conferring specific tasks on the ECB policies relating to the prudential supervision of credit institutions[1] (henceforth, the SSM Regulation) states that 'as the euro area's central bank with extensive experience in macroeconomic and financial stability issues, the ECB is well placed to carry out clearly defined supervisory tasks with a focus on protecting the stability of the financial system of the Union. It goes on to add that 'many Member States´ central banks are already responsible for banking supervision, to finally conclude, in view of both arguments, that 'specific tasks should therefore be conferred on the ECB concerning policies relating to the supervision of credit institutions within the participating Member States'.

Balancing the independence of the ECB's Supervisory Board, on the one hand, and its democratic *accountability*, on the other hand, is complex. It constitutes a 'quasi-oxymoronic' endeavor. To be properly dealt with, it must first be examined whether and to what extent such attribution of independence has a basis within EU primary law. Then, it is necessary to distinguish how this complex balance between independence and democratic control/legitimacy reflects itself over the appointment and resignation regime of the ECB's Supervisory Board members and over the performance of the such body.

A further distinction still needs to be made, this time only within the functional level, between how the requirements of democratic legitimacy and accountability impact on the independence of the ECB's Supervisory Board in the face of the specific types of functions it exercises under the SSM Regulation. There are two such functional types. The first one relates to the enactment of rules implementing the SSM Regulation, whose parameters of validity include, logically, those deriving from EU primary law, which precisely encompasses, in turn, the respect for democracy as an essential fundamental value common to the Union and its Member States (Article 2 TEU). The second functional type is given by the executive and applicative activity of the SSM Regulation by the ECB's Supervisory Board.

2.1.1 Legal bases covering the independence of the ECB's Supervisory Board: do they lie in EU primary law, or only in EU secondary law?

Article 282(3) TFEU grants independence to the ECB for the proper exercise of its competences. Such are those attributed by the Member States through the Treaties, according to the principle of conferral: Article 5(2) TEU. Article 282(1) TFEU states that the ECB and the national central banks of the Member States whose currency is the euro (i.e., what the same Treaty refers to as the Eurosystem) conduct the Union's monetary policy. It is also envisaged, as the teleological factor delimiting the ECB's field of competence, that its fundamental purpose is to maintain price stability, without prejudice to the support of the Union's general economic policies in the pursuit of its objectives (second paragraph of Article 282 TFEU).

Although placed outside the provisions relating to the ECB in the TFEU, Article 127(6) thereof, within the Title governing Economic and Monetary Union, allows conferring specific tasks upon the ECB concerning policies related to the prudential supervision of credit institutions and other financial institutions (except for insurance undertakings, an

1 Council Regulation (EU) No 1024/2013 of 15 October 2013, *OJ* L 287, 29.10.2013, 63-89.

issue which is beyond, the scope of this paper). However, this additional conferral is not to be carried out directly by the Treaty itself, for it requires the endorsement of Regulations following a special legislative procedure: by unanimity of the Council, after non-binding consultation to the European and to the ECB itself.

But does all this mean that such independence is limited only to the competences *directly* conferred by the Treaty to the ECB? To those that constitute the defining core of the ECB's functional status? Does the ECB's independence only extend itself to the ECB's conduct of monetary policy -Article 282(1) TFEU- with the objective of maintaining price stability and of supporting the EU's general policies in the pursuit of its objectives -Article 282(2) TFEU-? That's to say, does the EU's primary law limit ECB's independence only to the conduct of monetary policy, and therefore exclude such independence in the exercise of other possible ECB's powers, like those relating to bank supervision?

Legally, the answers to those questions are all negative. Although Article 130 TFEU grants independence to the ECB's for the exercise of the competences conferred on it by the Treaty and by the Protocol on the Statutes of the ESCB and the ECB, and such restriction leads to the doctrinal doubt as to whether or not this independence can be extended to the SSM (Türk, 2019: p. 50; Ferran & Babis, 2019: p. 70), provided that such competences (additional to those the ECB has on monetary policy) are conferred by a Regulation, the fact is that such Regulation specifies a possibility expressly provided for by its legal basis on EU primary law: Article 127(6) TFEU. In as much, the ECB's banking supervision tasks also correspond to competences attributed to it by the Treaty (i.e., according to its provisions). However, the exegesis should not be limited only to Article 130 -or to Article 130 plus Article 127(6) TFEU-. Article 283(2) TFEU should also be considered.

In accordance with the latter -Article 283(2) TFEU-, the ECB's independence is for the proper exercise of its powers. It should be noted that such provision is not one of those dedicated in the Treaty to the Union's policies. Therefore, it does not apply only to a specific one of them: the monetary policy, for example, just because it is the one that characterizes the existence and status -that's true- of ECB. Article 282(3) TFEU located in Part Six of the TFEU, on institutional provisions, which are 'horizontal', i.e., common to all Union policies, without being limited to one of them. In particular, it is not confined to the monetary policy and may perfectly also encompass that of banking supervision.

This means that banking supervision is also a competence exercised by the ECB in accordance with EU primary law, and therefore, legally speaking, such thing implies the application of the 'horizontal' institutional provisions of the Treaties also to the tasks over bank supervision conferred, in accordance to the TFEU, to the ECB: that is, Article 282(3) TFEU, and, consequently, the ECB's status of functional independence applies not only to monetary policy *stricto sensu*, but to all of the ECB's competences. A different issue lies in whether the SSM Regulation remains within the functional scope that can be attributed to the ECB according to the EU's primary law, or goes beyond what it allows, thereby incurring (or not) in *ultra vires*. But such judgement, whether Article 127(6) TFEU has been exceeded or respected in the attribution of banking supervision tasks to the ECB, is strictly judicial.

That judgement has not yet taken place at the EU's level (i.e., by the EU Court of Justice), but it has in Germany: its Federal Constitutional Court (*BVerfG*) has considered that the SSM Regulation does not incur in *ultra vires.* And according to Karlsruhe's Court, it is so precisely because of the provisions set forth by the SSM Regulation on the ECB's Supervisory Board democratic accountability. These mechanisms of parliamentary oversight legally established within the ECB's banking supervision are even more robust than those regulated by the Treaties concerning the monetary policy (Ferran & Babis, 2013: p. 271; Türk, 2019: p. 51), whose weakness, indeed, has been scholarly highlighted and criticized (Amtenbrink, 2002: pp. 147-163; Chalmers, 2010: p. 732-734).

After having examined the legal bases allowing the attribution of banking supervision tasks to the ECB, it is now necessary to distinguish between the democratic legitimacy of origin (or appointment) and the democratic legitimacy of functioning, in both cases, of the own ECB's Supervisory Board. This is because, as will be seen below, the ECB's *status* in the SSM differs from that of its monetary policy.

Disparities do not only lie in the different name given to the ECB's body entrusted with the attributed tasks: its Supervisory Board, a new ECB's formation created by the SSM Regulation specifically for the exercise of the banking supervisory function. The composition of the ECB's Supervisory Board is also partially different from those of the ECB's Governing Council and of the ECB's Executive Board (both acting in the field of monetary policy). Moreover, the ECB's banking supervision tasks must mandatorily be kept separate from those of monetary policy within the own ECB (Article 25 of the SSM Regulation), whereas the members of the Supervisory Board appointed as representatives of the ECB are prohibited from exercising powers related to the monetary policy -Article 26(5) of the SSM Regulation-.

Although there are important exceptions to this principle where the separation is not so clear, such as with regard to the implementing regulatory powers conferred by the SSM Regulation, the functional separation within the ECB is due to the fact that it was not decided to amend primary law, which attributes the exercise of the ECB's regulatory power, in general, to its Governing Council, a rule that could not, therefore, be contradicted by secondary legislation (i.e., by the SSM Regulation, in this case).

2.1.2 The (slight) enhancement of the SSM's democratic legitimacy stemming from the involvement of the European Parliament in the appointment of the ECB's Supervisory Board Chair and Vice-Chair persons

In terms of democratic legitimacy by appointment, the differences in the denomination of the various kinds of members of the ECB's Supervisory Board, compared to those of other ECB's bodies (Executive Board, Governing Council), are to be deemed positive. This is owed to the fact that the ECB's Supervisory Board has a type of members, although a minority of them (something which tempers the initial positive assessment), for whose appointment the European Parliament's favorable or unfavorable opinion is binding. This does not happen with the EB's Governing and Executive Boards, where the opinion of the European Parliament, although legally required, lacks all binding effect. Moreover, ECB's Supervisory Board members, in whose appointment the EP's opinion has binding effects, are none other than the Chairperson and the Vice-Chairperson. This veto power of the European Parliament to the appointment of the Vice-Chairperson of the ECB's Supervisory Board contrasts with the non-existent veto power of the European Parliament to the appointment, for example, of the members of the ECB's Executive Board, the body from which, as mentioned above, the Vice-Chairperson of the ECB's Single Supervisory Board must come (Amtenbrink & Makakis, 2019: pp. 14-15; Maricut, 2020: p.1202).

Firstly, the Chairperson has the casting vote in the event of a tie, which intensifies the element of democratic legitimacy derived from the role of the EP in his or her appointment. No less relevant (perhaps the contrary) is the position of the Vice-Chairperson, for he or she takes part in the preparatory work and draft decisions of the ECB's supervisory tasks -Article 26(8) of the SSM Regulation-.

Given that the Vice-Chairperson, in turn, must be elected from among the members of the ECB's Executive Board -Article 26(3) of the ECB Regulation-, and this simultaneously implies that he or she must also be a member of the ECB's Governing Council -Article 283(1) TFEU-, it results that, in such multiple simultaneous conditions. The Vice-Chairperson of the ECB's Supervision Board is also involved in the remaining procedural steps of the supervisory function.

As a member of the Executive Board, he/she contributes to preparing the meetings of the ECB's Governing Council -Article 12(2) of the Statute of the ESCB and of the ECB-. And as a member of the Governing Council, he/she takes part in the deliberations and decision-making on proposals of resolution coming from the own Supervisory Board -Article 26(8) of the SSM Regulation-, of which he/she is also its Vice-Chair. This 'ubiquitous' institutional position makes the ECB's Supervisory Board Vice-Chair, and not the Chair, the person with the most influential position in the ECB's supervisory tasks.

In any case, as regards the legitimacy of the members of the ECB's Supervisory Board, which is determined by the extent of parliamentary involvement in the procedure to observe for their appointment, or *accountability ex ante*, and dismissal, or *accountability ex post* (Bovenschen, Ter Juile, & Wissink, 2015: p. 170), a distinction must be made between the diverse types of such members. According to Article 26 of the SSM Regulation, the Supervisory Board is composed of a Chair and a Vice-Chair, four representatives of the ECB,[2] and one representative of the competent national authority of each Member State participating in the SSM (those whose currency is the euro, and those others which, upon request and in compliance with the conditions set out in Article 7 of the SSM Regulation, have established close cooperation with the ECB).

The European Parliament has a binding role in appointing the Chair and Vice-Chair of the Supervisory Board. The Eurochamber's consent to the ECB's proposal of appointment is required. However, once such parliamentary support has been obtained, the formal appointment must be made by an EU Council's implementing decision, as provided for by Article 26(3) of the SSM Regulation. On the other hand, the initiative (i.e., the proposal of the specific names to be appointed) does not lie with the European Parliament but with the ECB. The EP's role is thus limited to giving or denying its approval to the ECB's nomination, even though such parliamentary opinion is binding. Nevertheless, it is the ECB the institution that effectively selects the names to be proposed.

Regarding the Chair of the Supervisory Board, the ECB makes its proposal after choosing among candidates from a prior open selection procedure, which is also established by the ECB alone. The ECB must inform the European Parliament and the Council of this procedure, and it is legally required that the candidates be persons of recognized prestige and expertise in banking and financial matters not belonging to the ECB's Governing Council (again, paragraph 3 of Art. 26 of the SSM Regulation).

By contrast, the Vice-Chairperson must be appointed precisely from among the members of the ECB's Executive Board, who in turn are appointed by the European Council acting by a qualified majority among the nationals of the Member States with recognized prestige and professional expertise in monetary or banking matters, based on a recommendation from the Council, and the prior non-binding consultation to the ECB as well as, precisely, to the European Parliament (Article 283.2 TFEU), who only has a consultative say on such selection.

However, the Interinstitutional Agreement between the European Parliament and the ECB on practical arrangements for the implementation of democratic accountability and oversight of the exercise of the tasks entrusted to the latter within the SSM of 6 November 2013[3] sets out further obligations for the ECB (in the benefit of the European Parliament) as

2 Appointed by the ECB's Governing Council, pursuant to Article 20.5 of the SSM Regulation, as implemented by Decision 2014/427/EU of the European Central Bank, of 6 February 2014, on the appointment of representatives of the European Central Bank to the Supervisory Board, OJ L 196, 3.7.2014, pp. 38-39. The procedure for appointing these four ECB representatives to the Single Supervisory Board does not involve the European Parliament in any way, not even in a consultative capacity, and consequently lacks any democratic legitimacy by way of intervention by the institution that embodies popular representation at EU level, given its direct election by universal suffrage of the European citizens.

3 2013/694/EU, OJ L 320, 30.11.2013, p. 1-6.

regards the determination of the procedure for the submission and pre-selection of candidates to the position of ECB Supervisory Board.

As material guidelines on the issue, the Interinstitutional Agreement provides that the ECB should specify and publish the selection criteria, including the right balance between qualifications, knowledge of financial institutions and markets, and experience in financial and macro-prudential supervision, whereby the highest professional standards should be reconciled with the appropriate safeguard to the interest of the Union as a whole, as well as with a suitable diversity in the composition of the own ECB's Supervisory Board. As regards the procedural obligations established for the ECB by the Interinstitutional Agreement, these cover all stages of the mechanism for appointing the Chair of the ECB's Supervisory Board.

Regarding the initiation of the selection procedure, the Governing Council of the ECB is required to inform the competent Committee of the European Parliament, two weeks before the vacancy notice is published, of the selection criteria, the specific job profile, the open selection procedure, and other details. In the next stage, the Governing Council of the ECB is obliged to inform the competent Committee of the European Parliament about the applications submitted (number of candidates, qualifications, gender balance, nationality, in a list of details that the Interinstitutional Agreement leaves open with a significant 'etc.'), the method used for examining the applications, the selection criteria, the specific profile of the post, the open selection procedure, the method used to examine them, the need for the Governing Council of the ECB itself to shortlist at least two candidates in accordance with this method, and to provide the list of candidates thus shortlisted to the competent Committee of the European Parliament at least three weeks before submitting its formal proposal for the appointment of the ECB's Supervisory Board Chairperson.

In addition, the Interinstitutional Agreement gives this Parliamentary Committee one week from receiving the shortlist of candidates to submit questions to the ECB on the selection criteria and the shortlist itself, with the ECB having to provide a written reply within two weeks. As regards the appointment procedure, the ECB must transmit to the European Parliament its proposals for the Chair and Vice-Chair of the Supervisory Board, accompanied by written explanations of the reasons underlying such proposals.

This is followed by a public hearing of the proposed candidates before the competent Committee of the European Parliament. By means of a vote in that Committee and in plenary, the European Parliament will decide on its approval (or denial) to the ECB's proposed candidates for Chair and Vice-Chair of the own ECB's Supervisory Board within an indicative timeframe of six weeks from receipt of the proposal. In case of parliamentary rejection of the proposal of the Chairperson, the ECB may either turn to candidates who originally applied for the post (and discarded in the first proposal) or restart the selection process with a new vacancy announcement.

The different institutional origins of the Chair and Vice-Chair of the ECB Supervisory Board (the latter necessarily comes from the ECB's Executive Board, whereas the former must come from outside the ECB, as already seen) means that the procedure for their respective removal is also different, and that, consequently, the degree and intensity of the European Parliament's involvement differs in each case, both being greater in the case of the removal of the Chair than in the case of the Vice-Chair.

For this reason, it is provided that the Council, acting by a qualified majority of the votes of the representatives of the Member States whose currency is the euro, may adopt an implementing decision removing the Chair of the Supervisory Board because of his/her no longer fulfilling the conditions under which he/she was appointed, or for committing severe misconduct, on a proposal by the ECB alone, but endorsed by the European Parliament, as provided for by the first sentence of Article 26(4) of the SSM Regulation.

Thus, in removing the ECB Supervisory Board's Chairperson, the European Parliament has a binding role to play. But it is only in the intermediate stage of the procedure, as the initiative lies solely with the ECB, and the decision pertains exclusively to the EU Council. However, neither of them (ECB and EU Council) can proceed without the consent of the European Parliament. There lies the factor of European democratic legitimacy 'embedded' within the institutional removal or dismissal mechanism of the Chairperson of the ECB's Supervisory Board.

This is different, by contrast, for the Vice-Chairperson of the ECB's Supervisory Board, as the SSM Regulation links his or her term of office as such Vice-Chairperson to the end of his or her original position as a member of the ECB's Executive Board. Such legal text does not foresee the intermediate possibility: that the ECB Supervisory Board's Vice-Chairperson might be removed for reasons linked to his or her performance within the SSM without necessarily being connected to whether or not he or she remains on the ECB's Executive Board, as he or she could be replaced by another member of the latter ECB's formation if it were decided to remove him or her from his or her position as Vice-Chair of the Supervisory Board.

What certainly is provided for by the SSM Regulation, therefore, is the replacement of the ECB's Supervisory Board Vice-Chairperson when he/she ceases to be a member of the Executive Board in accordance with the Statutes of the ESCB and the ECB. To this purpose, the initial appointment procedure is, of course, essentially reproduced. That is to say, the termination is enacted through an implementing decision of the Council, adopted by a qualified majority of the votes from only those Member States whose currency is the euro, based on a proposal from the ECB endorsed by the European Parliament. The reflections made above about the degree of European democratic legitimacy presupposed by the admittedly limited, but at the same time binding, participation of the European Parliament is suitable, therefore, to be reproduced here with regard to this procedure.

In turn, Article 11(4) of the Protocol on the Statute of the ESCB and of the ECB confers to the EU Court of Justice the power to decide on the removal of members of the Executive Board, at the request of the ECB's Governing Council or of the ECB's Executive Board itself, without any involvement of the European Parliament. In such case and given the 'knock-on effect' that this dismissal as a member of the ECB's Executive Board has on that of the same person as Vice-President of the ECB's Supervisory Board, by connecting this second dismissal exclusively with the first one, the European democratic legitimacy disappears due to the lack of intervention on the part of the European Parliament.

Despite this, an element of European democratic legitimacy can be considered to be faintly present, in a very indirect fashion, through the intermediation of the requirements of the rule of law, which make themselves present in the fact that the dismissal is agreed by a Court in the application of the predetermined legal rules of previous parliamentary endorsement. However, those rules are, as we have seen, so open in the definition of the determining causes (serious breach of duties, or failure to meet the requirements for appointment, both imprecise notions if ever there was one) that all this confers a very high degree of discretion to the institutions involved (neither of them being the European Parliament, by the way).

That's to say, discretion is legally given to the bodies endowed with the initiative to activate the dismissal mechanism (which are exclusively ECB bodies: either its Governing Council or its Executive Board, which excludes the European Parliament). And discretion, too, is conferred by EU law to the institution to which the power to decide the dismissal is attributed, the EU Court of Justice (and not, once again, the European Parliament), given the broad terms, as already highlighted, used by the legal rules governing the issue. However,

such judicial power is conditioned by the fact that the initiative is given to other (non-judicial, and also non-parliamentary) EU institutions.

However, the European Parliament counts on a sort of 'initiative of the initiative' of the removal procedure by allowing it to 'inform' (note the *soft law* connotation intrinsic to the term) the ECB that they consider the conditions for removing the ECB Supervision Board Chairperson or Vice-Chairperson from office are fulfilled. The only binding legal effect given to this *provocatio* of the initiative is that the organ entitled to launch it, the ECB, must provide a response. Such a response, however, does not necessarily have to follow or accept the criterion for dismissal expressed in the EP communication. This drastically reduces the capacity of the democratic representation of the European citizens, limiting it to only being able to request, without binding force, to the independent technocratic body, the ECB, to exercise its initiative for dismissal, an initiative that the relevant EU's legislation attributes solely to that body, and not to the parliamentary representation of the citizens of the Member States.

The above-mentioned Interinstitutional Agreement between the ECB and the European Parliament provides that the former shall refer to the latter any proposal to remove the Chairperson and/or the Vice-Chairperson of the ECB's Supervisory Board from office, together with the relevant explanations that a draft resolution shall be voted on in the competent parliamentary Committee, and that a decision shall be taken in plenary session by the EP on the adoption or rejection of such Committee resolution. With regard to the Vice-Chairperson of the Supervisory Board, consistently with its different appointment mechanism and institutional origin, the aforementioned Interinstitutional Agreement adds that, in the event that the European Parliament or the Council inform the ECB that the conditions for his or her dismissal are met, the latter shall send its considerations to the former in writing within four weeks.

In any event, once the respective resignations have taken place, the substitution mechanism is activated once again, which does grant, in the intermediate phase, the European Parliament the capacity to veto or endorse the candidacy proposed by the ECB to the Council. The Council decides by a qualified majority of the Member States participating in the SSM, which is, as stated above, those whose currency is the euro, as well as those other Member States not belonging to the Eurozone but that cooperate within the SSM, in accordance with the Regulation of the latter.

2.1.3 Democratic legitimacy ex post: the complex relationship between the functional independence of the ECB's Supervisory Board and its democratic accountability

Once reviewed the democratic legitimacy in terms of the involvement of the European Parliament in the procedure of the ECB Supervisory Board's members appointment and early dismissal, we will now go on to examine, from the same perspective of democratic legitimacy and accountability, the monitoring system on the functional performance of this body. To that end, a distinction must be established between the two types of essential tasks pertaining to the ECB's Supervisory Board. That is, between those issuing implementing provisions of the SSM Regulation and those executing through individual decisions, the SSM rules to each singular case in the exercise of its bank-supervising functions.

2.1.3.1 Democratic oversight of the ECB's regulatory tasks within the SSM

As regards the exercise of the ECB's regulatory function within the SSM, it should be noted firstly that, in principle, it is limited to adopting Regulations only to the extent necessary to organize or specify the procedures for conducting the tasks entrusted to it by the same

Regulation (in accordance with the second paragraph of Article 4.3 of the SSM Regulation' last sentence). This is a regulatory power that, moreover, does not lie with the ECB's Supervisory Board but with the ECB's Governing Council, a circumstance which, in the absence of any specific provision of the SSM Regulation in this respect, derives from Article 17 of the Protocol on the Statute of the ESCB and of the ECB.

The ECB may also, within the field of the SSM, adopt guidelines and recommendations in accordance with the applicable Union law, as prescribed in the first sentence of the second paragraph of Article 4(3) of the SSM Regulation, or even with national law implementing EU Directives or choosing among options expressly open to the Member States by EU Regulations pursuant to the first paragraph of Article 4(3) of the SSM Regulation, in particular, as regards non legislative acts latter referred to in Articles 290 and 291 TFEU (delegated and implementing acts), in accordance with the first sentence of the second paragraph of Article 4.3 of the SSM Regulation. Specifically, the ECB is subject to the binding regulatory and implementing technical standards developed by the European Banking Agency (EBA) and formally adopted by the Commission in accordance with Articles 10 to 15 and Article 16 of Regulation (EU) 1093/2010, as well as to the provisions of the European supervisory handbook developed by the EBA, according to the second sentence of the second paragraph of Article 4.3 of the SSM Regulation.

Operating within those material and subjective constraints, the exercise of the regulatory function conducted by the ECB in the application of the SSM Regulation bears the same relation to the imperative of respect for democracy as any other type of performance, by a Union institution or body, of a regulatory function implementing another EU's secondary law which so provides. This means, in particular, that there is no need for prior scrutiny by the European Parliament on the ECB's drafts of legal provisions within the scope of the SSM in which it can operate as described in the previous paragraph, nor for subsequent approval, confirmation or validation of such drafts by the European Parliament (except, of course, in the case of delegated acts, by application of the general provisions on this type of non-legislative normative acts of the Union laid down in Article 290 TFEU and, under it, and where appropriate, by the corresponding basic legislative act.).

Thus, apart from the actual normative implementation of the SSM Regulation itself, or of the rest of the applicable EU law, or of national law transposing EU Directives or enacted to make a choice among options expressly opened to the Member States by EU regulations, the ECB does not have any other regulatory powers, except in relation to the self-organization of its own Supervisory Board. The latter also constitutes a normative development of the SSM Regulation, which, as such, isn't subject to authorization or validation by the European Parliament either, but only to judicial review by the EU Court of Justice in all matters relating to compliance with and non-violation of the SSM Regulation itself, as well as any other formal or material parameter of EU legal validity (Timmermans, 2019: pp.165-ss.).

The rest of the legislation governing the Banks subject to supervision, as well as the supervisor itself (the ECB's Supervisory Board for systemic institutions; the National Supervisory Authorities, or NSSA's, for the others), is produced outside the ECB, as has already been seen. In particular, the rules of the EBA (European Banking Authority) must be abided by banks in their organization and activities and by the supervisors of Banks (ECB's Supervisory Board, NSAB's), as clearly derived from Article 4(3) of the SSM Regulation. The EBA normative acts are adopted under the so-called 'Lamfalussy process' (or 'Lamfalussy-Larosière process'). It is a specific method of regulatory production in the field of financial services, including those of banking, which incorporates the technical expertise of regulators and consultations with private market participants and stakeholders, while seeking to maintain democratic and inter-institutional balances within the Union (Chatzimanoli, 2011; Molloney, 2008; Mollers, 2010; Vaccari, 2009).

As regards the areas in which the ECB's regulatory powers in the field of banking supervision may be deployed and exercised, the Interinstitutional Agreement between the ECB and the European Parliament was reached in accordance with what is provided for by Article 20(9) of the SSM Regulation, establishes reporting obligations on the ECB and in the benefit of the EP (as well as the corresponding rights for the counterparty institution).

The agreements between the ECB and the EP within the SSM are certainly not mere *soft law*, for they have an enabling basis in the SSM Regulation. Accordingly, they can be considered a development of that Regulation insofar as they comply with it (a matter on which the final word obviously rests with the EU Court of Justice). The normative nature of these Interinstitutional Agreements is clear, and it is not called into question by the fact that the Interinstitutional Agreement was published in the C series of the Official Journal of the European Union (that which publishes non-legally binding acts) and not in the L series (which publishes normative acts with binding legal content). This place of publication in the Official Journal is merely an administrative practice and not a binding interpretation of the SSM Regulation, which can only be done by the General Court and, above all, by the Court of Justice of the EU.

Together with its normative nature, the bilateral and reciprocally binding dimension of this Interinstitutional Agreements for its two parties (ECB and EP) should not be forgotten, as it arises from the formal commitment of both institutions. Consequently, it also has a contractual nature for them, which makes its content legally binding and, therefore, legally enforceable for its contracting parties. Unlike the MoU's[4] signed between the European Stability Mechanism (ESM) and one of its Member States in case of financial assistance asked by the latter to the former, the Interinstitutional Agreement reached between the ECB and the EP within the scope of the SSM is not an instrument of international law (treaty), because both parties (the ECB and the EP) are not themselves subjects of international law, for they belong to the same international subject: the European Union.

However, such Interinstitutional Agreements do have the character of EU legislation (Gortsos, 2019: p. 36), similar, *mutatis mutandis,* to that possessed by the MoU's signed by the financially assisted States and the EU itself (the latter acting through the Commission) within the framework of the EU's mutual assistance mechanism envisaged by Article 143(2) TFEU for the Member States with a derogation to adopt the euro as their currency, when they are in the serious balance of payments difficulties (or when there is a threat thereof), which may jeopardize the functioning of the internal market or the common commercial policy. Within EU secondary law, such a mechanism is governed by the Council Regulation (EC) No 332/2002 of 18 February 2002. The twofold legal value that the existing Interinstitutional Agreement between the ECB and the EP has within the SSM (both normative and contractual at the same time, as already seen) means that its provisions are legally enforceable and thus justiciable, depending on the case, before the EU's General Court or before the EU's Court of Justice. The validity parameter for such an Interinstitutional Agreement is clearly given in the first place by the SSM Regulation itself because of the referral that the former makes to the latter to implement some of its provisions[5].

4 Although they are not acts of Union law, but of the ESM as a distinct international organization (which, for its part, does not prevent the Commission and the ECB from acting on behalf of that distinct international organization as 'borrowed institutions'), as the Court of Justice stated in its Grand Chamber Judgment of 20 September 2016, Joined Cases C-8/15 P to C-10/15 P Ledra Advertising and Others v European Commission and ECB, paragraph 54, these Memoranda of Understanding are of a normative nature and can be considered as international agreements under general treaty law, as they are concluded between two subjects of international law (the EU Member State financially assisted by the ESM, on the one hand, and the ESM itself, as an international organization with legal personality, on the other hand).

5 In a non-exhaustive list, Article 20(9) of the SSM Regulation makes the referral to the Interinstitutional Agreement and determines what are its provision to be implemented by the latter. After stating in the first sentence that these Agreements shall cover the practical modalities of democratic accountability

In a non-exhaustive list, Article 20(9) of the SSM Regulation refers to the Interinstitutional Agreement. After stating in the first sentence that these Agreements shall cover the practical modalities of democratic accountability and oversight over the exercise of the tasks conferred on the ECB by this Regulation, the second sentence of such Article makes a non-exhaustive material delimitation, stating that '[t]hose agreements shall cover, inter alia, access to information, cooperation in investigations and information on the selection procedure for the Chair of the Supervisory Board'.

Of course, the rest of the EU law's parameters of validity are applicable when judicial review is sought against any irregularities that may arise through omissions or specific acts implementing the provisions of the Interinstitutional Agreement. Such validity parameters include, of course, EU primary law itself and, within it, the Charter of Fundamental Rights. In particular, the Charter may indeed have a particular impact within the legal validity parameter insofar as any deviations from the provisions of such Interinstitutional Agreement to the detriment of the European Parliament and its Members may entail infringements, among other rights, of that to stand as a candidate, in its dimension of protecting the proper exercise of his/her functions as MEP's, once the candidate is elected up until his or her mandate ends, in the terms that those functions are defined by the law (which precisely includes this Interinstitutional Agreement, and more rules, of course). I. e., the also known as the *ius in officium* of each MEP.

However, the powers of democratic control granted to the European Parliament by the SSM Regulation (and, in its deployment and implementation, by the Interinstitutional Agreement between the own Eurochamber and the ECB) do not go so far as to be consultative, much less to provide the European Parliament and/or its Members with binding possibilities to influence the final wording of ECB's legal acts in which the corresponding initiatives may culminate.

With these important nuances, in terms of reinforcing the ECB's independence in exercising its normative powers and the parallel undermining of democratic legitimacy due to the lack of regulatory capacity (or binding influence) on the part of the Chamber elected by direct universal suffrage of the European citizens, the aforementioned Interinstitutional Agreement establishes that the ECB will inform the competent Committee of the European Parliament, including the corresponding timetable, about the procedures that the ECB has the legal commitment to establish for adopting its regulations, decisions, guidelines, and recommendations that are subject to public consultation in accordance with the SSM Regulation, and that it shall do so before initiating such consultation.

Pursuant to the Interinstitutional Agreement, the information must encompass, in order to increase transparency and consistency in the ECB's policies, the principles and types of indicators or data it normally uses for the preparation of policy acts and recommendations (in this context, of course, within its supervisory banking policy, not within the monetary one). EP is entitled to submit comments, with the possibility of exchanges of views ('informal exchanges', the Agreement restrictively limits) to be held at the same time as the open public consultations are in progress. There is a striking contrast between the informality of these exchanges of views and the openness of the said public consultations (as well as the formality of these latter, since they are conducted through a procedure).

Once the ECB has adopted the legal act, it must, in accordance with the Interinstitutional Agreement, send it to the competent Committee of the EP, which can only be seen as a specific manifestation of the general function of (European) parliamentary

and oversight over the exercise of the tasks conferred on the ECB by this Regulation, the second sentence of such Article makes a non-exhaustive material delimitation, stating that [t]hose agreements shall cover, *inter alia*, access to information, cooperation in investigations and information on the selection procedure for the Chair of the Supervisory Board'.

scrutiny. Besides such specific act-by-act referrals, the Interinstitutional Agreement closes the circle of communication between the ECB and the EP with a regular obligation on the former to inform the later, in writing, and on a regular basis, to update previously adopted legal acts.

In addition to the fact that there are no pre-conditioning powers (i.e., there is no *ex ante accountability*) with regard to the exercise of the ECB's normative powers within the SSM, the European Parliament's tasks of democratic control do not include the possibility to revoke legislative measures already adopted by the ECB (i.e. there is no *ex post accountability* either). In other words, the European Parliament does not have any *overriding* powers over the ECB within the SSM (Ter Kuile, Wissink & Bovenschen, 2015: p. 173).

2.1.3.2 Democratic accountability in the decision-making within the SSM: the scrutiny by the European Parliament over the interactions between the ECB's Supervisory Board and the ECB's Governing Board

Decisions implementing the SSM Regulation have a complex adoption procedure, which involves the ECB's Supervisory Board and the ECB's Governing Council. The first of these two bodies, the Supervisory Board, is responsible for preparing and implementing the decisions assigned to the ECB (Article 26.1 of the SSM Regulation). By contrast, the ECB's Supervisory Board is not responsible for adopting such decisions but only for the complete drafts of such decisions, which it must propose to the ECB's Governing Council -Article 26(8), first paragraph of the SSM Regulation-. Formally, it is up to the Governing Council to decide.

It can do so either through a sort of tacit approval ('positive silence') or by means of a reasoned written refusal, within a general period of no more than ten working days -third paragraph of Article 26(8), again-, or within no more than 48 hours in urgent cases (fifth paragraph of the same regulatory provision). In the latter case of explicit and written negative, the ECB' Governing Board must specify the reasons for monetary supporting such negative. But there may be other reasons for the negative, since Article 26 of the SSM Regulation is not specific about the grounds for the ECB Governing Council's refusal of the draft submitted by the ECB's Supervisory Board).

Such is the extent of the rules on the decision-making system in the SSM, according to its governing Regulation, which does not provide for any involvement of the European Parliament. However, there exists such a rule within the Interinstitutional Agreement, which in the first paragraph of Section I.4 establishes a specific case of accountability.

It provides that, in case of an objection by the ECB's Governing Council to a project of decision submitted to it by the ECB's Supervisory Board, the President of the ECB shall inform the President of the competent Committee of the European Parliament of the reasons for this objection, albeit subject to the confidentiality requirements mentioned in the Interinstitutional Agreement itself. Such provision of the Interinstitutional Agreement does not go beyond what is permitted by the SSM Regulation because it falls within the broad terms of the reference made therein -Article 20(9)- to the Agreements between the EP and the ECB.

This means that the ECB's Governing Council must explain its reasons, not only to the own ECB's Supervisory Board, which is nothing in terms of democratic accountability (as none of the ECB's bodies is democratically elected by suffrage), but also to the European Parliament, which, by contrast, is a relevant factor from the perspective of accountability. However, the recipient part of the explanation only reaches the Chair of the competent parliamentary Committee and does not call into question the decision-making power of the ECB's Governing Council, since the obligation of the latter does not go beyond having to explain itself, but without the possibility of the Parliament being able to change the direction of the decision already taken by the ECB's Governing Council, at least in terms of a legally

binding force that the Eurochamber' intervention precisely lacks here (Ter Kuile, Wissink, & Bovenschen, 2015: p. 179).

As regards the implementation of the decisions already taken following the procedures described above, which is the responsibility of the ECB's Supervisory Board, as mentioned above, they constitute the quantitatively most abundant and statistically 'ordinary' exercise of power within the field of the prudential supervision of banks. They include both the granting of the banks of authorizations to start their operations and, where appropriate, the withdrawal of such authorizations as the initial and final terms, respectively, of the financial and corporate life of banks institutions.

Between both ends along the lifespan of banking institutions, with the respective decisions (authorization; revocation), the ECB's Supervisory Board's actions applying the SSM Regulation and other relevant legislation include the broad series of administrative decisions that may be taken in relation to these same institutions, the banks, in the exercise of its supervisory function in the full range of situations regulated by the aforementioned legislation, and corresponding to the day-to-day activity of the supervised banks in the performance of their respective business within the market.

The European Parliament (the institution embodying direct supranational democratic legitimacy, given its election by universal suffrage by the peoples of the Member States) must, however, not take part in the procedures of the implementing decisions of the ECB's Supervisory Board to conduct its tasks of prudential supervision of European banking institutions. The clearest reason for such parliamentary, but probably not the most straightforward, lies in the own independence conferred by Article 19 of the SSM Regulation on the ECB's Supervisory Board vis-à-vis the European Parliament as far as the latter's banking supervisory function is concerned.

It is surprising, however, if one follows the logic of the higher o lesser democratic legitimacy of origin(or, what is the same, the direct or indirect nature of such democratic legitimizing basis), that, while no delegation or representative of the European Parliament can take part in the meetings of the ECB's Supervisory Board (not even as an observer with a voice but without a vote), the Commission may precisely be invited by the ECB's Supervisory Board to its meetings as an observer -Article 26(11) of the SSM Regulation-, despite the fact that the EU Commission's democratic legitimacy is mediate or indirect, (precisely through its investiture by the European Parliament), as it is not elected by universal suffrage, unlike the Eurochamber.

But the most general operational reason (and regardless of the independence of the ECB's Supervisory Board vis-à-vis other European or State institutions) for the European Parliament's inability to intervene in the procedures to the enactment of ECB's Supervision Board decisions over banking institutions go linked to the very principle of separation of powers. Adopting such enforcement decisions is simply the execution of legal/normative acts. And the European Parliament, like any other parliamentary assembly within the framework of constitutionalism, is excluded from this function.

On the contrary, and as it is customary in all models framed within the coordinates of constitutionalism, the only control with binding legal effects even on the validity and consequent effectiveness of the administrative decision implementing the applicable legislation (in this case, the decisions of the ECB's Supervisory Board exercising the administrative powers over banking institutions that the SSM Regulation confers on it) is judicial control. This is a matter for the EU Court of Justice or the EU General Court, as the case may be. It is a simple question of separation of powers, then.

Another issue is, as will be seen later, that this enforcement, administrative or executive action, in which the Parliamentary Assemblies cannot participate prior to, or

simultaneously with, the procedures of banking supervision, can be the object of a typically parliamentary task. It is the classical parliamentary function of control or monitoring of the executive branch, organs, and bodies, which is exercised *ex post*, both on persons (the members of the ECB's Supervisory Board, asking them about the reasons, motivations, data, etc., which led to the supervisory action which in each case may be subject to parliamentary scrutiny), as well as on the actions themselves (adequacy of the sense and content of the actions, their effects, and consequences, etc.).

By exercising such monitoring, the EP (its Members) are entitled to question (and to criticize) the technical correctness and timeliness of the monitored executive body (here, the ECB's Supervisory Board) and even to include assessments of legality, although without binding effect, as such assessments are officially the responsibility of the Court of Justice or, where appropriate, of the General Court.

By contrast, the SSM Regulation does not confer the European Parliament powers to demand political responsibility through censure, residence, or removal from office. Or no other of such powers except the own Eurochamber's partial intervention that, as already seen before, involves its necessary approval to the initiative and final decision of other institutions (respectively, the ECB itself and the EU Council) on the removal of the Chairperson of the ECB's Supervisory Board. But the EP lacks such capacity over, but the larger number of other members of the same Board.

2.1.3.3 Parliamentary control over the functional performance of the ECB's Single Supervisory Board: reports, hearings, answers to questions posed by the European Parliament and by national Parliaments. Other transparency and accountability obligations

Linking with what has already been said above and raising the phenomenon to a category, the acts of the ECB's Supervisory Board are certainly subject to the political control of the European Parliament. This is done through specific accountability instruments devised and governed by the SSM Regulation, which compel such Supervisory Board to submit reports to the EP proactively and to hold parliamentary hearings equally on the own Board's initiative.

But the Eurochamber's oversight within the scope of the SSM can and must also be conducted through the general instruments of parliamentary control at the initiative of the European Parliament itself, for, as they can be exercised with respect to any Union institution, it is then possible to conduct them as regards the ECB' Supervisory Board. The common accountability mechanisms for all the tasks of the ECB's Supervisory Board are, in the first place, those provided for by EU primary law itself with respect to the ECB in general. That is to say, with respect to all ECB's functions and formations.

Thus, Article 284(3) TFEU provides that the President of the ECB shall submit an annual report to the Council, the Commission, and the European Council on the activities of the Bank (including those tasks carried out within the SSM) and on the Monetary Policy during the previous and the current year. The provision also envisages that the EP may hold a general debate based on this report. In addition, the same Article also states that the President of the ECB and the other members of the ECB's Executive Board may be heard by the competent committees of the European Parliament on their own initiative, but also on the initiative of the EP'S plenary.

These are archetypical tasks in the exercise of the traditional parliamentary oversight function of the executive, but also of those other bodies performing similar executive, governmental or administrative functions in legally circumscribed areas, although these bodies may benefit from the recognition, by law, of independence *vis-à-vis* other bodies or subjects, either of public or private nature, either supranational or national. The

independence exceptionally conferred to such bodies (scholarly labelled as 'independent administrations') is not synonymous, however, with a lack of control, nor is it an antonym of such control.

Nevertheless, a distinction should be made here between the parliamentary function of political control and that of demanding political responsibility through removal (which can be considered as a manifestation and consequence of the former function, but only in qualified cases explicitly predetermined by the applicable legislation).

The ECB's independence is compatible with the political control exercised over it by the European Parliament, understanding such parliamentary control as the continuous monitoring and follow-up through various legally regulated mechanisms, a part of which is the interaction with the heads of the independent bodies subject to scrutiny by the corresponding representative parliamentary assembly. Nor is the ECB's independence incompatible with additional mechanisms of political control, other than appearances, hearings, and debates, conducted in documentary form (questions for written answer, requests for relevant documentation on the subject matter, and activities of the ECB's Supervisory Board).

Quite the contrary, the ECB's functional independence is legitimized precisely by its submission to such controls carried out by the democratic representation of the sovereign citizenry, as the Explanatory Memorandum of the SSM Regulation does not fail to point out (Recital 55)[6], even though, somewhat contradictorily, the own SSM Regulation's Explanatory states later on, in Recital 75, that 'In order to carry out its supervisory tasks effectively, the ECB should exercise the supervisory tasks conferred on it in full independence, in particular free from undue political influence and from industry interference which would affect its operational independence'.

What the ECB's independence turns out to be in principle incompatible with is any parliamentary mechanism of political accountability, whereby the EP would be legally entitled to remove the members of the independent body due to disagreements over the appropriateness of the decisions taken by them in the legitimate exercise of their duties. Unless, of course, an exception to the contrary is expressly provided for by law. Precisely, EU primary law does not provide for such exceptions for the ECB in general terms.

However, the SSM Regulation does so with the ECB's Supervisory Board, one of the ECB's formations, bodies, or organs. When we previously examined the legitimacy of origin (by appointment of the members of such a Board), we mentioned the limited role given to the European Parliament. It was noted there that the Eurochamber lacks both the initiative and the final decision on the removal of the Chair and Vice-Chair of the ECB's Supervisory Board, as it results from article 56(9) of the SRM Regulation when it attributes to the Council the decision for such dismissal, which must be adopted by a qualified majority of the institution (meaning that if the such majority is not reached, the dismissal does not take place). However, as it has also been pointed out when examining the legitimacy of origin (appointment and dismissal), the European Parliament's opinion for or against the removal of one or the other officers at the ECB's Supervisory Board (or both officers) is binding under the SSM Regulation.

A further limitation of the role of the European Parliament within this context lies in the fact that all the members of the ECB's Supervisory Board (including those who simultaneously must be either member of the ECB's Executive Board or representatives of

6 Echoing, in turn, the positions of the Basel Committee on Banking Supervision (BASEL COMMITTEE ON BANKING SUPERVISION, Core principles on effective banking supervision, Sept. 2012, "Principle 2: Independence, accountability, resourcing and legal protection for supervisors", p. 22, available online at http://www.bis.org/publ/bcbs230.pdf) and of the International Monetary Fund (IMF STAFF POSITION NOTE, The making of Good supervision: Learning to say 'no', 18 May 2010, p. 16, available on-line at http://ssrn.com/abstract=1670831), as noted by TER KUILE, WISSINK, and BOVENSCHEN, 2015: 164.

the NSAA), the Eurochamber only intervenes in the removal (and consequent political accountability) of the Chair of the ECB's Supervisory Board. The EP is also involved in the removal of the Vice-Chair of the Supervisory Board, but with additional limitations due to his or her mandatory simultaneous membership of the ECB's Executive Board since the decision on his or her removal from the latter Board is taken by the Court of Justice, as provided for in the Protocol on the Statute of the ESCB and of the ECB -Article 11(4)-.

In addition to the applicability of the general rules dedicated by the TFEU to the ECB's accountability, there are also specific mechanisms provided for in the SSM Regulation with respect to the ECB's Supervisory Board activity. As has already been seen, the legal basis invoked by that Regulation (which therefore covers, in particular, its provisions on the democratic control and accountability of the ECB's Supervisory Board) is Article 127(6) TFEU, which is placed within the Title governing EMU, and not, however, within the part of such Treaty devoted to the institutions, one of which is, obviously, the ECB.

Specifically, Article 20 of the SSM Regulation, which provides for such specific democratic control and accountability mechanisms of the ECB's Supervisory Board, does not have its legal basis in Article 284 TFEU, which deals with the accountability of the ECB in general. Consequently, the legal basis for the ECB Supervisory Board's accountability within the SSM can only be found in its governing Regulation itself. That means that its legal basis in EU primary law is only Article 127.6 TFEU, the sole provision which, moreover, is expressly invoked as the basis of EU primary law for the entire SSM Regulation in its Explanatory Memorandum.

Therefore, under Article 20 of the SSM Regulation, the ECB's Supervisory Board is accountable before the European Parliament for the activity of the former within the SSM. But such legal rule adds a specific obligation not provided for in EU primary law (Article 284 TFEU, as has already been mentioned): that the ECB's Supervisory Board should send this report not only to the European Parliament but also to the Commission, and even to the Eurogroup.

Moreover, the report must cover only the year in question (without including the previous year and forecasts for the following year, unlike the report provided by Article 284 TFEU, which by contrast, must effectively do so). Finally, the report referred to in Article 20 of the SSM Regulation is not presented by the President of the ECB, unlike it is stated by Article 284 TFEU as regards the general ECB's report on its activities and on monetary policy.

The final report provided for by Article 20 of the SSM Regulation is publicly presented before the European Parliament by the Chair of the ECB's own Supervisory Board (not by the ECB's President). And he or she must also submit a such final report before the Eurogroup in the presence of representatives of any participating Member State in the SSM: the EU Member States whose currency is the euro, plus those representing other Member States that have established cooperation within the framework of the SSM, in accordance with Articles 2(1) and 7 of the SSM Regulation.

In addition to the obligation placed on the Chair of the ECB's Supervisory Board to report to the aforementioned institutions, paragraphs 4 and 5 of the SSM Regulation grant the European Parliament and the Eurogroup a right of initiative to hear that Chair on the performance of the supervisory functions by the Board which he or she heads. Oddly enough, a similar right of scrutiny and accountability is also granted to the Eurogroup, despite its more than dubious representative nature, given its governmental rather than parliamentary composition.

From the viewpoint of democratic legitimacy, it is questionable that this body (Eurogroup) be granted the same right as the European Parliament to hear the ECB's Supervisory Board on the exercise of its tasks. But even more questionable is the fact that

the EU Court of Justice has denied the Eurogroup the legal status of being an institution of the Union and regarded it only as an intergovernmental ministerial formation[7].

Fulfilling the various calls in the SSM Regulation for cooperation between the ECB and the EU institutions to which it is accountable, the Interinstitutional Agreement of the ECB's Supervisory Board with the EP adds that the report to be presented by the Chair of such Board must be made available to the latter, on a confidential basis, in one of the official languages of the Union four working days before the hearing and that translations will subsequently be provided in all the other official languages.

The same legal text also sets out a list of such annual report's minimum contents: the execution of supervisory tasks and the sharing of these tasks with the national supervisory authorities, cooperation with other competent national or Union authorities, the separation of supervisory tasks from monetary policy functions, the evolution of the supervisory structure and staff, including the number and composition of seconded national experts, the implementation of the code of conduct for the members of the Supervisory Board to be adopted by it according to Article 19(6) of the SSM Regulation[8], the method of calculation of supervisory fees and their amount[9], the budget allocated to supervisory tasks, and the experience with complaints lodged under Article 23 of Regulation 1024/2013 (reporting of infringements).

In addition, the Interinstitutional Agreement requires the ECB to publish the Annual Report on the SSM website, provides for the ECB's email information service to be expanded to address SSM-related issues specifically, and mandates the ECB to convert the information received via such email into a Frequently Asked Questions (FAQ) section on the SSM website.

The accountability obligation that Article 20 of the SSM Regulation establishes for the ECB's Supervisory Board has a multi-subjective addressee. It combines, in a somewhat heterodox manner, democratic obligations of control and accountability before the European Parliament, as we had already seen, with other types of accountabilities (before the Eurogroup, with the objection already noted: its non-parliamentary but intergovernmental composition, governed by the respective national laws.

Article 20(6) of the SSM Regulation confers on the European Parliament -also on the Eurogroup, with equal *caveats*: it is not an elected body but a governmental one; it is not even a Union institution, according to the Court of Justice - the right to submit questions to the ECB (that is, to its Supervisory Board). The provision is for the latter to reply orally or in writing to such questions from either body (Parliament, Eurogroup), in accordance with its procedures, with the additional requirement, in the case of the Eurogroup, that representatives of any participating Member State whose currency is not the euro also be present.

This is the classic parliamentary instrument of *question time*, or simply the possibility of supervising and controlling governmental action (that is, the activity conducted by the ECB's Supervisory Board within the scope of its tasks under the applicable regulations).

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7 Judgment of the Court of Justice (Grand Chamber) of 16 December 2020, Joined Cases C-97/18 P, C-598/18 P, C-603/18 P and C-604/18 P, Council v. Chrysostomides and Others.

8 The Interinstitutional Agreement itself stipulates that, prior to its adoption by the ECB -specifically, through its Governing Council, according to Article 19(6) of the SSM Regulation-, the ECB shall inform the competent Committee of the European Parliament of its main elements and, once adopted, the ECB shall inform the European Parliament of the need to update it. Note that the European Parliament, according to this Interinstitutional Agreement, only has the initiative to request the ECB to report in writing on the implementation of this Code of Conduct, to not adopt, to amend or to update it. The Agreement also specifies the content of the Code, something that the SSM Regulation does not, which is a serious shortcoming from the perspective of the principle of legality and of democratic legitimacy.

9 The same obligation to inform the European Parliament about this concept is reiterated in Article 17 of Regulation (EU) No 1163/2014 of the European Central Bank of 22 October 2014 on supervisory fees, OJ L 311, 31.10.2014, p. 23.

Although with the nuance of the independence of this body. Independence which, although it does not bar parliamentary control by means of questions, in principle excludes the demand for political responsibility consisting in removing the institutional heads supervised by the Parliament.

The Interinstitutional Agreement between the ECB and the EP provides that written questions shall also be answered in writing. It adds that they shall be addressed to the Chair of the Supervisory Board via the Chair of the competent Committee of the European Parliament, with a maximum deadline for reply of five weeks from their transmission to the ECB and a general principle that the reply should be given in the shortest possible time. Furthermore, and as an additional element of publicity or transparency, the same Interinstitutional Agreement compels the European Parliament and the ECB to dedicate a specific section to these questions and answers on their respective websites.

Article 20(7) of the SSM Regulation states that when the European Court of Auditors examines the management of the ECB's operational efficiency under Article 27(2) of the Statute of the ESCB and of the ECB, it shall also consider the supervisory tasks conferred on the ECB by the SSM Regulation. Although labelled as 'Accountability and reporting', this provision does not fit into the figurative sense in which the term is used in the case of scrutiny, which a representative parliamentary assembly elected by universal suffrage conducts. It does, conversely, into the purely literal sense: i.e., the rendering of "accounting" (textually speaking) accounts. In fact, and in accordance with the aforementioned regulatory provision, the Court of Auditors also audits the ECB's Supervisory Board, and this function appears in the same Article, mixed with political accountability, as has just been pointed out

After carrying out such methodologically heterodox 'encrustations' of bodies which, according to the schemes of constitutionalism, should not receive but render, democratic accounts (Court of Auditors; Eurogroup, given its intergovernmental composition), the last two paragraphs of Article 20 of the SSM Regulation once again address genuine cases of parliamentary control over the ECB's Supervisory Board. Article 20(8) provides for the possibility of holding parliamentary hearings, albeit confidential and *in camera*, on the tasks of the ECB's Supervisory Board, before the Chair and Vice-Chairs of the competent Committee of the European Parliament. Likewise, Article 20(9) of the SSM Regulation refers to other traditional instruments of parliamentary scrutiny, the Committees of Inquiry, and compels the ECB to cooperate sincerely with the EP for this purpose.

The Interinstitutional Agreement envisages two public hearings with the ECB's Supervisory Board Chair within the year following the relevant audited activities. Their celebration dates must be agreed upon between the ECB's Supervisory Board and the EP's competent Committee. The same Interinstitutional Agreement adds the possibility for the Chairperson of the ECB's Supervisory Board to be invited to additional *ad hoc* exchanges of views with the competent Committee of the European Parliament on supervisory issues.

The Interinstitutional Agreement also foresees special confidential meetings at the request of the Chairperson of the competent Committee of the European Parliament to be held on a date previously convened by both parties, whose participants are all subject to confidentiality obligations equivalent to those applicable to the members of the ECB's Supervisory Board and the supervisory staff of the ECB. The meeting must be held according to the principle of openness and the need to be explicit about the specific circumstances.

These last two principles are inherent to the proper exercise of parliamentary powers of governmental political control, in this case, exerted over the independent body entrusted with the exercise and, to the limited extent indicated above, also with the regulation of banking supervision: the ECB's Supervisory Board. Attendance at such confidential meetings is subjectively restricted by the Interinstitutional Agreement, both for the European Parliament and for the ECB's Supervisory Board itself.

Accordingly, only the Chair of the former and the Chair and Vice-Chairs of the latter's competent Committee may take part in them and be accompanied by two staff members from the ECB and the Secretariat of the EP, respectively. Moreover, and notwithstanding the principle mentioned above of openness, which means the necessary transmission of information between both parties' representatives, the confidential information so exchanged must comply with the limits set by EU law. The corresponding obligations extend to persons who have had access to the information on behalf of both the European Parliament and the ECB, even after they have ceased to hold office or employment in either body.

Furthermore, the Interinstitutional Agreement between the ECB and the European Parliament requires that no minutes or records be kept of confidential meetings, that no statements be made to the press or other media, and that all participants in these meetings sign a solemn declaration on each occasion undertaking not to pass the content of the discussions to a third party. As it is well known, such secrecy is, as a general rule, in direct conflict with the publicity inherent in parliamentary work, which is essential for forming free public opinion in a democratic system.

However, there may be exceptions to that rule of public disclosure of parliamentary works because of pressing general interests that so may require but without undermining core requirements of constitutionalism. Nevertheless, as such an exception to the key principle of publicity of parliamentary work (and through it, to the proper exercise of the rights of suffrage, active for all voters, and passive consisting in the proper exercise of the functions inherent to the elective office for which the representative has been elected), its interpretation must be restrictive, and therefore opt for the principle of publicity to the detriment of secrecy in hermeneutically dubious cases.

The Interinstitutional Agreement parliamentary places the parliamentary Committees of enquiry addressed to the ECB's Supervisory Board within the general framework of Article 226 TFEU and Decision 95/167/EC, Euratom, ECSC, of the European Parliament, the Council, and the Commission. The same Interinstitutional Agreement compels the ECB to attend the parliamentary Committee in accordance with the principle of sincere cooperation. Article 20(9) of the SRM Regulation reiterates such obligation of loyal cooperation, specifically with regard to the parliamentary enquiries, by adding that the ECB shall enjoy the same protection as that provided by the Interinstitutional Agreement to confidential meetings (a fact which, moreover, takes away to a large extent the effectiveness of such committees, which precisely lies in the publicity of enquiries and interrogations made to the examinees by the MEPs acting on behalf of the citizens).

The Interinstitutional Agreement furtherly adds that the recipients of information provided by the ECB to the EP through these Committees of Enquiry are subject to confidentiality requirements equivalent to those applicable to the members of the Supervisory Board and to the ECB staff responsible for banking supervision, whose implementing measures must bee agreed by the EP and the ECB. In particular, the European Parliament is committed to ensuring the protection of a public or private interest acknowledged by Decision 95/167/EC as an interest required of preservation of confidentiality and to non-disclose the concerned information's content.

The same conclusion applies here about the difficult relationship between the confidentiality of this information and the publicity of parliamentary work, especially that carried out in these Committees of Enquiry. However, legitimate interests, including the reputational ones, of the entities subject to oversight must be preserved. The balance reached in the Interinstitutional Agreement between these two opposing values is the viability of parliamentary enquiry and oversight, but with the filter of confidentiality *ad extra* on the part of the commissioners themselves and that of the staff who issue, handle, and

transmit the information, provided that this confidentiality serves a legitimate interest, as described above.

Article 20.9 of the SSM Regulation refers to the enactment of practical implementing rules on the obligations of democratic accountability and supervision over the ECB to conclude agreements between the latter and the European Parliament. As for the content of such agreements, reference to it has already been made in the relevant places of this paper, depending on the diverse types of accountability mechanisms, except what relates to the general rules on access to information.

In this latter respect, the Interinstitutional Agreement places an obligation on the ECB to provide the EP's competent Committee with at least a detailed and significant record of the procedures conducted by its Supervisory Board which allows any interested stakeholder to understand the deliberations, including an annotated list of decisions. As regards credit institutions in liquidation, it is foreseen that non-confidential data will be disclosed *ex post* once the restrictions on relevant information arising from confidentiality requirements cease to apply. The SSM Regulation also compels the ECB to publish the supervisory fees on its website, with an explanation of their calculation, as well as guidance on its practices of bank supervision.

Finally, an intergovernmental logic overlaps with the supranational one in what relates to democratic accountability. While the latter manifests itself in the oversight of the SSM by the European Parliament, as discussed above, the former of such both logics, the intergovernmental one (that will be discussed below), emerges in the envisaging, by the SSM Regulation, of a procedure involving national parliaments, similar to the *early-warning system* in the field of the EU policies related to the Area of Freedom, Security, and Justice, or more generally speaking in the Protocol on the role of national parliaments in the European Union.

Article 21(1) of the SSM Regulation provides that national parliaments may send motivated observations to the ECB on the annual report, which, as has been seen, the latter must prepare and send to them, as well as questions or comments -Article 21(2) of the same Regulation-. Alternatively, each Member State's legislative chamber(s) may participate in an exchange of views on the supervision of credit institutions in the respective country with the Chair or a member of the ECB's Supervisory Board and a representative of the NCA, without prejudice to the accountability of the same NCA *vis à vis* its respective State Parliament in accordance with its national law as regards the bank supervision tasks that the SSM Regulation has not conferred on the ECB, or in relation to cases where, according to Article 6 of the same Regulation, the NCA prepares and implements ECB decisions when requested to do so by the own ECB (for more details on such national parliamentary oversight, see HÖGENAUER, 2021).

Again, these are informative and advisory tasks with no possible legally binding outcome. This lack of binding effectiveness is more logical in the case of the supervision of national parliaments than when the European Parliament conducts similar tasks (those provided for in Article 20 of the SSM Regulation, as we have already seen), since in the case of the Member States in general, and their national parliaments in particular, there is a transfer of their competences to the Union in the terms that, as we have seen, are provided for and permitted by Article 127(6) TFEU.

However, this justification (the transfer of competences from the States to the Union) for the absence of binding results of national parliamentary control is clearly invalid to explain why all the results of the solely European democratic-parliamentary control also lack such binding force since the European Parliament belongs to the Union that receives these competences transferred by the Member States (at least, and most certainly, by those whose currency is the euro), and, in fact, is also one of its main institutions.

3 DEMOCRATIC LEGITIMACY AND ACCOUNTABILITY WITHIN THE SRM

In apparent symmetry with the SSM, the management and governance of the SRM are also assigned to an independent body, the Single Resolution Board (SRB), by the SRM Regulation[10]. This organizational-functional parallelism between both European single mechanisms is due to the interdependence between banking supervision and banking resolution, as highlighted, for example, in the Explanatory Memorandum of the SRM Regulation[11], and has been scholarly pointed out even prior to the adoption of such Regulation (Kern, 2013: 90-ss.; Ferran, 2014: p. 11; Veron And Wolff, 2013: *passim*).

However, from the perspective of legitimacy and democratic accountability, it is very significant to note that the ECB is not the independent body to which the SRM Regulation confers the managing and implementing of its provisions (in the broadest sense, including from typical and purely executive and administrative actions or resolutions to elements, as will be seen, of regulatory emanation and *soft-law* instruments within the scope of its tasks). By contrast, the responsibility and powers to implement the SRM Regulation are conferred to an *ad hoc* body, the SRB, whose direct source of creation is the SRM Regulation itself.

The fact that the SRB is not created by EU primary law, but by a text of secondary law, is the fundamental reason why the parameters of validity of the attribution of independence to the SRB must be sought, fundamentally, in the legal basis of that Regulation, which is none other than Article 114 TFEU, whose suitability to give coverage to the creation of independent agencies by secondary legislation has been accepted by the case law of the Court of Justice of the EU[12]. In this scenario, therefore, the balance between opposing (oxymoronic) legal coordinates such as the independence of an extra-parliamentary agency on the one hand, and democratic legitimacy and control through, essentially, the European Parliament, on the other hand, unfolds in a different legal setting to that of the same opposition between democratic legitimacy and the independence of the ECB, provided that such independence (like the ECB itself), even with the nuances analyzed above in relation to its performance within the SSM, is a direct creation of EU primary law.

In addition to this peculiarity, there is another, no less significant. It lies in the fact that the funding of the SRF is governed by an (intergovernmental) Treaty between the Member States participating in the SRM. In other words, the 'embedding' of an *a se* Treaty into a mechanism created by the EU following the communitarian legal method. This significant difference with respect to the SSM has specific implications for the SRM from the perspective of the European democratic legitimacy, in terms of institutional origin but also of performance.

10 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 on uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ *L 225, 30.7.2014, p. 1-90.*

11 Recital 11 of Regulation 806/2014: '[...] Supervision and resolution are two complementary aspects of the establishment of the internal market for financial services whose application at the same level is regarded as mutually interdependent'.

12 Judgment of the Court of Justice of the European Union (Grand Chamber) of 2 May 2006, Case C-217/04, United Kingdom v. European Parliament and Council of the European Union, paras. 44 and 45, upheld the creation of the European Network and Information Security Agency by Regulation (EC) No 460/2004 on the basis of the then Article 95 TEC (now Article 114 TFEU). Similarly, the Judgment of the Court of Justice of the European Union (Grand Chamber) of 22 January 2014, Case C-270/12, United Kingdom v. European Parliament, paras. 104 and 105, upholding the creation of the European Securities and Markets Authority by Regulation (EU) No. 236/2012 on the basis of Article 95 TEC (now Article 114 TFEU).

3.1 Democratic legitimacy and the EU's legislative choice of creating an independent agency for the management of the SRM and the SRF

The decision to create the SRM is itself one of several possible economic and financial policy options (such as, for example, the public assumption of the economic consequences of the resolution of credit institutions in irreversible crisis). In this respect, the SRM differs fundamentally from the SSM. The difference lies in the original EU law itself. In fact, Article 127(6) TFEU envisages the possible assumption of banking supervision competences by the EU and, should such transfer or assumption happen, that these competences would be attributed to the ECB. By contrast, legally speaking, nothing like that has happened with the SRM.

Its creation (that of the SRM) lacks any specific provision in EU primary law, not even as a mere possibility dependent upon its activation by enacting secondary legislation, unlike what has happened with the SSM. Article 114 TFEU, the legal basis of the SRM, does not specifically prescribe that measures relating to the resolution of credit institutions operating within the EU may be adopted under it. Nor does it provide for the *ad hoc* creation of a body to which such tasks may be attributed or that these tasks might be conferred on the ECB, unlike Article 127.6 TFEU with respect to the SSM and the ECB itself.

The level of the democratic basis of the SRM's origin, since it is not as such expressly provided for in EU primary law (hence excluding the joint national legitimacy that would come from the prior national parliamentary ratifications of the Treaties on which the Union is based), stems here from the procedures followed for the drawing up of the legal instruments that have given rise to this Single Mechanism (of Bank resolution). And once again, there is another peculiar difference between the SRM and the SSM: the partially different legal nature of one and the other, as well as the different origin of these normative instruments creating and regulating the SRM with respect to those that do the same with the SSM.

On the one hand, we have the Regulation establishing the SRM, which enjoys the democratic backing of the European Parliament's participation within the ordinary legislative procedure in accordance with which, as required by Article 114 of the TFEU, this Regulation was adopted. Such procedure includes the binding intervention of the European Parliament, exercising its capacity for co-decision with the Council.

But, on the other hand, we have the intergovernmental agreement on the transfer and mutualization of contributions to the SRF signed between the respective EU Member States participating in the SRM -the same Member States as in the SSM, according to article 4(1) of the Regulation governing this latter Single Mechanism). And precisely because of its intergovernmental and paracommunitarian nature (i.e., it does not belong to the system of sources of the European Union's law), the such intergovernmental agreement lacks any democratically legitimizing intervention at the level of the Union, for the European Parliament does not participate in the enactment in this type of Treaties among the own EU Member States.

The democratic legitimacy of the intergovernmental Agreement for the funding of the SRF is a pooled legitimacy resulting from the sum of each national legitimacy, which is channeled through the respective parliamentary ratifications to that Agreement. Such a pooling of multiple national democratic legitimacies displaces supranational legitimacy, given the fact that the European Parliament does not intervene in the procedure for drawing up this international instrument (Ruccia, 2016: p. 326).

However, any change in the conditions for transferring funds to and from the SRF must be made through an amendment of the funding Agreement, which in turn requires, once again, the respective ratifications of all the involved EU Member States' national parliaments. While this is not necessarily an objection from the point of view of democratic

legitimacy, it does constitute an operational disadvantage compared to the communitarian method since, should it have been chosen exclusively, only the intervention of the European Parliament would have been sufficient.

From a democratic perspective (this cannot be said from the point of view of European integration), such a shift from the supranational (European Parliament) to the national level (parliaments of the Member States that are signatories to the intergovernmental SRF's funding Agreement) may seem *prima facie* indifferent when it comes to giving concrete regulatory content to the collection, transfer, and mutualization of financial resources to the SRF.

'Better' alternatives, based on democratic considerations, to the intergovernmental SRF's funding Agreement? As relative as this qualifier ('better') may be, there are two main choices.

One of those solutions is the full regulation of the SRM by secondary EU law (RUCCIA, 2016: 326), including the SRF in all its element (its funding, especially), which involves the essential disadvantage of the democratic deficit usually attributed to the EU's decision-making methodology, a circumstance to which reference was made earlier in this work, and to which we can only indicate that this deficit is relative and is in gradual regression, for indeed each and any amendment of the EU primary law has increased the legislative role of the European Parliament and at the same time reduced that of the Council, although there is still much work to be done ahead.

But, on the other hand, the communitarian method has the advantage of adding a vision of the Union's interests as a whole, and although the negotiating balance between the EU Member States (within the Council, still the institution with the greatest share of legislative power) does not mean that the respective national bargaining positions are equal (especially in the case of decisions by qualified majority according to primary law). Those positions are certainly equal when deciding unanimously, although such cases are in decline to the benefit, precisely, of qualified majority voting after each amendment of the EU Treaties). Anyway, the imbalance among the Member States in the communitarian decision-making methods is at any rate minor than in the 'pure and simple' international negotiation of intergovernmental agreements, where the mere facticity weighs to the detriment of the theoretical legal equality of all States as sovereign entities within the international sphere.

Alternatively, in order to maintain the level of secondary legislation without 'touching' EU primary law, the use of Article 352 TFEU (governing the so-called EU's subsidiary powers) would also be possible where the Union may wish to achieve one of the objectives assigned to it by the Treaties, and these have not provided specific powers to do so. The share of democratic legitimacy is exactly the same as that deriving from Article 114 TFEU, insofar as Article 352 TFEU also requires the approval of the corresponding secondary legislation by the European Parliament through the ordinary legislative procedure, although its use might raise fewer technical doubts as to whether this legal basis of primary legislation allows the creation of an independent agency such as the SRB) than if that basis is, as has indeed been the case, Article 114 TFEU. Scholars' opinions differ (Ter Kuile, Wissink & Bovenschen, Willem, 2015: p.163 Wellerdt, 2015: p. 78-ss).

In addition to the option of full regulation of the SRM, including the SRF, only by means of secondary Community law (with its breakdown into the two possible legal bases just analyzed: respectively, Articles 114 and 352 TFEU), a second alternative is possible for providing EU rules to the whole SRF in detriment of the intergovernmental way: the

amendment of the Union's primary law itself, in order to introduce a specific legal basis for bank resolution, in parallel to that offered by Article 127.6 TFEU for bank supervision[13].

3.2 The (more complex) organic-functional democratic legitimacy within the SRM due to the peculiarities of the SRB compared to the ECB's Supervisory Board in the SSM

As regards the 'organic' democratic legitimacy of SRM, it should be noted that the parallel of such a Single Mechanism with that of Supervision necessarily turns out to be limited for several reasons. First, due to the specific existence of the SRB as an independent body for the management and implementation of SRM rules, which is a separate, different agency from the ECB (even when the latter acts through its Supervisory Board in the context of the SSM). This determines the existence of differences as regards the provenance (i. e., the procedure for the appointment) of some of the SRB members compared to those of the ECB's Supervisory Board. This, in turn, places the issue of the democratic legitimacy of the selection of SRB members in different coordinates from those applying to the ECB's Supervisory Board as regards the same issues, as will be discussed below.

Another difference lies in the decision-making method for day-to-day functioning, where the SRB's independence does not result in a similar share of decision-making within the SRM as the ECB's Supervisory Board has within the SSM. As additional but related, differentiating elements between both organs, the SRB's decisions are dependent upon the non-opposition of the Commission and the Council, as will be seen below, which is not the case for the ECB's Supervisory Board within the SSM (within the latter, the veto is of the ECB's Governing Council, a different body or formation of the same institution, the ECB, to which the Supervisory Board also belongs). And finally, the existence of the Intergovernmental Agreement on the transfer and mutualization of funds to the SRF is a key differential element within the SRM's legal regime which, plain and simple, does not exist within that of the SSM. Each of these issues will be analyzed hereafter from the perspective of democratic legitimacy and accountability.

3.2.1 Democratic legitimacy in the appointment and dismissal of SRB members. Differential aspects with respect to the ECB' Supervisory Board

From a legal standpoint, there exist institutional differences between the SSM and the SRM, as opposed to the usually repeated emphasized (even in this paper) interrelation of both mechanisms within the fields of the Banking Union and the EMU. The first of the two differences are obvious: the dissimilar names of the respective competent organs (the ECB's Supervisory Board and the SRB) and, with them, the diverse composition of the two bodies.

More importantly, the SRB is not a formation of the ECB but a new body: its creation as an Agency endowed with its own legal personality is laid down in Article 42 of the SRM Regulation. This is significant not only as an SRB's differentiating factor in itself with respect to the ECB's Supervisory Board but also as a result of the different respective legal bases of the creation of both bodies upon the EU's primary law: Article 114 TFEU (on harmonization of legislation within the internal market of financial services provided by banking institutions in this case) with regard to the SRB, as opposed to Article 127.6 TFEU, which does the same for the ECB's Supervisory Board.

Indeed, the latter provision, Article 127.6 TFEU, allows banking supervision functions to be attributed to the ECB, as has already been pointed out. On the other hand, the generic terms of Article 114 TFEU do not include any institutional reference as to what institution,

13 The European Council of 18-19 October 2012 discarded this path, EUCO 156/12, para 5, p. 7. But there is nothing in theory to impede a future change of approach and to make use of this alternative.

organ, or body may be the addressee of the functions according to secondary legislation enacted upon such legal basis of EU's primary law. This means that the ECB cannot be the body to which the tasks assigned by Regulations adopted upon the legal basis of article 114 TFEU are addressed, for the ECB's powers are expressly limited by the EU's primary law to the conduct of monetary policy -Article 282(1) TFEU- and to the execution of the banking supervision powers conferred on it (as has effectively occurred) by Regulations adopted in accordance with the ordinary legislative procedure, as envisaged by Article 127(6) TFEU.

Since the SRB is a body of new creation by secondary legislation and not envisaged in the EU's primary law, the restrictions derived from the Court of Justice's *Meroni* doctrine (the content of which is detailed below) on the creation of independent agencies by means of secondary legislation apply. The consequences of that case-law, as will be seen shortly after, are visible more in the SRB's decision-making mechanisms and functional aspects than in its name and the system for appointing its members.

Therefore, the first aspect of democratic legitimation to be examined within the institutional sphere of the SRM is not so much (or not only) the name of the body with the implementing functions of the Regulation governing the Mechanism (and the implementing functions of the Intergovernmental Agreement on the transfer and mutualization of the participating EU Member States' contributions to the SRF). Rather, it is a question of the composition of the SRB and, above all, of whether there is any involvement in the way the SRB's various components are appointed, of the Union's institution that directly represents the citizens: the European Parliament.

In this respect, the SRB's composition and the respective denominations of its various kind of members differ from those of the ECB's Supervisory Board. Pursuant to Article 43.1 of the SRM Regulation, the SRB consists of a Chair, a Vice-Chair, and four members as regard its elective members, in addition to its *ex officio* members, who in the SRB, as in the ECB's Supervisory Board, are representatives of the National Competent Authorities: in the case of the SRB, the bank resolution authorities.

However, in contrast to the ECB's Supervisory Board within the SSM, the four SRB's elective members other than the Chair and the Vice-Chair do not have to come from the ECB, for they are chosen following the same selection procedure as the Chair, in accordance with Article 56.4 of the SRM Regulation. According to the same provision (Article 56.4 of the SRM Regulation), the same applies to the SRB's Vice-Chair.

The SRB's Vice-Chairperson is also an elective position. But it does not have to come from the ECB, unlike the Vice-Chair of the ECB's Supervisory Board in the context of the SSM, who, as seen above, has to be elected from among the members of the own ECB's Executive Board, which, in turn, makes more rigid his or her appointment and (even more) his or her removal from office, since the latter is in the hands of the Court of Justice, as seen above.

All these requirements are not demanded for the SRB's Vice-Chairperson's selection (and even dismissal). Moreover, the six elected SRB's members are subject to a regime of exclusivity that deprives them of the right to hold any other function or office in the Union or at the national or international level (last sentence of Article 56.5 of SRM Regulation). This, among other consequences, prevents ECB's members or representatives from being elected simultaneously as members of the SRB.

Article 56 of the SRM Regulation deals with the election of the SRM's members. According to it, the Chairperson, the Vice-Chairperson, and the four other SRB's elective members are appointed based on merit, skills, knowledge of banking and financial matters, and experience relevant to financial supervision, regulation as well as bank resolution through an open selection procedure respecting the principles of gender balance, experience, and merits. The term of office is five years non-renewable as a general criterion,

except for the first Chairperson, who is elected for three years with a possible renewal for a further five years period, pursuant to Article 56(5) and (7) of the SRM Regulation.

What is, therefore, the involvement of the European Parliament in the selection procedure of the SRB's elective members as a democratic legitimizing factor of origin (appointment) in their functional performance? Article 56(4) of the SRM's Regulation, with similar provisions in this respect to those established by the SSM Regulation for the elective members of the ECB's Supervisory Board, provides that the European Parliament (and also the Council) shall be kept duly informed at all stages of the procedure. The role of the European Parliament in the pre-selection system for candidates for elective positions on the SRB is thus limited to such right of information.

As regards the actual appointment and dismissal stages, Article 56(6) and (9) of the SRM Regulation provide for a procedure identical to that laid down in Article 26 of the SSM Regulation. The European Parliament has a binding power of authorization over the Commission's proposal for appointing candidates to the SRB. Once the European Parliament's consent to the Commission's proposal has been obtained, the appointment is formally made by the Council through an implementing decision to be adopted by a qualified majority.

The same applies to the removal of these SRB's elective members: there is clear parallelism with the SSM Regulation as regards those of the ECB's Supervisory Board. The European Parliament has the same power of prior binding consent to the Commission's proposal with respect to the possible removal of SRB's elected members, but in this case, on grounds specified by the law: Article 56(9) of the SRM Regulation. That is if the corresponding SRB's elective officeholder no longer fulfils the conditions required for performing his or her duties or commits serious misconduct.

The Council must finally decide the removal of a proposal from the Commission authorized by the European Parliament through an implementing decision approved by a qualified majority. And, as in the SSM Regulation, the European Parliament counts on something of an 'initiative of the initiative' power to inform the Commission that, in the opinion of the Eurochamber, the grounds for dismissal have been met (Article 56.9 *in fine* of the SRM Regulation). Although it is beyond the scope of this paper, which is confined to considerations of direct democratic legitimation linked to the role of the European Parliament, it should be noted here that an equal 'initiative of the initiative' for the dismissal or removal of elected members of the SRB is granted in the same provision to the EU Council.

The European Parliament's authorizing powers over the proposal of the SRB's elective members are similar to those it enjoys as regards the ECB's Supervisory Board, but with a different nuance in relation to the SRB's Vice-Chairperson, by contrast with the same office in the ECB's Supervisory Board. Such difference does not refer to the decision-making status of the European Parliament but rather to the institutional origin of each Vice-Chair capacity.

In the case of the ECB's Supervisory Board, its Vice-Chairperson, who must also be proposed by the Commission, authorized by the European Parliament, and appointed by the Council, must necessarily come from the ECB's Executive Board -Article 26(3) of the SSM Regulation, which severely limits the selection options: not only for the European Parliament, of course (but also for it), as well as for the Commission and the Council themselves.

However, this limitation does not apply to the SRB's Vice-Chairperson position. On the contrary, its provenance from the ECB not only isn't an obligation but even an option, in view of the absolute incompatibility rule that the SRM Regulation establishes for the SRB's elective members -once again, according to Article 56(5), second paragraph-. With this sole exclusion, the range of elective options grows quantitatively.

Mutatis mutandis, what has been said about the meaning, in terms of democratic legitimacy, of the European Parliament's participation in the appointment and dismissal of the ECB's Supervisory Board members can be applied to those of the SRB's. The European Parliament's decision is certainly binding, but the Eurochamber lacks the powers of both 'initiative of the initiative' and pre-selection of candidates (which in this case is granted to the Commission), as well as the final decision on their appointment, which is left to the Council.

In other words, the final decision corresponds to a Union's institution with a national governmental composition, the Council, and is not politically accountable to the European Parliament. Instead, the democratic legitimacy of such an EU institution, more or less indirect according to the specific terms of each of the respective applicable national legislations, derives (and depends) on what is determined precisely by such legislations.

3.2.2 Democratic accountability of the SRB's functional performance, and of its interactions with the Commission, the Council, and the ECB within the SRM

The SRM Regulation devotes recitals 42 and 43 of its Explanatory Memorandum, as well as Articles 20 and 21) to the democratic legitimacy of the SRB at the functional level, which faithfully transposes or reproduces those devoted to the same issues by the SSM Regulation with respect to the ECB's Supervisory Board. Therefore, *mutatis mutandis* (i.e. essentially replacing the references to the ECB's Supervisory Board within the SSM Regulation with parallel references to the SRB within the SRM Regulation), the type of provisions relating to these aspects (that's to say, those regulating the reciprocal obligations and rights of the European Parliament and the SRB) are very similar, if not identical in content.

Thus, reference will be made henceforth to what has already been said above about the ECB's Supervisory Board but replaced by the SRB; the references are then made to the former and addressing the differential aspects where appropriate. Nevertheless, does it suffice to make here reference to what the SSM Regulation provides for in terms of democratic accountability to deal with such the same issue within the SRM? Not really. Article 19 of the SRM Regulation expressly grants the SRB a status of independence, whereas its Explanatory Memorandum (Recital 31) states that '[i]n order to ensure a swift and effective decision-making process in resolution, the Board should be a specific Union agency, with a specific structure, corresponding to its specific tasks, and which departs from the model of all other agencies of the Union'. But despite all this, the decision-making mechanism devised by the SRM Regulation, in fact, calls openly such independence into question.

Just as the SRB, generally speaking, does not implement but supervises the implementation of the resolution arrangements by the national authorities and may only issue enforcement orders to the bank under resolution if the national authority does not properly comply with the SRB's resolution decision - Articles 18(9), 28 and 29 of the SRM Regulation-, the SRB proposes these arrangements but does not decide on them. This is done by the Commission and the Council as a result of Article 18(7) of the SRM Regulation.

The reasons were set out above and stem from the well-established *Meroni* doctrine of the EU Court of Justice[14], according to which only the Union's institutions and bodies created by the Treaties can be held responsible for adopting legally binding decisions of a general nature or individual decisions involving a margin of discretion in their adoption

14. Judgment of the Court of Justice of the European Communities (now the Court of Justice of the European Union) of 13 June 1958, Joined Cases C-9/56 and 10/56, Meroni & Co., Industrie Metallurgiche, SpA v. High Authority.

(Georgosouli, 2021: p. 82; Lintner, 2017: p. 603). Moreover, the SRB is not the only body with the power to trigger the resolution procedure; the ECB may also do so, albeit by informing the SRB, as stated by Article 18(1), fourth paragraph of the SRM Regulation.

However, the SRB has the right of initiative, as it is solely responsible for producing the formal proposal to trigger the resolution procedure -Article 18(6) of the SRM Regulation-, including the choice of the resolution scheme to be applied -Article 18(7) of the SRM Regulation- from among those provided for by the SRM Regulation. This means that the ECB shares with the SRB a kind of 'initiative of the initiative', or 'pre-initiative', and must also be notified by the SRB when the idea of carrying out the bank resolution comes from this latter organ, according to Article 18(2,) *in fine*.

Indeed, as noted by Lintner, it is normally the ECB who triggers the decision if it considers that an institution under its direct supervision within the SSM is in serious difficulties or is likely to be in serious difficulties, while the SRB may exceptionally determine the same if it informs the ECB of its intention to do so and the latter has not acted within a maximum of three days (Lintner, 2017: p. 599). This is without prejudice to the fact that the procedure laid down in the Regulation governing the SRM encourages the Board's proposals to 'come to fruition' in the sense that it makes it easier for them to become the content of the final decision.

However, to do so, such SRB's proposal must pass through two binding decision-making 'filters', as provided by Article 18(7) of the SRM Regulation. The Commission must firstly accept as its own proposal the adoption of the resolution scheme communicated to it by the SRB, but the own Commission can also reject it: Article 18(7) of the SRM Regulation. Secondly, it is up to the EU Council to endorse (or not) the Commission's proposal.

The simplification comes from the noticeably short deadlines for the total or partial veto of both EU institutions (Commission: 12 hours; Council: 12 hours from receipt of the proposal; and 8 hours for the SRB if the Commission proposes and the Council endorses a significant modification in the amount of the proposed scheme of resolution). Such simplification, envisaged in Article 18(7) of the SRM Regulation, is also a result of the *quorum* set for a favorable vote by the Council: a simple majority is sufficient, with the Commission and/or the Council (as the case may be) having to justify the reasons for their respective objection.

The measure will be deemed to have been adopted when neither the Commission nor the Council raise objections within 24 hours of the SRB's transmission of the proposal. Conversely, in case of objection by the Council, where they consider that it is not fulfilled the public interest criterion consisting in the inability of the relevant banking institution to meet its debts or other liabilities as they fall due, or in the existence of objective elements indicating that it will not be able to do so in the near future, the relevant entity shall be wound up in an orderly manner, and in accordance to the applicable national legislation -Article 18(8) of the SRM Regulation-.

From the perspective of democratic accountability, it should be noted that, as envisaged in the SSM Regulation with respect to the ECB Governing Council's rejection of a decision coming from the ECB's Supervisory Board, the SRM Regulation does not provide for specific parliamentary scrutiny over the reasons that lead the ECB Governing Council to object the proposed resolution scheme presented by the SRB and approved by the Commission, nor of the reasons that make the Commission reject or amend the SRB's proposal.

However, while the Interinstitutional Agreement between the ECB and the European Parliament remedies this omission by compelling the former to transmit to the latter (at least to the President of the competent Committee of the European Parliament) the reasons for its

objection, a similar provision is lacking in the Interinstitutional Agreement signed between the SRB and the European Parliament[15]. Such omission or gap is a clear shortcoming in terms of democratic legitimacy as regards the relevant decisions of the Commission and/or the Council within the SRM.

Paradoxically, the various forms of democratic accountability which, in faithful transposition of those established by the SSM Regulation for the ECB's Supervisory Board (although the latter, unlike the SRB, is not subject to the double binding decision-making filter of the Commission and the Council, as it is the SRB), Articles 20 and 21 of the SRM Regulation only apply to the SRM and do not encompass the content and reasoning of the Commission's and the Council's resolutions which the SRM's proposals of decisions and resolution tools are dependent upon.

Above all, that happens when the criterion of either the Commission or the Council is totally or partially adverse to that expressed by the SRB in its proposed resolution scheme, but also does when they coincide, since in the latter case, only the SRB can be subject to parliamentary oversight, but not the Commission and the Council. Conversely, when the Commission or the Council's refusal is to be scrutinized, the SRM Regulation does not extend to either institution the specific democratic accountability mechanisms that it foresees with respect to the SRB.

This clear anomaly from the standpoint of the democratic legitimacy in the legal framework of the SRM (SRM Regulation and Interinstitutional Agreement between the SRB and the European Parliament) does not prevent to apply the general mechanisms of control by the European Parliament over both institutions (questions, Committees of Inquiry, hearings, debates, etc.) when appropriate, nor even the exigence of political accountability through a motion of censure, although only against the Commission, as results from Articles 17(8) TEU and 234 TFEU.

4 CONCLUSIONS: DEMOCRATIC WEAKNESSES IN THE SSM AND THE SRM WITHIN THE MORE GENERAL CONTEXT OF A GROWING EUROPEAN DEMOCRATIC DEFICIT IN EMU

The landscape described throughout this paper leads to a clear conclusion: a democratic deficit prevails in the SSM and the SRM. But it is not the democratic deficit generally attributed to Community decision-making procedures (the absence of initiative and full legislative capacity of the European Parliament, the legislative nature of the EU Council, despite its governmental composition, that relegates the Eurochamber to the mere role of an essentially negative co-legislator through the veto in the ordinary legislative procedure, the still relative abundance of cases of merely consultative intervention by the European Parliament through the also now called special legislative procedures...).

The SSM and the SRM suffer from an increased democratic deficit. The mechanisms of accountability are merely informative, and the binding powers of the European Parliament are scarce and weak (approval or rejection of the Commission's proposal for the appointment of members of the ECB's Supervisory Board, or of the SRB's, and moreover, only for the appointment of some, and not of all, such members). Other institutional characteristics and law sources go hand in hand within the SSM and the SRM (Olesti Rayo, 2018: pp. 95-97).

The responses to COVID have meant a change of direction in the EMU in general (from austerity as a reaction to the 2008 crisis to expansionary policies in the aftermath of

15 Agreement between the European Parliament and the Single Resolution Board on the practical modalities of the exercise of democratic accountability and oversight of the exercise of the tasks conferred to the Single Resolution Board within the framework of the Single Resolution Mechanism of 16 December 2015, OJ L 339, 24.12.205, p. 58-65.

the pandemics: activation of the safeguard clause of the Stability and Growth Pact, SURE or *Next Generation EU* programs, etc.). And also, specifically in the area of banking supervision, with its possible impact on bank resolution, due to the change in prudential parameters as well as the link existing between both functions (Olesti Rayo, 2018 & 2021).

But these are short-term responses and have been configured as measures implementing the existing legal framework, without changing the structural deficiencies from the perspective of democratic legitimacy and the consequent parliamentary control, probably due to the urgency of dealing quickly with the consequences of all kinds, including, as far as it is concerned, the economic and financial consequences of the crisis (initially only of public health) of the COVID-19 (Sebastião 2021; Ladi & Tsarouhas, 2020: p. 1053).

In a nutshell, the increased democratic deficit (compared to the EU as a whole) existing within the SSM and the SRM is the result of a motley *cocktail* of complex regulatory instruments, institutional and procedural aspects, and the limited binding powers of supranational (European Parliament) or national (Member States' parliaments) direct representatives of citizens. As regards regulatory complexity, this is particularly evident in the case of the SRM, given the bifurcation of its legal framework between an EU Regulation and an intergovernmental agreement. Generally speaking, there is a quantitative dispersion in a constellation of different legal instruments: Regulations, Directives, intergovernmental Agreements, EBA prudential standards, etc.

In addition to such regulatory complexity, we have the organic-institutional proliferation within the SSM and the SRM, which results in an 'alphabet soup' or a 'soup of acronyms', corresponding to each of the many institutions, bodies, and agencies that overlap, sometimes with little clarity as to their respective tasks. There is also the reciprocal functional interaction between the former (agencies, institutions, bodies) and the latter (their respective tasks and roles).

We have the EBA, the ECB (in its various formations: Supervisory Board, Executive Board, Governing Council), the SRM, in addition, of course, to the Commission, the EU Council, the European Parliament, the Court of Auditors, and, in the cases of litigation, the Chambers of Appeal, the General Court, the Court of Justice, as well as, finally, the Eurogroup, which is not an EU institution according to the Court of Justice's case-law, although the concrete and detailed legal framework of the SSM seems to refute such judicial characterization, as seen above.

For proper democratic oversight and, where possible, political accountability, it is necessary to know precisely who is doing what, and that is not easy within the respective fields of the SRM and the SSM. The almost complete de-parliamentarisation of decision-making, at least as far as the European Parliament is concerned, isn't an ingredient in favor of democratic legitimacy.

It is precisely this 'supranational or European deparliamentarisation' seems to have been the main trigger, and not just a legal one, for the recourse to an intergovernmental agreement to fund and mutualize the SRF. Such prevailing technical-legal complexity, in turn, gives rise to a lack of transparency within the EU's legal framework of bank supervision and resolution. It is not sufficient justification the consideration that, unlike monetary policy, where transparency increases the effectiveness of the measures adopted or even the ECB's probity, in the field of supervision, it can produce adverse effects on the supervised banks, their customers, and users, and even on the ECB's own performance (Türk, 2019: p. 51).

All this landscape, in short, lies at the antipodes of what should be the public knowledge of the works conducted by the SRB and the rest of the relevant public actors. As a general rule, such publicity is essential for citizens' control and monitoring (directly at the

ballot box or indirectly through their parliamentary representatives) of the task carried out by their governing bodies, national or European.

Finally, the legal framework of SSM and SRM within the European Banking Union gives a clear predominance to experts at the expense of the sovereign citizenry, thus ultimately prioritizing technocracy over democracy. This imbalance in favor of the former to the detriment of the latter contrasts glaringly with the fact that it is not technocracy but democracy that constitutes one of the essential values on which the Union is founded, as provided for in Article 2 TEU.

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Article

La buena administración tributaria en América Latina (In Spanish)

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KEYWORDS:

Public administration; taxation; rule of law; rights; citizenship

ABSTRACT:

This paper deals with good administration in law and particularly in the field of the tax legal system, and more specifically from the experience of Latin America. To do this, the author begins by addressing the concept, elements and fundamentals of good administration. Then, he focuses on the matter in the field of tax law in general, showing the great breadth of the matter, which makes a global analysis of the matter difficult. Finally, the author addresses the way in which the matter has been treated in Latin America, especially from the work of the Inter-American Center of Tax Administrations, which gathers the experiences of the subcontinent.

PALABRAS CLAVES:

Administración pública; tributación; estado de derecho; derechos; ciudadanía.

RESUMEN:

El presente articulo trata acerca de la buena administración en derecho y particularmente en el campo del sistema jurídico tributario, y más específicamente desde la experiencia de América Latina. Para ello, el autor comienza abordando el concepto, elementos y fundamentos de la buena administración. Luego, enfoca el asunto en el campo del derecho tributario en general, mostrando la gran amplitud del asunto lo que torna difícil un análisis global en la materia. Finalmente, el autor aborda el modo en que se ha tratado el asunto en América Latina, especialmente desde el trabajo del Centro Interamericano de Administraciones Tributarias.

MOTS CLES :

Administration publique ; imposition ; État de droit ; droits ; citoyenneté

RESUME :

Cet article traite sur la bonne administration en droit et en particulier dans le domaine du système juridique fiscal, et plus spécifiquement à partir de l'expérience de l'Amérique latine. Pour ce faire, l'auteur commence par aborder le concept, les éléments et les fondamentaux d'une bonne administration. Ensuite, il focalise la matière dans le domaine du droit fiscal en général, montrant sa grande ampleur, ce qui rendra difficile une analyse globale de la matière. Enfin, l'auteur a abordé la manière dont la question a été traitée en Amérique latine, en particulier à partir des travaux du Centre Interaméricain des Administrations Fiscales, qui rassemble les expériences du sous-continent

CONTENTS:

1 EL DERECHO A LA BUENA ADMINISTRACIÓN PÚBLICA

Existe un movimiento mundial a nivel de doctrina jurídica, de leyes, y de jurisprudencia que persigue instaurar mecanismos que conduzcan a una actuación de la Administración del Estado más eficiente, conforme a criterios de interés publico, interés general y respeto de los derechos de las personas (Mendonça, 2020: p. 47).

Ahora, esta idea de buena administración constituye un concepto de carácter indeterminado, elástico y funcional, que la doctrina legal ha tratado de perfilar jurídicamente desde su concepción doctrinaria y normativa (Bousta, 2018: p. 24) hasta entenderse hoy desde una triple perspectiva: como un principio general del Derecho; como un deber de la Administración; y, como un derecho de los administrados, incluso de carácter fundamental (Campanelli, 2018; 207; Viñuales, 2014: p. 329; Hachem & Valencia, 2018: p. 49; Tomás, 2004: p. 222; Mendonça, 2020).

Este concepto se centra en la idea de un adecuado servicio a los ciudadanos por parte de la administración pública (Hachem & Valencia, 2018: p. 9), y busca un equilibrio o conciliación de intereses públicos y privados (Bousta, 2018: p. 32), en el contexto de la democracia y del estado de derecho (Linazasoro & Cornejo, 2020: p. 52).

La buena administración pública orienta su actuación al cumplimiento del interés general, y considera principios tales como la igualdad, eficacia, eficiencia, transparencia, celeridad, la respuesta en plazo razonable, participación, motivación, reparación, y el pleno respeto a los derechos de los administrados (Rodríguez-Arana, 2012: p. 115; Rodríguez-Arana, 2013). Asimismo, busca orientar y limitar la discrecionalidad (Milkes, 2018) y la arbitrariedad de la actuación de los órganos públicos frente a sus ciudadanos (Ponce, 2019: p. 56).

En su faceta de derecho, en el contexto europeo, aparece consagrado en el artículo 41 de la Carta de los Derechos Fundamentales de la Unión Europea (del 7 de diciembre de

2000), y se ha entendido que forma parte de los principios generales del Estado de derecho, como se destaca en la sentencia del Tribunal de Justicia de la Unión Europea en Asunto T-54/1999, sobre el caso Telekommunikation Service GmbH contra Comision de las Comunidades Europeas, de 30 de enero de *2002* (Demuro, 2007). Asimismo, fue incorporado en el Código Europeo de Buena Conducta Administrativa (del año 2002), el cual si bien carece de fuerza vinculante, constituye estándar de conducta (Mendes, 2009; Carrillo, 2010: p.1142).

Finalmente, la doctrina ha destacado el rol de algunos organismos internacionales que promueven principios de buen gobierno, tales como el Banco Mundial, Fondo Monetario Internacional, o la OCDE (Campanelli, 2018: p. 210). Respecto de América Latina, existen estudios específicos en esta materia (OCDE, 2020).

2 LA BUENA ADMINISTRACIÓN EN AMÉRICA LATINA

En América Latina, el principio de buena administración no se encuentra consagrado sino excepcionalmente de modo expreso en sus constituciones políticas o sus leyes. Sin embargo, en ellas sí se consagran una serie de elementos que pueden significar que tal principio se encuentra reconocido de modo parcial o incluso totalmente, desde la perspectiva de las interpretaciones constitucionales nacionales, como lo ha destacado el preámbulo de la Carta Iberoamericana de los Derechos y Deberes del Ciudadano en Relación con la Administración Pública, documentos aprobado por el Consejo Directivo del CLAD el 10 de octubre de 2013.

En efecto, a nivel nacional, el derecho a la buena administración presenta manifestaciones en las leyes, en doctrina jurídica y en la jurisprudencia judicial de Brasil sobre la base de normas constitucionales (Hachem & Valencia, 2018: p. 60), y algo semejante sucede en Argentina (Zaidman, 2021), Colombia (Campanelli, 2018: p. 207) y Uruguay (Brito, 2018: p. 160). En México, la Constitución de la Ciudad de México de 2017 incorpora, en su artículo 7 literal A, el derecho a la buena Administración Pública (Brito, 2018: p. 156). En particular, la disposición mexicana consagra el derecho a la buena administración pública, indicando sus condicionamientos juridicos, unos contenidos amplios del derecho de tutela judicial efectiva, y deberes de los organos de la adminitracion en relacion a los usuarios.[1]

En esta región, ha sido relevante la actuación del Centro Latinoamericano de Administración para el Desarrollo (CLAD), organismo público internacional, de carácter intergubernamental, asesor de los Estados en materia administrativa.

En el seno del CLAD ha emanado la mencionada Carta Iberoamericana de los Derechos y Deberes del Ciudadano en Relación con la Administración Pública. Este documento, en su Preámbulo, enfoca la función del Estado al servicio de la persona, estando la relación entre ambos teñida por el estatus de ciudadanía. Dicho estatus es concebido por el Preámbulo de la Carta, como un conjunto de derechos y deberes que definen su posición jurídica dentro del ordenamiento jurídico. Dicha Carta asevera que la buena Administración

1 En particular, la disposición señala lo siguiente: "Artículo 7 Ciudad democrática. A. Derecho a la buena administración pública. 1. Toda persona tiene derecho a una buena administración pública, de carácter receptivo, eficaz y eficiente, así como a recibir los servicios públicos de conformidad con los principios de generalidad, uniformidad, regularidad, continuidad, calidad y uso de las tecnologías de la información y la comunicación. 2. Las autoridades administrativas deberán garantizar la audiencia previa de los gobernados frente a toda resolución que constituya un acto privativo de autoridad. En dichos supuestos, deberán resolver de manera imparcial y equitativa, dentro de un plazo razonable y de conformidad con las formalidades esenciales del procedimiento. 3. En los supuestos a que se refiere el numeral anterior, se garantizará el acceso al expediente correspondiente, con respeto a la confidencialidad, reserva y protección de datos personales. 4. La ley determinará los casos en los que deba emitirse una carta de derechos de los usuarios y obligaciones de los prestadores de servicios públicos. Las autoridades conformarán un sistema de índices de calidad de los servicios públicos basado en criterios técnicos y acorde a los principios señalados en el primer numeral de este apartado."

Pública "es una obligación inherente a los Poderes Públicos en cuya virtud el quehacer público debe promover los derechos fundamentales de las personas fomentando la dignidad humana de forma que las actuaciones administrativas armonicen criterios de objetividad, imparcialidad, justicia y equidad, y sean prestadas en plazo razonable". Se añade que la buena Administración Pública presenta una triple función: es un principio general de aplicación a la Administración Pública y al Derecho Administrativo; es una obligación de toda Administración Pública que se deriva de la definición del Estado Social y Democrático de Derecho; es un derecho fundamental, del cual se derivan a su vez, una serie de derechos concretos que definen el estatuto del ciudadano en su relación con las Administraciones Públicas y que están dirigidos a subrayar la dignidad humana.

Otro instrumento emanado del CLAD es el Código Iberoamericano de Buen Gobierno, adoptado por la XVI Cumbre Iberoamericana de Jefes de Estado y de Gobierno, mediante Resolución N°15 del año 2006 (Gerpe & Sanguinetti, 2008)

El Código Iberoamericano de Buen Gobierno del CLAD, en su Preámbulo, establece como su fundamento el principio de la dignidad de la persona, y como valores esenciales de desarrollo los de la libertad y autonomía del ser humano y su esencial igualdad intrínseca. Añade, en el párrafo 4 de los Fundamentos, que es necesario "que un buen Gobierno reconozca, respete y promueva todos los derechos humanos -civiles, políticos, sociales, culturales y económicos-, en su naturaleza interdependiente y universal." En su Fundamento 4, define como buen gobierno, "aquél que busca y promueve el interés general, la participación ciudadana, la equidad, la inclusión social y la lucha contra la pobreza, respetando todos los derechos humanos, los valores y procedimientos de la democracia y el Estado de derecho."

En el Preámbulo indicado, se añaden como principios básicos los siguientes: el respeto y reconocimiento de la dignidad de la persona; la búsqueda permanente del interés general; la aceptación explícita del Gobierno del pueblo y la igualdad política (y no discriminación arbitraria) de todos los ciudadanos y los pueblos; el respeto y promoción de las instituciones del Estado de derecho y la justicia social. Asimismo, califica de inaceptables las siguientes conductas gubernamentales: que ampare y facilite la corrupción; que dificulte el escrutinio público sobre su toma de decisiones; que no tome en cuenta las necesidades de sus ciudadanos; que no rinda cuentas y no se haga responsable. Este Código se articula en tres tipos de reglas de conducta, vinculadas en cada caso a la naturaleza democrática del Gobierno, a la ética gubernamental y a la gestión pública.

Particularmente, algunas disposiciones de este Código muy vinculadas con la gestión tributaria administrativa (y referidas a la actuación del Poder Ejecutivo) son las siguientes, referidas a: (a) La actuación pública de acuerdo con los principios de legalidad, eficacia, celeridad, equidad y eficiencia, orientación al interés general y el cumplimiento de los objetivos del Estado (Nº26); (b) Gestión pública enfocada en el ciudadano, de modo de mejorar continuamente la calidad de la información, la atención y los servicios prestados (Nº27); (c) Garantizar el ejercicio del derecho de los ciudadanos y de los pueblos a la información sobre el funcionamiento de los servicios públicos (Nº28); (d) Proteger los datos personales y el derecho ciudadano a conocerlos y actualizarlos, y la adecuada clasificación, registro y archivo de los documentos oficiales (Nº40).

3 LA BUENA ADMINISTRACIÓN EN MATERIA TRIBUTARIA

El campo de la buena administración en materia tributaria es muy amplio, y ello torna compleja su concesión jurisprudencias o normativa (Marín-Barnuevo, 2020). Sin embargo, algunos asuntos suelen ser destacados en los estudios: el fortalecimiento del cumplimiento tributario y la recaudación tributaria oportuna y la disminución de la elusión y

evasión (Peláez, 2022); la reducción de la litigiosidad tributaria (Juan & Fuster, 2016); los derechos de los contribuyentes (García, 2019) y sus garantías (Díaz Calvarro, 2020).

Sin embargo, es posible establecer un paralelo entre los amplios contenidos de la buena administración general con la buena administración general tributaria, siendo algunos asuntos de más visibilidad que otros, por ejemplo, de acuerdo a Casas Agudo: la interdicción de la arbitrariedad; la diligencia en los procedimientos administrativos; la resolución sobre procedimientos administrativos dentro de plazos razonables; la bilateralidad de la audiencia; derecho de acceso al expediente; exigencia de motivación de las decisiones administrativas; la interpretación administrativa; etc. Nuevamente, este autor destaca ciertos aspectos de la buena administración en el campo tributario, tales como la seguridad jurídica y la disminución de los niveles de litigiosidad, el derecho a la defensa y el proceso equitativo, el intercambio de información tributaria (Casas, 2020).

Malherbe, Renders y Traversa, en materia general de buena administración se enfocan en la validez formal y material del acto administrativo. En el primer aspecto, destacan el respeto de los derechos de defensa en la realización de la actuación administrativa (al menos, la audiencia previa del administrado antes de tomar una decisión que le puede afectar afecte) y el principio de imparcialidad (objetiva y subjetiva) de la autoridad administrativa, y el deber de honestidad y de diligencia. En cuanto al segundo aspecto, enfatizan que la decisión administrativa debe sujetarse a los principios de legalidad, de igualdad y no discriminación, de motivación, de transparencia, de prudencia, de razonabilidad y de proporcionalidad, de seguridad jurídica y de confianza legítima, y finalmente, el principio de interdicción de la desviación de poder. Todos estos aspectos son reconducibles a la relación del contribuyente (u obligado tributario, en términos más generales),con las administraciones tributarias, en aspectos tales como los siguientes: interpretación estricta del Derecho tributario; el principio de libre elección de la opción fiscal menos gravosa; el principio de confianza legítima y de seguridad jurídica; los principios de independencia y de imparcialidad; los derechos de defensa; el principio de *fair-play* (que "impone la obligación a la Administración de que ésta no dificulte o imposibilite con su actuación el ejercicio de sus derechos por parte del contribuyente"); la obligación de motivación de los actos administrativos; la prohibición del abuso de poder; el principio de proporcionalidad (Malherbe et al, 2012).

Para Díaz Yubero, las notas básicas de una administración avanzada serían las siguientes: (a) Cumplen la misión de recaudar los impuestos de los contribuyentes, poniendo énfasis en aumentar el nivel de cumplimiento voluntario de los ciudadanos. Para ello, deben ofrecer las máximas facilidades para cumplir con sus obligaciones fiscales y, además, reforzar la lucha contra el fraude fiscal; (b) debe estar integrada, esto es, administrar todos los tributos internos y externos, y mantener, al menos, una adecuada coordinación con la organización encargada de recaudar las contribuciones a los sistemas de seguridad social; (c) debe gozar de autonomía, deben tener flexibilidad para gestionar los recursos humanos y presupuestarios y encontrarse sometida a un riguroso sistema de control, y asimismo debe orientarse a resultados y a la calidad del servicios; (d) su estructura organizativa debe basarse no en las distintas figuras impositivas, sino en funciones y tipos de contribuyentes; (e) deben estar altamente informatizadas en todos sus procesos de trabajo y usar las tecnologías para mejorar la comunicación con los ciudadanos y mejorar los métodos y procedimientos de control; (f) su personal debe tener condiciones de calificación, integridad, motivación, adecuada; deben impulsar la cooperación internacional en todos sus aspectos: intercambio de información, prácticas administrativas e inspecciones conjuntas (Díaz Yubero, 2003: p. 13).

De todos los aspectos destacados, hay que hacer notar ciertos énfasis generales que la literatura realiza en este campo:

(a) Los derechos humanos y derechos constitucionales y su impacto en el sistema tributario, y contenido de la ciudadanía tributaria (Masbernat, 2016).

(b) Los procedimientos administrativos y judiciales tributarios, en general. En este campo juegan los derechos procesales del contribuyente, particularmente los vinculados al derecho a un debido proceso y al derecho a la tutela judicial efectiva (Barnes, 2018: p. 79).

(b) La interpretación y aplicación de la ley tributaria (o de la normativa tributaria, en general), lo que conduce al campo de los acuerdos y los diversos mecanismos de solución de conflictos, por una parte, y por otra, los asuntos vinculados a la seguridad jurídica para los contribuyentes (Checa 2020), y el fortalecimiento de las interpretaciones jurídicas de éstos que le permitan cumplir con las obligaciones tributarias y desarrollar planes de *compliance* (Pareja, 2018).

En América Latina en general, podemos destacar los análisis en el seno del Centro Interamericano de Administraciones Tributarias (CIAT), cuyos aspectos más usualmente referidos son aquellos vinculados a sus mayores preocupaciones, que giran en torno al mejoramiento de capacidades técnicas y operativas de las administraciones tributarias (Díaz De Sarralde, 2019) para aumentar la eficiencia recaudatoria (Peláez, 2020; CIAT 2022), el cumplimiento tributario y los mecanismos que lo permiten -como el cumplimiento cooperativo y el uso de tecnologías de la información (CIAT, 2020)-, la certeza tributaria en la aplicación de las normas tributarias (que además constituye una condición del cumplimiento), y la calidad de los procedimientos tributarios especialmente en sede administrativa (sobre todo bajo las condiciones del debido proceso).

Por cierto, todos estos asuntos (referidos a los múltiples temas de buena administración) se cruzan con la gran complejidad del sistema tributario, lo que implica que tanto el análisis es extenso como asimismo que las necesidades de reforma institucional sea muy variada (CEPAL, 2006; CIAT, 2017). Sin embargo podemos usar un punto de particda general para el análisis, desde el Modelo de Código Tributario.

Ahora, el Modelo de Código Tributario, elaborado por el CIAT (2015) a partir de la experiencia iberoamericana, en su versión de 2015, considera las nuevas circunstancias (como las tecnologías de la información y las comunicaciones) y la evolución desde el enfoque fiscalista hacia el de asistencia al contribuyente para facilitar el cumplimiento de sus obligaciones tributarias, la necesidad de incorporar mecanismos de solución de controversias (transacción, conciliación, arbitraje), las nuevas realidades impositivas (parafiscalidad), las nuevas figuras de responsabilidad tributaria, la cooperación internacional entre administraciones tributarias en un mundo cada vez más globalizado, etc. (CIAT, 2015: p. 15-17).

Al referirse a su estructura y contenido (CIAT, 2015: p. 19-23), se mencionan las perspectivas tenidas a la vista al redactarlo en su última versión:

(a) El Titulo I, ha tratado de llenar de contenido constitucional al concepto y estatuto del tributos;

(b) El Titulo II, ha perfeccionado técnicamente los elementos de la obligación tributaria y limitado el ámbito de discrecionalidad tributaria, se ha fortalecido la posición jurídica del contribuyente y también la posición del Estado como acreedor de la obligación, se ha perfeccionado las normas relativas al abuso del derecho por parte de los contribuyentes;

(c) El Titulo III configura de modo más técnico los procedimientos administrativos con plenas garantías al contribuyente, incorpora las TIC, y establece criterios garantistas

tales como la audiencia previa al obligado tributario, y se mejora el instituto de la consulta tributaria. Asimismo, se incorporan mecanismos de "acuerdo conclusivo" (con publicidad y transparencia) "como mecanismo alterno a la solución de conflictos", que define los hechos y las bases imponibles "sin dejar de reconocer la indisponibilidad del crédito tributario" (CIAT, 2015: p. 21);

(d) El Titulo IV, en materia de infracciones y sanciones, se mejora la descripción de los tipos y la gradación de sanciones con criterios objetivos, se instauran mecanismos para evitar la doble persecución penal, el concurso aparente de infracciones, y se respeta el principio *non bis in ídem*, se amplían los efectos del principio *pro libertatis*, se excluye la responsabilidad penal objetiva;

(e) El Titulo V establece los procedimientos de revisión administrativos y judiciales (y la coordinación entre ellos) de los actos administrativos tributarios (por violación a requisitos constitucionales y legales), preservando las garantías de los contribuyentes frente a la Administración Tributaria.

Si bien es cierto sería posible revisar los Códigos Tributarios de los diferentes países de América Latina desde las exigencias de la buena administración tributaria, estimamos que por razones de espacio puede ser más apropiado esta vez abocarse directamente al comportamiento de sus administraciones tributarias, desde los parámetros de la buena administración, a través de los casos que han sido ventilados en la Corte Interamericana de Derechos Humanos.

4 CONCLUSIONES

La buena administración constituye un concepto muy amplio, con incidencia en la enorme diversidad de funciones públicas y sus relaciones con los ciudadanos. Se trata de categoría jurídica indeterminada, elástica y funcional, relativamente reciente, y que se encuentra en proceso de evolución, y presenta características de principio general del Derecho, de deber de la Administración y de derecho de los administrados (ciudadanos). Asimismo, se encuentra en proceso de implementación a áreas especificas, tales como el sistema tributario, el cual por sus especiales características a veces es más refractario en aplicarlo.

Si bien presenta su mayor desarrollo en Europa, la recepción de esta categoría jurídica se ha extendido a América Latina a través de diversos mecanismos, incluida la influencia de organizaciones internacionales como la OCDE, el CIAT, el CLAD, la CEPAL. Dicha recepción se ha producido básicamente a través de la doctrina jurídica, de resoluciones judiciales y de instrumentos internacionales de *soft law.* Sin embargo, es posible encontrar en los sistemas jurídicos latinoamericanos elementos esenciales de la categoría de buena administración (principio jurídico, deber publico y derecho fundamental) y del propio derecho que comprende, sobre todo a nivel de las constituciones políticas y de las principales leyes de derecho administrativo y derecho tributario.

Desde ese lugar, es posible observar que se ha acogido dicha categoría jurídica en los sistemas tributarios latinoamericanos, y en algunos casos se ha reconocido (al menos parcialmente) en leyes tributarias especiales o en los Códigos Tributarios de la región, y esto se refleja en el Modelo de Código Tributario, elaborado por el CIAT.

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Article

The framework of public audit in Spain

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KEYWORDS:

European Union, Economic and Monetary Union, European Stability Mechanism, European Monetary Fund, Banking Union, Single Resolution Fund

ABSTRACT:

The depth of the economic crisis that began in 208 led to financial stabilization instruments in the European Union (EU). After a period of transience and provisionally, the European Stabilization Mechanism (ESM) allowed the Economic and Monetary Union (EMU) countries to consolidate a permanent financial assistance fund. In 2017, the Commission proposed revising the ESM to revoke its international organizational character and transform it into an EU agency included in the EU's institutional structure. The strong opposition of some Member States (MS) has avoided this possibility. The ESM Treaty has been revised and signed by the Eurozone states and maintains its intergovernmental nature. In any case, some new functions have been added, including its establishment as the Single Resolution Fund (SRF) backstop facility only in case of extreme need and when its liquidity is insufficient. Creating this support to the SRF is essential for consolidating the Banking Union.

PALABRAS CLAVES:

Unión Económica y Monetaria, Mecanismo Europeo de Estabilidad, Fondo Monetario Europeo, Unión Bancaria, Fondo Único de Resolución

RESUMEN:

La profundidad de la crisis económica iniciada en el año 2008 condujo a la creación de instrumentos de estabilización financiera en el ámbito de la Unión Europea (UE). Tras un período de transitoriedad y provisionalidad, el establecimiento del Mecanismo Europeo de Estabilización (MEDE) permitió la consolidación de un fondo permanente de asistencia financiera los países de la Unión Económica y Monetaria (UEM). En 2017, la Comisión propuso la revisión del MEDE con la intención de revocar su carácter de organización internacional y transformarlo en una agencia de la UE incluida dentro de la estructura institucional de la UE. La oposición decidida de algunos Estados miembros ha evitado esta posibilidad. El Tratado constitutivo del MEDE ha sido revisado y firmado por los Estados de la Eurozona y mantiene su naturaleza intergubernamental. De todas formas, se ha aprovechado la ocasión para ampliar sus funciones, entre las que se destaca su constitución como el instrumento de último recurso del Fondo Único de Resolución (FUR) sólo en caso de extrema necesidad y cuando su liquidez no fuera suficiente. La creación de este apoyo al FUR es considerado una condición esencial para consolidar la Unión Bancaria.

MOTS CLES :

Union économique et monétaire, Mécanisme européen de stabilité, Fonds monétaire européen, Union bancaire, Fonds de résolution unique

RESUME :

La profondeur de la crise économique qui a débuté en 2008 a conduit à la création d'instruments de stabilisation financière au sein de l'Union européenne (UE). Après une période transitoire et provisoire, la mise en place du Mécanisme européen de stabilisation (MES) a permis la consolidation d'un fonds permanent d'assistance financière aux pays de l'Union économique et monétaire (UEM). En 2017, la Commission a proposé la révision du MES dans le but de lui retirer son caractère d'organisation internationale et de le transformer en une agence de l'UE incluse dans la structure institutionnelle de l'UE. Une opposition chez de certains États membres a empêché cette possibilité. Alors le traité instituant le MES a été revu et signé par les États de la zone euro et conserve son caractère intergouvernemental. En tout cas, cela aura été le moyen d'élargir ses fonctions, y compris celle de la constitution qui n'imposera le fonds de résolution unique (FRU) qu'en tant qu'instrument de dernier recours en cas d'extrême nécessité et lorsque la liquidité n'est pas suffisante. La création de ce soutien au FRU est considérée comme une condition essentielle à la consolidation de l'Union bancaire.

CONTENTS:

1 INTRODUCTION

The primary and most basic purpose of an audit report is to express an opinion about the financial information provided by a company, in particular, whether the financial statements are prepared truthfully and presented fairly in accordance with accounting standards.

An audit report concerns and interests the company itself, mainly their senior managers. By contrast, trust in the accounts also affects third parties. Different kinds of people may have different kinds of needs from the company and different types of relationships with the company.

Employees, owners, potential investors and all sorts of stakeholders are interested in accounts being checked by accounting professionals and being in agreement with the company's financial position reflected on the accounts.

Everyone interested in annual accounts can trust the integrity of the accounts when reading an independent auditor's report that includes this paragraph in a country that has agreed to IFAC[1]accounting and auditing standards:

> We have audited the financial statements of ... Company ....
>
> In our opinion, ... present fairly, in all material respects, (or give a true and fair view of) the consolidated financial position ...[2]

Why can we be confident? It cannot be denied that economic scandals, at the beginning of the first decade of the 20th century, triggered a deep crisis of confidence in financial information and one of the most questioned aspects was the performance of auditors with respect to audited firms.

In response to these scandals, which harmed a large number of small investors who had relied on audit reports, the auditing profession was called into question [3]. Trying to resolve the loss of confidence in its activity, [4] many government and parliamentary debates [5] were sparked on the need to maintain a situation that guarantees the independence of the auditor with respect the auditee as well as the quality of the audit, [6]and that, furthermore, engenders the trust of the public.[7]

The turning point was the Sarbanes-Oxley Law. It was approved in the USA with the main purpose of restoring confidence in the markets, which required improving the protection of investors by implementing a series of strict measures to increase the accuracy and veracity of the information disclosed by companies. The Act imposed more stringent

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1 The International Federation of Accounting (IFAC) was established in 1977, as the heir and agglutinating entity of different international organizations of accounting and auditing professionals. It has developed very comprehensive accounting and auditing standards that have become the benchmark for the profession throughout the world. Its formulation meets, initially, the needs of accountants and auditors in the private sector.

2 International standard on auditing 700 (revised) forming an opinion and reporting on financial statements (Ref: Para. A19–A26)

3 Gómez Maldonado, Mario Alberto. *Determinando la Auditoría Pública*. Auditoria Pública, 2010, nº 51, p. 61.

4 García Benau, Mª Antonia. *El marco normativo internacional de la auditoría y su repercusión en España*. Revista española de nº control externo 52,2016, p. 176.

5 En el país origen del escándalo, la GAO, ràpidament dirigió diverses recomendaciones al Congreso. Walker, David M. "El siglo XXI retos y oportunidades". Revista internacional de auditoría governamental, 2002, vol. 29, nº 3, p. 2.

6 Rubio Herrera emphasizes that the Directives of the European Union have undergone an evolution that has materialized, as far as the subject matter of this article is concerned, in a progressive strengthening of the duty of independence. *Rubio Herrera, Enrique. El deber de independencia de los auditores según la nueva normativa*. Revista española de control externo, 2016, nº 52, p.61.

7The scandal produced great mistrust among investors and the general public. Vide Cortijo Gallego, Virginia. Impacto de la Ley *Sarbanes-Oxley* en la regulación del sistema financiero español. Boletín económico del ICE, 2007, nº 2907, p. 43.

requirements in accounting and audits and has significantly influenced the changes in many countries. In general, Governments felt compelled to enable real change to restore confidence. [8]

Today, as a result of these measures, I think that we can say that a significant level of trust in auditing work has been restored.

Is it exactly the same in the case of public audits? Is it exactly the same in the case of public audits in Spain?

We can answer affirmatively, saying that the goal is the same: to express an opinion about the financial information. If the above-mentioned condition is fulfilled, the auditing works are carried out according to International standards. We must also say that in Spain, audits are carried out according to International standards. Therefore, our answer will be the same.

Although if we are talking about public auditing, there are different groups concerned and this will be a central question. We must take into consideration a very relevant kind of stakeholder, in addition to those referred to above, that is, the executive and legislative powers and the most relevant interested party, the citizens. [9]

2 EVOLUTION OF AUDITS IN SPAIN. THE ADOPTION OF INTERNATIONAL STANDARDS ON AUDITING (ISAS)

2.1 BEFORE EU MEMBERSHIP

The audit, in its modern conception, began with the advent of the industrial revolution in the United Kingdom.[10]

The first law about audits was the British Corporations Act, which was passed in 1844. The Corporations Law established the obligation of administrators to keep accurate accounts and the appointment of auditors to review the company's accounts.[11]

The Spanish auditing tradition, unlike the Anglo-Saxon tradition, is recent.

We can consider only one antecedent to the current regulation of the auditing of accounts. This is an article, article 108, of the Law of Corporations Act, passed in 1951, which introduced the figure of censorship of accounts in Spanish Law. Although its scope was much more limited, it can still be considered a step toward auditing. [12]

However, the similarity between the audit of accounts and censorship of accounts rests in only one point, the need to verify the accounts of limited liability companies in order to protect small shareholders. Apart from this, it was a radically different system that was completely outside the international auditing standards.

Strangely, however, the General Budgetary Law, a public regulation initially enacted in 1977, made the first legal reference regarding audit in Spanish law. It was issued twelve

8 Restoring trust in audit and corporate governance. Consultation on the government's proposals. March 2021. for Business, Energy and Industrial Strategy UK. Pag 15.

9 Mata i Remolins, Lluis and Muñoz Juncosa, Antonio. La Reforma de la Comptabilitat de l'Administració Local. Escola d'Administració pùblica de Catalunya. 2005. Pag 69.

10 Derek Matthews. A History of Auditing. Ed Taylor & Francis Group. Ed, 2006, p.4 y ss.

11 Lee Teck-Heang, Azham Md. Ali. "The evolution of auditing: An analysis of the historical development". Journal of Modern Accounting and Auditing, december, 2008, vol.4, n.º12 (Serial No.43).

12 Vide Vives Ruiz, Fernando. El derecho español en el siglo XX, vol. 3: Derecho privado. 2003. Varios Autores. Marcial Pons, *El Derecho Contable en el Siglo XX*, p. 257.

years before the first auditing law. This law timidly included an indirect mention about auditing, in article 100.

Since then, in parallel with private auditing, public auditing has experienced a significant boom.[13]

2.2 FIRST AUDIT LAW, LAW 19/1989.

As we have seen, before Spain joined the EU we cannot speak of an audit regulation in accordance with international standards, but since then, the situation has changed significantly. We can't forget that Article 288 of the Treaty on the Functioning of the European Union says

> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

As a consequence, when Spain became a Member State of the European Community it was required to extensively reform its commercial laws and accounting matters, which also affected the field of auditing, so as to adapt them to European regulations.

This reform launched the adaptation to the community commercial legal framework, which comprised the Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of company, the Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54 (3) (g) of the Treaty on consolidated accounts and the Eighth Council Directive 84/253/EEC of 10 April 1984 based on Article 54 (3) (g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents.

The adoption of the Directives provoked the most significant accounting reform of Spanish mercantile legislation to date, with the enactment of Law 19/1989 on partial reform and adaptation of commercial legislation to the directives of the European Economic Community (EEC, precursor to the EC) in matters of companies. Through this Law along with Royal Decree 1643/1990, several laws were modified and a new General Accounting Plan was approved, which developed the legal provisions contained in the Code of Commerce and the Corporations Law. The reform included, among others, the Law 19/1988 of 12 July on the Auditing of Accounts.

Afterwards, the evolution of accounting standards has been led by the European Union, and public accounting standards in Spain, but not always in all EU members, have evolved to adapt public accounting rules to private ones. [14]

In the following table we can see a summary of this evolution:

13 Cervera Notari, Manuel "La auditoria en las entidades Locales", Revista de Hacienda Local nº 90, p. 775.

14 Nonetheless the trend is towards a common framework. Presente y futuro del control interno en la Administraciones Públicas. Miguel Miaja Fol. Auditoría pública: revista de los Organos Autónomos de Control Externo, ISSN 1136-517X, Nº. 74, 2019, págs. 85-98

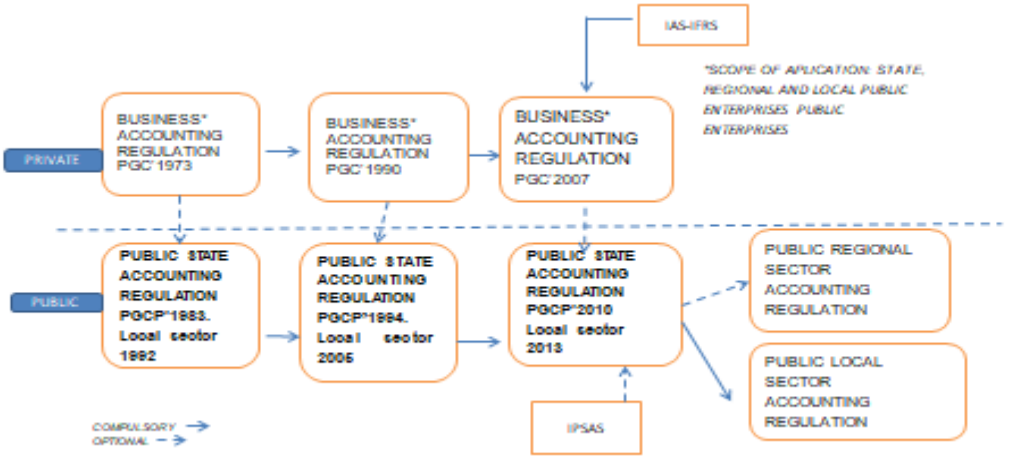

Figure 1. Spanish Accounting Regulation

Law 19/1988 established, in a general way, mandatory accounting review by auditors. Only a small number of companies were exempt from this duty. Lawmakers opted to alleviate the accounting burdens of some companies with few assets, low turnover or few workers.

They are only exempted if, in the two consecutive years leading up to the balance sheet date, they meet one of the following criteria:

- Total assets of €2,850,000 or less.
- Annual turnover of €5,700,000 or less.
- Average number of employees during the year of 50 or fewer.

Accounting and auditing reforms were happening in parallel and lawmakers considered that it was also necessary to establish a control mechanism over both activities. In Spain, this control is exercised by the Accounting and Auditing Institute, which was established by Law 19/1988.

There are two fundamental missions of the Accounting and Auditing Institute: to resolve queries on the correct interpretation of national accounting regulations and to exercise a supervisory function over auditors and audit activities.

Concurrently with these functions, the Institute is in charge of the Official Registry of Account Auditors. Companies that are under the obligation to have their financial statements audited must have their audit reports signed by auditors registered in the Official Registry of Auditors and deposited in the Mercantile Registry. This applies both to private and public companies.

In Spain, all companies must be registered at the Spanish Mercantile Registry, where they must deposit their annual accounts. As the Mercantile Registry is a public registry, any person may consult this information and therefore the annual accounts. This is a requirement of European Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies.

If a public company must be audited, it must be audited by auditors registered in the Official Registry of Auditors and the audit reports are required to be deposited in the Mercantile Registry with the annual accounts.

The Accounting and Auditing Institute is also the competent authority on the adoption of rules on ethics, internal quality control rules on audit activity and technical auditing rules in the terms provided in Law 19/1988. The first Spanish Technical Auditing

Standards were adopted by the Resolution of January 19, 1991, of the President of the Accounting and Auditing Institute.

2.3 SECOND AND CURRENT AUDIT LAW, LAW 22/2015

In the European Union, the rules of auditing have been evolving over time. Directive 2014/56/EU of European Parliament and of the Council, of April 16, 2014, modified Directive 2006/43/EC, with an impact on auditing.

In Spain, Law 22/2015, of July 20, on the Audit of Accounts has come to transpose the provisions of the Directive in replacement of Law 19/1988. The provisions of the Audit Law are expanded in Royal Decree 2/2021 of January 12.

The legal definition of an audit is found in article 4 of Law 22/2015, of July 20, reinforcing the previous law. [15] This definition of Account Auditing is the common definition and consists of verifying the accounts in order to determine whether they express the true image of the assets, the financial situation and the results of the audited entity, in accordance with the regulatory framework of financial information that results from application. This definition is suitable also for the public sector. Then both share regulation and purpose.

Law 22/2015 makes a specific mention of public sector audits in its second additional provision. On the one hand, the provision enforces a duty to audit the annual accounts of state-owned commercial companies on a level playing field with private companies, and on the other hand, it excludes public auditing from the object of the law.

In this regard, the activities of review and verification of annual accounts, financial statements or other accounting documents, and the issuance of the corresponding reports, carried out by public control bodies, are subjected to General Budgetary Law, Law 47/2003. But, as we will see next, specific regulation in the field of audit is similar to and converging with private legislation and standards.

2.4 RULES FOR AUDITING

In order to achieve the objective of an audit report, both public and private auditing require the existence of a *lex artis*, a series of regulations governing professional technique, which sets the rules and guidelines. These are regulations about the behavior and conditions of the people who will participate in the work, the execution of the work and the report to be issued. The aim is that the reader, any interested party or society in general, can trust the report issued.

Since the approval of the Sarbanes-Oxley Act, auditing rules have generally been tightened in all countries and have led to more intense regulation of audit activity. [16]

The public sector has also felt the need to develop standards to guide the execution of auditing works. [17] As in the private sector, there are international standards, which are nothing more than an adaptation of auditing standards to the public sector, and are generally introduced in national regulation.

15 García Benau, Mª Antonia. "El marco normativo internacional de la auditoría y su repercusión en España." Revista española de nº control externo 52. 2016, p. 175.

16 Gómez Maldonado, Mario Alberto. *Determinando la Auditoría Pública,* Auditoria Pública, 2010, n.º 51, p. 57.

17 Melián Hernández, José A. Relaciones y diferencias entre fiscalización y auditoría. Razones para una reforma de las normas de auditoría del sector público. Auditoría Pública, 2006, nº 39.

In Spain, the first Public Auditing Standards (NAP) were issued by the Comptroller Office of the State in 1983, five years before Law 19/1988, and were subsequently replaced by Resolution of September 1, 1998, of the General Comptroller of the State Administration, approving the Public Sector Audit Standards. [18]

Today, Article 2 of Law 22/2015, in line with the principles defined by the European Directive, accepts the Regulatory rules for auditing of accounts, and says:

> *For* these purposes, international auditing standards shall be understood as the international auditing standards, the international quality control standard and other international standards issued *by the International Federation of Accountants through the International Auditing and Assurance Standards Board, provided they are pertinent to the account audit activity regulated in this Law*

Even before the entry into force of Law 22/2015, IFAC standards were initiated by the Resolution of October 15, 2013 of the Institute of Accounting and Auditing of Accounts. Once the law had been passed, IFAC standards continued with the Resolution of December 23, 2016, of the Institute of Accounting and Auditing of Accounts.

As we have seen, the auditing standards in Spain, as in the entire European Union and a large majority of countries, are standards issued by IFAC. As far as the public sector is concerned, there was no legal requirement for the adoption of international standards, but the need for standardization with the private sector was considered, resulting in adaptation to the ISAs. [19]

The homogenisation process in Spain culminated in the Resolution of October 25, 2019 of the General Comptroller of the State Administration, approving the adaptation of the Public Sector Auditing Standards to the International Auditing Standards

Obviously, taking into account the differences between the public and private sectors, the audit process in Spain in both sectors are perfectly comparable.

All públic standards are accompanied by an explanatory note, a set of regulations called “the regulatory of the activity of auditing accounts for the Public Sector in Spain”

The auditing standards of the public sector can be divided into the following areas:

- General rules: Global objectives of the public auditor and performance of the audit in accordance with the International Auditing Standards adapted for application to the Spanish Public Sector. They define concepts, objectives, scope, areas and classes of auditing.

  They are basic assumptions, consistent premises, logical principles and requirements that contribute to the development of auditing standards and are used by auditors to form their opinions and prepare their reports, especially in cases where there are no specific applicable standards.

  They include several standards relating to the professionals who will carry out the audit work, the diligence that they must observe in their execution and define their obligations and responsibilities, and rules on incompatibility.

  Also, they include an essential idea, namely, that public auditors be able to apply their own criteria in the exercise of their functions, in accordance with legal provisions. This requires enough independence that they be able to act freely in the

18 These Audit Standards are mandatory in the State Administration . Also in the local sector, according to art. 220-3 of Royal Legislative Decree 2/2004, of March 5, which approves the revised text of the Regulatory Law of Local Finances,

19 La auditoría: más pronto que tarde, con normas Internacionales. Cuenta con IGAE. Junio 2010 número 24. Pag. 22.

issuance of their professional judgment. This independence must be maintained with respect to the audited entity, without any kind of prejudice, for or against.

- Rules on the performance of audit work: The aspects related to the preparation and planning of actions, documentation and evidence, control and supervision of work and issues related to the review of compliance with the audit are developed.

  Particular attention is paid to legality, of special significance in the public sector. The audit plan, a schedule of the work to be carried out that is approved by the internal control body, is particularly relevant here.

- Standards relating to audit reports: Indicate the requirements relating to preparation, content, presentation and dissemination.

3 Reserve of public audit to control bodies

Spain's model of financial economic control of public administrations is a continental one, although, in practice, it has notable adaptations.

It's a classic system of coexistence[20] of a body linked to parliament, external control, with another inserted within the administrative organizations, internal control, but endowed with functional autonomy. [21]

The institutions of external control, of course, have the mission of reviewing the financial activity of the administrations in their territorial scope. They can review the annual accounts but do not issue an audit report, as such, on each and every one of the annual accounts of the different públic entities that make up the public administrations.

The internal control bodies are the Comptroller's offices of the different public administrations. The external control bodies are the National Court of Auditors, and the corresponding regional external control bodies.

In the case of the regional authorities, we can say, in general, that they have promulgated a fairly uniform regulation, inspired by the General Budgetary Law, Law 47/2003, in which an administrative body is created, called the General Comptroller Office, following the tradition of the Spanish budgetary regulations. This body is in charge of internal control including auditing works.

Commonly, in all the regional parliaments that have approved budgetary laws, there is an article similar to article 140 of the General Budgetary Law, Law 47/2003, in which the autonomy of the General Comptroller Office is proclaimed, with respect to the different públic bodies that are supervised.

Based on this common denominator, regional regulations follow two different models. The first model would be communities in which their own body of comptrollers has been created and the second model leaves the general comptroller office as one more organ of the administration that is made up of officials according to the general norms of the community, but a separate body has not been created.

20. Fernández Díaz, Andrés. "¿Puede hablarse de una economía del control?". Revista española de control externo, 1999, n.º 1, p. 41.

21 Longás Lafuente, Antonio. "La convalidación de la omisión del acto de fiscalización previa o intervención crítica: régimen jurídico Civitas". Revista española de derecho financiero, 1995, n.º 85, 1995, p. 54.

In any case, the delegated auditors are guaranteed to be solely and exclusively subordinate to the general auditor, as well as functionally autonomous with respect to the bodies they control.

From now on, we will refer to the national and local administrations. The regional administrations are endowed with autonomy, and although, in general, the tendency is to follow the same model as the State, there are some variations that would make this article excessively long.

In any case, Act 19/2013, of 9 December, on Transparency, Access to Public Information, and Good Governance requires the publication of annual accounts and an audit report for all public entities of all públic administrations. Also Article 136.2 of the Law 47/2003, establishes that the State Comptroller's Office shall publish the annual accounts of the agencies making up the State public sector in the "Register of annual public sector accounts".

Spanish public audits have been entrusted to the members of internal control bodies because they are considered an additional question of internal control.

Article 140 of Law 47/2003 regards audit as a manifestation of control because one of the aims of internal control, according to article 142 of Budgetary Law, is to verify the proper recording and accounting of the operations performed, and their true and regular reflection in accounts and statements.

The General Comptroller of the State Administration is in charge of monitoring the economic-financial management of the state public sector. This control shall be carried out by means of prior financial control, permanent financial control and public audit. Audit is an essential method of financial control.[22]

In parallel to this regulation, Royal Legislative Decree 2/2004, of March 5, which approved the revised text of the Regulatory Law of Local Finances, reserves (article 213) the competencies of financial control, prior financial control, permanent financial control and public audit for local comptrollers.

Accounting verification of annual accounts, in Spanish law and ISAs, focuses on the relationship between the company and the auditors, always seeking to guarantee independence and objectivity in the exercise of the entrusted functions. This claim is clearly emphasized in the Accounts Audit Law, Law 22/2015, by providing that the auditors must be and appear to be independent. [23]

Obviously, the first question is whether civil servants in charge of the audit reports of public entities are really independent. What is the situation in Spain like?

3.1 STATE REGULATION. LEGAL REGIME OF THE GENERAL COMPTROLLER OFFICE OF THE STATE

In order to allow the officials in charge of audits to act freely with respect to their judgment, their legal status must be guaranteed by law, so that it can be real. The possibility of an independent mental attitude is a real duty for those who are in charge of auditing works, but at the same time, it is their right and the public administration must facilitate the conditions for their real autonomy. [24]

22 Díez Zurro, Alicia. El control interno. Revista española de control externo, 2002, nº 10, p. 40.

23 Aurelio Menéndez Menéndez, Rodrigo Uría González Editorial. *Curso de Derecho Mercant*il. Civitas. Edición, 2007, p. 1009.

24 Estrada Gonzalez, Elena Maria; Cortes Sanchez, Rafael. El control interno de la actividad economico-financiera de las entidades locales. Presupuesto y Gasto Público, 1996, nº 18, p. 160.

The autonomy of state internal control bodies is addressed by Law 47/2003, article 140-2, that clearly sets out the principle of autonomy in the exercise of internal control functions:

> The General Comptroller of the State Administration will exercise, under the terms provided in this Law, internal control of the economic and financial management of the state public sector, with full autonomy with respect to the authorities and other entities whose management it controls.

Now, is this autonomy real? The autonomy of the General Comptroller of the State Administration is proclaimed by law, and is sought in their special incarnation within the administrative organization. They are attached to the Secretary of State for Budgets and Expenditures and have the rank of undersecretary. The Comptroller General of the State Administration is the head of the Comptroller Office of the State, which also includes the General Comptroller of Defense and the General Comptroller of Social Security, which depend functionally on the Comptroller Office, and only structurally on the respective ministries.

It's organized in a hierarchical way,[25] and both the Comptroller General of Defense and the Comptroller General of Social Security functionally depend on the Comptroller General of the State Administration, from whom they will get their respective instructions.

This hierarchical structure of all officials dedicated to the auditing function with an exclusive dependence on the Comptroller General ensures a reasonable autonomy of the officials in charge, based on the general guarantees of the public function.

The exercise of the financial control outlined in the 4th additional provision of Law 47/2003, the General Budgetary Law, is reserved to certain bodies of civil servants. According to this complement, which guarantees the control of personnel, auditors in the civil sphere of the State and all kinds of public entities under public law will be appointed from among the officers of the of State Comptrollers and Auditors body, auditors in the Armed Forces from among the officials of the Military Corps of Comptrollers of Defense, and auditors in the Social Security system from among the Control and Accounting officials of the Social Security Administration.

The assignment of functions to a certain body is not trivial in the Spanish civil service system. It is generally prohibited to exclusively assign jobs to official members of a specific body or Scale. The Law states this in article 15.2 of the Law on Measures for the Reform of the Public Function. The Law only admits an exception when it derives from the nature and function to be performed and only as a consequence of its specifications. [26]

This is the case for the functions reserved to the officials of the different internal control bodies, which cannot be entrusted to other personnel, because the law entrusts the exercise of the entrusted functions exclusively to the officials of these bodies.

There are two fundamental principles that tend to ensure the autonomy of the General Comptroller Office of the State: its independence from the authorities whose management it supervises, and the fact that all the comptrollers and auditors are subject only to the hierarchy of the Comptroller Office of the State.[27]

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25 Sánchez Revenga, Jaime. Mannual de presupuestos y gestión financiera del Sector Público. Ed 2010, p. 518.

26 Ferret Jacas, Joaquim. Cuerpos generales, cuerpos especiales en el momento presente. Una vieja polémica. Revista catalana de dret públic, 2012, nº 45, pp. 63-75.

27 Miaja Fol, Miguel. Las tendencias actuales en los sistemas de control interno de las organizaciones. Implicaciones para las Administraciones Públicas. Documentación Administrativa. n.º 286-287 , p. 209.

Within the General Comptroller Office of the State there is a department entirely dedicated to audits, the National Audit Office.

Royal Decree 1330/2000, of July 7, gave the rank of Deputy General Directorate to the National Audit Office inside the General Comptroller Office, to which it attributed planning, programming, execution and monitoring of the financial control and auditing actions of the public sector, which corresponded to the General Comptroller of the State Administration.

The autonomy of the State's Comptrollers is adequate to international standards.

3.2 LOCAL REGULATION

In each municipality and each province, there are three officials appointed by the State through a selective process who hold three basic positions in local administrations, secretary, comptroller and treasurer. The rest of the positions are served by civil servants selected by each local institution.

The status of comptrollers in local authorities used to be different with respect to the national government. This situation was highly criticized by scientific doctrine.[28] Their proximity to the political decision makers[29] which consequently implies an involvement in the decision-making process, [30] seemed to be an important weakness of the national entitlement officials [31], and specifically of the comptrollers.

Even the Court of Auditors, in a session of July 20, 2006, approved a Motion that described the exercise of the comptroller function on Local Entities as unsatisfactory and noted the need to improve certain aspects, primarily related to their autonomy.

The proposed solution by the Court of Auditors was to develop a statutory regime to allow the Comptroller Office of the State to exercise control with full autonomy from the body or entity whose management is subject to control, similar to that of the Comptrollers of the State.

In addition to the aforementioned measure, the Court of Auditors also proposed to modify the conditions for the appointment or removal of comptrollers. The Court deemed it necessary to restrict appointments to the jobs reserved for nationally authorized civil servants using the free appointment system. This mainly applied to comptrollers, in order to guarantee their impartiality and independence. In the same way, cause for dismissal should be regulated to avoid subjective criteria, instead relying on objective criteria evaluated by the same authority that had appointed the comptroller.

This has been the trend. Successive Governments took these considerations into account as proposed. Royal Decree-Law 8/2010, of May 20, by which extraordinary measures were adopted to reduce the public deficit, has already introduced corrective measures in article 15-2. The next step was Law 27/2013, of December 27, of rationalization and sustainability of the Local Administration. This Law marked a turning point and led to Royal Decree 128/2018, of March 16, which regulates the legal regime of Local Administration officials with national authorization. Law 27/2013 expressly bans any

28 Gonzalez Pueyo, Jesus, Arnal Suria Salvador. *Comentarios al Texto refundido de la ley Reguladora de las Haciendas Locales.* Editorial El Consultor. Ed. 2005, p. 1445.

29 Esta es en general una característica de los cuerpos especiales. Ferret i Jacas, Marti. Les tendències actuals i les perspectives del règim de personal de l'administració pública. Ponències del seminari de dret local. Ajuntament de Barcelona. 1988, p. 317.

30 Vide Parrado Díez, Salvador. Las elites de la administración estatal (1982-1991). Junta de Andalucía. 1996, pp. 169 y 170.

31 Arnal Suria, Salvador y Barril Dosset, Rafael. *Mannual de presupuestos y contabilidad de las corporaciones locales.* El Consultor, 1982, pp. 36 y 37.

possibility of dismissal for political reasons or loss of confidence of local comptrollers and requires a previous compulsory report from the Ministry of Finance if the termination is due to the comptroller's inefficiency.

The auditing functions of local comptrollers are regulated by Royal Decree 424/2017, of April 28, which regulates the legal regime of internal control in entities of the Local Public Sector, with the objective of achieving a more rigorous economic-budgetary control and reinforcing the role of local comptrollers.

The auditing cycle starts with an annual audit plan, prepared and approved by the comptroller and submitted to the City Council for its review. The City Council will then receive the audit reports, closing the cycle.

Law 27/2013, article 213, forces the comptrollers of Local Entities to send an annual report to the General Comptroller of the State Administration. It's a summary report of the findings of the controls carried out in the development of the previous control function, financial control function and audit of accounts.

Article 218-3 of the same law also requires the comptroller to submit an identical report to the National Court of Accounts each year.

Today we can consider that the autonomy of local comptrollers is adequate to international standards.

3.3 WHAT KINDS OF PUBLIC ENTITIES ARE AUDITED IN SPAIN?

The typology of public bodies is regulated in Law 40 / 2015, Of 1 Of October, of Legal Regime of Public Sector and has the following categories:

- Autonomous bodies ('organismos autónomos'), which deliver public services with more flexibility than the ministries.
- Business Public Entities, which are an intermediate category between Autonomous bodies and public-owned commercial companies.
- Independent administrative authorities, created with Law 40/2015, which have regulatory or supervisory functions over a particular sector or economic or social activity.
- Public foundations.
- Public-owned commercial companies, which are engaged in a commercial activity and operate under commercial law. The government owns at least a direct or indirect majority of the shares (Law 33/2003). When the central government owns 100% of the shares, administrative law is applied in budgetary, accounting, patrimonial, financial and contracting matters.
- State agencies.

In addition, the law provides for a different type of entity, the consortium. Consortia are entities governed by public law, created by several Public Administrations or their entities, among themselves or, even, with the participation of private entities, for the development of activities of common interest to all parties. [32]

These autonomous public entities are always dependents of a territorial administration, (State, Regions, Provinces and municipalities) but have some functional autonomy, without having full independence from the territorial administration, who

32 Panizo García, Antonio.La regulación de los consorcios, con especial consideración de los consorcios locales. Cuadernos de derecho local, , Número 44, 2017, Pág. 310.

appoints the director. These entities have a distinct public legal personality, their own assets and treasury, as well as management autonomy.

All of them have separate public legal personality, equity and treasury, as well as management autonomy and must be audited each year.

We said above that only the auditors registered in the Official Registry of Auditors may sign audit reports for companies under the obligation to have their financial statements audited. However, are state-owned commercial companies inconsistent with the restriction of public audit to control bodies?

First of all, state-owned commercial companies are 37,28% of all entities [33]. The number of these companies that must be audited is not published, but the main owners (53,62% of all Trading companies [34]) are local governments, which are usually small. It could be safely assumed that half of them is not under compulsory audit. Therefore, more than 80% of public entities are audited by comptrollers.

The account auditing regulated in Law 22/2015 is focused mainly in the commercial field, and it refers essentially to the companies and entities operating in commercial traffic, in order to provide transparency to the economic-accounting information of the companies, as a consubstantial element of a market economy system and arises from the need to transpose the European Union directives on this matter

For its part, Law 47/2003 also contemplates commercial and public auditing in the public sphere. It both defines and regulates public audits with substantial differences from commercial audits, with the former being broader than the latter as well as able to adopt different modalities. Also, public audit will be done through the review procedures contained in the rules and instructions for audits issued by the Comptroller General of the Administration of the State.

Certainly if a public company must be audited, it must be audited by auditors registered in the Official Registry of Auditors and their reports will be deposited in the Mercantile Registry with the annual accounts, but this does not close any doors to the public auditor.

The audit of annual accounts is only one aspect of the public audit of various public entities.

There are three more kinds of audit that must be performed by public auditors in each entity:

- a financial regularity audit,
- a legality audit, and
- a performance audit.

On top of this, we can't forget that the European System of National and Regional Accounts (ESA 2010) is the tool for harmonizing and monitoring the excessive deficit procedure (EDP) statistics. Public auditors are in charge of the transition from business accounts and budgetary accounts to national accounts, according to ESA 2010. This means they make all adjustments required.

For public commercial companies that are not required to submit their annual accounts to audit, the audit report will be carried out by comptrollers and subject to public sector auditing standards.

33 https://www.pap.hacienda.gob.es/invente2/pagVisorInformesBI.aspx

34 https://www.pap.hacienda.gob.es/invente2/pagVisorInformesBI.aspx

This raises the important question of the relationship between the auditor and the auditee in the private and public fields. In public audit, the auditee is not a client bound by a contract, it is the subject of supervision and control.

Aside from this, there are a variety of circumstances that require the necessary coexistence of public-private auditors. Two are specifically important.

First, it is very common to contract private auditing companies to help public auditors. This is provided for in the second additional provision of Law 47/2003. In practice, private auditors are working for and under the supervision of public auditors. The external auditor acts on behalf of the Internal Control body, under its direction and even though he is responsible for his work, just like any other professional, the ultimate responsibility of the control action falls on the entity's Internal Control body.

Second, public-private auditors come into play when auditing the consolidated accounts of a group [35] in which the entity's parent company is a public entity, subject to mandatory public auditing by law and whose compliance is assigned to a public auditor.

For all these reasons it was advisable to adopt the Resolution of the General Comptroller of the State Administration Concerning Technical Standards in the Relationship With Auditors in the Public Sector.

This Technical Standard regulates the interactions between public auditors and private auditors and the delimitation of functions and responsibilities between them, as well as their effects on the reports to be issued by the public auditor.

In relation to the working papers of the private auditor, public auditors may always access the working papers that have served as the basis for the public audit reports carried out by private auditors. This is the Third additional provision of Law 47/2003.

3.4 PUBLIC AUDITOR *VS* PRIVATE AUDITOR

Public audit originates from and is modeled on private audit [36]. In spite of this, it must be noted that public audit cannot be considered an identical copy of private audit.[37]

We can see *prima facie* that, in Spain, public audit seeks a broader scope than the audit of accounts provided for in Law 22/2015. Private audit focuses on the review and verification of annual accounts and other financial statements or accounting documents. By contrast the target of public audit is the systematic *post facto* verification of the economic-financial activity of the public sector of public administration. Therefore, the intention of Parliament is to expand the objective scope of public audit beyond mere accounting review.

There is also a wider subjective range of entities to be audited.

We will focus on the main three differences, in my view, between the two branches of auditing in Spain.

The first difference is the perception of audit. In Spain, public audit, despite the broad extension of the concept, is primarily considered to be an instrument for verifying the economic-financial functioning of the public sector, [38] and an element of control. However, the same does not apply in all countries. In Spain it is a legal requirement. Law 47/2003, the General Budgetary law, has come to regulate financial control in a specific Chapter within

35 Order HAP/1489/2013, of July 18, which approves the rules for the formulation of consolidated annual accounts in the field of the public sector.

36 Gómez Maldonado, Mario Alberto. Determinando la Auditoría Pública Auditoria Pública, 2010, nº 51. 2010, p. 56.

37 Díaz Zurro, Alicia. Evolución del control de la actividad económico-financiera del sector público. Presupuesto y gasto público, 2004, n.º 35, p. 235.

38 Garcés Sanagustín, La eficacia de la auditoria pública. El seguimiento de recomendaciones. Partida Doble, n.º180, p.94.

Title VI of the Law. This chapter regulates the control of the economic-financial activity of the state public sector exercised by the General Comptroller Office.

That is the vision of the law, which allows public audit to access all types of public entities where other modalities of internal control do not reach.[39]

This point of view is paramount in Spanish regulation, and connects with the second of the big differences between the audit of private and public entities. It can basically be summarized as the need to assess compliance with the law and devote greater attention to the internal control report, with a special emphasis on the recommendations section, in order to ensure that the public audit is fundamentally constructive. Obviously the first target is a verification of financial reality [40], but a verification of legal compliance is also important.

This question has been addressed in NIA-ES-SP 1250, CONSIDERATION OF THE LEGAL AND REGULATORY PROVISIONS IN THE AUDIT OF FINANCIAL STATEMENTS (NIA-ES 250 adapted for application to the Spanish Public Sector).

Legality is one of the guiding principles of the control of public management activity. Therefore, the auditor of the Public Sector should pay specific attention to it, but without implying a substantial change in the scope of the audit of accounts.

The same note points out that even so, the verification of legality that is carried out during the work of auditing accounts cannot be expected to have the same depth as in the case of a compliance audit. Neither is it exactly comparable to the approach that is carried out in the scope of the auditing of accounts of public entities that must be audited by auditors registered in the Official Registry of Auditors.

Without prejudice to the professional judgment of the auditor, the compliance tests on legality will normally have a greater scope and, consequently, their greater effect should be considered in the audit report, in the case of public sector audits. In this sense, breaches of the law that do not affect the accurate image but which are not irrelevant, must be included in the report in the legal and regulatory requirements section of the report.

In addition, there is an essential element influenced by the great importance of the budget. According to article 46 of the General Budgetary Law, expenditures over budget allocations are prohibited and rendered void *ab initio*.

In 2011, Spain implemented a national reform at the Constitutional level to reinforce the fiscal framework, accepting the principle of budgetary stability and prohibiting structural deficit beyond the limits stipulated by the European Union for its Member States. It was also established that the volume of public debt for all the Public Administrations as a whole as a ratio of the Gross Domestic Product shall not surpass the benchmark figure set forth in the Treaty on the Functioning of the European Union.

Obviously, these strict new budgetary rules across all levels of government attached great importance to verification of their compliance.

In this sense, Act 19/2013, of 9 December, on Transparency, Access to Public Information, and Good Governance includes Article 28: Infractions in financial and budgetary management.

It constitutes a very serious infraction to be found guilty of:

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39 Blasco Lang, José Juan. "El control financiero y la auditoria pública en la nueva Ley General Presupuestaria". Revista española de control externo, 2004, vol. 6, n.º 18. p. 183.

40 La auditoría y la evaluación públicas una función y una actividad similares con fundamento diferente. Javier Medina Guijarro, Enrique Alvarez Tólcheff. Revista española de control externo, Nº 33, 2009, pág. 22.

> c) Committing to an expense, recognizing an obligation, or ordering a payment without sufficient credit or in breach of the terms of Act 47/2003 of 26 November, on Budgeting, the annual Budget Act, or other applicable budgetary legislation.

Also Organic Law 2/2012 of 27 April 2012 on Fiscal Stability and Financial sustainability includes budgetary requirements.

> Article 30. All public administrations must approve an upper limit on non-financial expenditure which shall mark the ceiling for allocation of resources in their Budgets.

Public audits must specifically verify the due application of the budgetary principles in order to issue a technical opinion on the budget deficit or surplus. The General Budgetary Law includes, in addition to the annual accounts of the commercial system, the budget outturn. Consequently, it is one more statement that the public auditor must verify, with the special importance that the budget has for public entities. [41]

These are, I believe, the three major differences, but I want to refer to two nuances that are also important.

First, let us consider a very relevant kind of stakeholder of public accounting information and an element to be introduced into the concept of independence of the public auditor.

In Spain, Document No. 1 of the Public Accounting Principles of The General Comptroller of the State (1991) constitutes the first work that identifies the users of public financial information. [42]

These appear arranged into five large groups, the same ones that have later been included in paragraph No. 7 of the introduction to the General Public Accounting Plan of 1994:

- Organs of political representation: Chambers of National Parliament, Legislative Assemblies of the Autonomous Governments and the Provincial and municipal Councils.
- Officials in charge of the different Public Administrations both at the political and administrative levels.
- External control bodies: the Court of Accounts and the Courts, Chambers and Accounts Commissions of the Autonomous Communities and Local Corporations.
- Private entities, associations and citizens interested in the *"res publica".*

The first four groups will always have a certain level of knowledge that may range from mere notions in many cases of those included in the first group, to the expertise that will occur in the vast majority of those belonging to the remaining three.

However, we cannot forget that the most important group is the last one, the citizens, the true holders of sovereignty, since the others are simply their representatives or the managers of public affairs.

Whatever the case may be, the objective is the same, to be able to trust that the accounts present the consolidated financial position fairly.

As in other cases of communication of information included in the NIA-ES-SP 1260 R, a public auditor may have legal or regulatory obligations that establish the communication

41 Díaz Zurro, Alicia: "La auditoria Pública" en Presupuesto y Gasto Público, 2001, nº 25, p.70.

42 https://www.Comptroller Office of the State.pap.hacienda.gob.es/sitios/Comptroller Office of the State/es-ES/Contabilidad/ContabilidadPublica/Documents/Principios_Contables_Publicos_Doc_1_a_8.pdf. Pág. 28

of internal control deficiencies to recipients other than those of the audited entity. Furthermore, and depending on the needs, objectives and types of audited entities, the public auditor may need to detail aspects related to internal control originating in breaches of the law or any other work in a different report specified in this standard.

Finally, Public Sector auditors may have additional responsibilities to communicate deficiencies in internal control identified during the performance of the audit.

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Article

Tax transparency, tax avoidance and stakeholder education

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Sustainable development, tax transparency, stakeholders' education, tax avoidance

ABSTRACT:

Tax transparency is slowly becoming a new norm. In our article we made an attempt to look at tax transparency as a tool to combat tax avoidance from the social historical perspective. We concluded that although there are many developments in the field of tax transparency to raise public awareness and introduce voluntary and mandatory public disclosures for multinational companies, stakeholders' formal education on the matter is needed to help achieve better results. Social contract theory and the social cost of tax avoidance should be the necessary parts of such education.

PALABRAS CLAVES:

Desarrollo sostenible, transparencia fiscal, educación de las partes interesadas, evasión fiscal

RESUMEN:

La transparencia fiscal se está convirtiendo poco a poco en una nueva norma. En nuestro artículo, intentamos analizar la transparencia fiscal como herramienta para combatir la evasión fiscal desde la perspectiva histórico-social. Llegamos a la conclusión de que, aunque hay muchos avances en el campo de la transparencia fiscal para concienciar al público e introducir divulgaciones públicas voluntarias y obligatorias para las empresas multinacionales, es necesaria una educación formal de las partes interesadas en la materia para ayudar a conseguir mejores resultados. La teoría del contrato social y el coste social de la evasión fiscal deberían ser partes necesarias de dicha educación

MOTS CLES :

Développement durable, transparence fiscale, éducation des parties prenantes, évasion fiscale

RESUME :

La transparence fiscale apparaît peu à peu comme une nouvelle norme. Dans cet article, nous avons tenté d'examiner la transparence fiscale en tant qu'outil de lutte contre l'évasion fiscale au regard de l'histoire sociale. Nous avons conclu que, bien qu'il y ait de nombreuses améliorations dans le domaine de la transparence fiscale pour sensibiliser le public et introduire des divulgations publiques volontaires et obligatoires pour les sociétés multinationales, l'éducation formelle des parties prenantes sur la question est nécessaire pour aider à obtenir de meilleurs résultats. La théorie du contrat social et le coût social de l'évasion fiscale devraient être les piliers de cette éducation.

CONTENTS:

1 STAKEHOLDERS FOR TAX TRANSPARENCY

The global movement for tax transparency and sustainability started in the second half of the 20th century and now is growing. More jurisdictions and nongovernmental organizations are getting involved and have raised their voices to urge global multinational companies to become more transparent.

On May 25th, 2022, during Amazon's annual meeting, shareholders representing $144 billion called for increasing tax transparency by the company, requesting the Board of Director to "issue a tax transparency report to shareholders, at reasonable expense and excluding confidential information, prepared in consideration of the indicators and guidelines set forth in the Global Reporting Initiative's (GRI) Tax Standard"[1]. This proposal Amazon, the company, initially tried to decline on the basis of Rule 14a-8(i)(7) (Code of Federal Regulations: 17 CFR § 240.14a-8 - Shareholder proposals, 2011) which permits a company to exclude a shareholder proposal from the company's proxy statement that "deals with a matter relating to the company's ordinary business operations" (17 CFR § 240.14a-8 - Shareholder proposals), but the SEC sided with the shareholders in this matter and in its letter dating April 8, 2022 said that in the Commissions view the Proposal exceeds ordinary business matters (Commission, 2022).

In 2022 Cisco and Microsoft investors submitted similar proposals asking the companies to adopt the GRI standards (Sarfo, 2022). In Australia the Labor party made public release of high-level data tax information county by country a part of its program (Australian Labor Party).

In September 2021 a group of 63 investors with 2.9 trillion in assets sent a letter to the USA FASB in support of tax transparency (Fact Coalition, 2021).

1 See the petition (Tell Amazon shareholders and Board: Vote to hold Amazon accountable and expose global tax avoidance, 2022)

OECD, the United Nations and the European Union are actively working on mechanisms that would harmonize taxation and address the sustainability of economies, which is not possible without predictable, reliable and constant streams of tax revenue.

On March 9, 2022, 127 leading transparency, anti-corruption, open data and journalists' organizations including Transparency International issued a statement demanding open company and beneficial ownership registers (Transperency International, 2022).

While tax transparency is slowly becoming a new norm, and shareholders and governments are the ones who started this movement, what can be the next step in this direction? Would it be enough to achieve not just transparency, which is eventually just a tool not a goal, but true financial sustainability for local jurisdictions in particular? To answer these questions, we need to look back on the history of tax avoidance and tax havens.

2 TAX AVOIDANCE AND TAX HAVENS: HISTORY

From the very start there were two groups of major players that were involved in this process, on the one side - managers and majority shareholders, tax haven authorities; governments, investors and individual taxpayers were on the other side. For the last two centuries the demand for tax transparency from one group of players grew directly proportional with the number of tax havens and the introduction of new and more sophisticated profit shifting and tax avoidance techniques. While tax authorities were becoming more cooperative, working toward creating an effective tax system based on the principles of justice and legal certainty (Andrés Aucejo, 2008), international corporations exploited existing loopholes in legislations while formally following the law used more and more sophisticated tax planning and offshore arrangements to shift profit and reduce their local social obligations, such as taxes. For many years tax havens providing anonymity and profit shifting techniques allowed companies to stash their revenue, while local tax authorities and the public couldn't see the tax payments globally.

The modern age of tax havens started in the US. New Jersey's corporate sector was booming in the late 19th century after its Governor Leon Abbet, in an attempt to save his state and being desperate for funds, rewrote New Jersey's incorporation law which allowed easy incorporation requirements and relaxed regulations (Seligman, 1976). In the beginning of the 20thcentury Delaware, another USA state, saw the opportunity to sweep away New Jersey when the then-new governor of New Jersey pledged to clean up the corporate sector. Delaware went further and created a special tax regime allowing it to set up nonresident companies and exempt corporations from state tax (Delaware Division of Corporations). In 1970 was created the Delaware loophole that allowed companies to save millions in after tax dollars. Delaware doesn't tax revenue from intangible assets if the company isn't physically located in Delaware (Weitzman, 2022). The companies can transfer intangible assets to the subsidiary established in Delaware, then the other related companies send payments for usage of that intangibles to the subsidiary. These payments are deducted from revenue in the other states lowering companies' tax obligations and are not taxed in Delaware. The other benefits of incorporation in Delaware are anonymity and the court that "historically respected the good faith decisions of a Board of Directors over the desires of its stockholders" (Harvard Business Services, Inc.). As a result, in 2021 approximately 93 percent of all US initial public offerings were registered in Delaware (Corporations, n.d.), including such multinational corporations as Google, Amazon and Apple.

This practice was copied and spread worldwide with some modifications within Europe. First was the canton of Zug (Ball, 2011), then the UK. The UK court went further allowing non-resident companies to incorporate in the UK without paying taxes. This technique known as "virtual" residence was later copied by such jurisdictions as Bermuda,

Bahamas and vastly improved by Cayman Islands (Palan, 2009). In 2007 $5.6 trillion of global wealth was held in Switzerland. Over the last four decades global offshore wealth and the quantity of offshore centers increased significantly. Research performed by Annette Alstadsæter, Niels Johannesen & Gabriel Zucman estimated that the equivalent of 10% of world GDP is held in tax havens globally (Alstadsæter et al., 2018).

From the very beginning of the history of tax havens the features that these jurisdictions offered were secrecy, anonymity, and tax and ownership non transparency. The big question is who the winners are and who are the losers of such an arrangement, or if to reword the question, who are the players now. On the surface the shareholders and managers are the one who are the obvious beneficiaries of such arrangements, which contradicts with the facts we listed above. Then only the jurisdictions that lose its revenue would be the ones who would ask for more transparency.

In the last century most scholars supported the idea that the simplified incorporation laws and lax regulations empowered managers at the expense of shareholders (Cary, 1974), since the managers can choose the place to incorporate, and shareholders cannot influence this decision. In the last quarter of the 20th century the opinion has changed to the opposite, saying that shareholders win the most from the special incorporation and tax regimes (Winter, 1989). The jurisdiction's competition maximizes shareholders' value and allows it to drive down the cost of capital, while without this competition the shareholders of new corporations would be in a disadvantageous position. Harwell Wells in his article (Wells, 2009) although doesn't focus on what kind of race it was, states the Delaware incorporation laws are written in the way that empower managers, citing that "Corporations needed the freedom to enter new business fields or to issue new securities, even if these changes disadvantaged existing shareholders". The other research included 17,331 publicly listed firms and focused on the international environment suggests that tax haven subsidiaries are used for entrenchment activities beyond pure tax savings, and for example shield cash from outsiders such as minority shareholders (Zeume & Stefan, 2015). These incentives and such instruments, as tax havens, complex transfer pricing rules, special agreements with some local governments, double tax treaties available for multinational companies and top one percent wealthy individuals resulted in the local income tax burden being shifted from big companies to middle class and local businesses. For example, the US Treasury announced that the tax collected as a percentage of GDP is at its historic minimum, skewed very heavily toward the top 1 percent earners - high income individuals and multinational corporations. The estimated percentage of unpaid tax for 2019 was about 28 percent ($163B) (Sarin, 2021). OECD published that tax avoidance cost countries from $100B to $240B in lost revenue (Organisation for Economic Co-operation and Development, 2021). Most of the developing countries struggle to collect taxes to obtain a sustainable economy. In August 2022 US president Biden signed the Inflation reduction Act in law (117th Congress, 2022). Almost 80 billion in this law was appropriated to the IRS. Most of this amount goes to enforcement and operations support. Enforcement was determined as tax collection, legal and litigation support, conduct of criminal investigation. Operations support includes "rent payments; facilities services; printing; postage; physical security; headquarters and other IRS-wide administration activities; research and statistics of income; telecommunications; information technology development, enhancement, operations, maintenance, and security; the hire of passenger motor vehicles". There are not too many countries in the world that can invest such an amount in tax services. Given our statistics above, the majority of unpaid taxes that should be returned belong to wealthy individuals and multinational companies. If the IRS admitted that to fight with the tax avoidance it needs such enormous resources, how can developing countries with all their internal problems achieve the same purpose?

To summarize facts that we introduced above, tax havens or jurisdictions offering more anonymity appeared as a movement after WWI and spread globally. President Roosevelt in his speech to Congress said that as the nation was overwhelmed with the problems resulting from the Great Depression, Congress and the courts faced significant planning by taxpayers that deprived the government of revenue at a time when it could ill afford to lose income (Roosevelt, 1937). For many years there was no adequate tool to fight global tax avoidance, especially during global crises times like world wars, when countries didn't trust each other enough to exchange information and cooperate. Some instruments that were developed to help companies became old and inadequate. When the League of Nations in 1928 developed its first model tax treaty to prevent double taxations, they tried to address the immediate need to support global cooperation. When a couple of decades after WWII globalization started to revitalize, global supply and value chain gradually became more sophisticated as well as cross border tax structure, tax treaties created some opportunities for profit shifting. The 1928 Double Tax Treaty became a foundation of the 2010 Model, the UN Model and of modern tax treaties, and while the treaties settle the competing and overlapping taxing rights of a source country and residence country, they inherited their fundamental flaws that offer an opportunity for profit shifting and "with a treaty in place, the MNE's incentive is to extract income in forms that attract a low or zero WHT rate, which may be ones — management fees, for instance, or royalties—that the host authorities find particularly difficult to value (International Monetary Fund, 2014).

1. Modern Development on Tax Transparency

Since the 1980s global organizations are working toward tax transparency and fair competition. OECD implemented a Multilateral Instrument to help jurisdictions to close the loopholes in international tax treaties by transposing results from BEPS Project into bilateral tax treaties worldwide. Pillars I and II is another project introduced by OECD to fight with profit shifting and tax avoidance and make the multinationals pay their "fair" taxes to the jurisdictions whose resources they use. Although the fight is far from being over. There is a huge push back from some of the biggest multinational companies who chose to follow the letter of law other than spirit of law.

Even companies with great brand names, like Starbucks and Apples, who are very supportive to other sustainability issues, like climate change and environmental, are using all legal opportunities to "optimize their tax liability", and as we cited in the beginning of our paper even their shareholders don't understand all the complexity of the tax arrangements, and risk associated with them, since the information is not available to them.

Unfair competition, mutual mistrust and globally very disproportionate distributions of natural and labor resources (most of the countries who provide resources are developing, have higher levels of corruption, less trained tax personnel, and cannot withstand multinational companies and make them pay enough of a contribution back to the jurisdiction) created well fertilized ground for tax abuse. There is not enough research on the correlation between natural resources and corruption, but empirical studies showed that "that resource-rich countries indeed have a tendency to be corrupt because resource windfalls encourage their governments to engage in rent-seeking" (Bhattacharyya & Hodler, 2010). As we see the latest attempts to close the loopholes are patchwork that doesn't solve the fundamental problems., which is the reality, modern laws are a very complex compromise between attempts to close discovered tax flaws, influence social behavior and still be competitive with other jurisdictions to attract more business opportunities. This internal complexity is the fundamental problem that couldn't be solved without changing social behavior of every single individual (stakeholder) through education which would enhance deep understanding of global sustainability (Fischer et al., 2012).

The complexity of tax law directly correlates to the lack of transparency (Holtzman, 2007). It is difficult to administer such complex laws and apply them consistently. Introduction of country-by-country reporting was a huge step in the right direction and made Pillar I and II possible. Although Pillar I is arguably very complex which postpones its implementation and as many scholars agreed the complexity creates an avoidance opportunity especially in the case of multinational companies.

The other problem is almost during every global crisis the willingness for cooperation ceases. Before the conflict between Russia and Ukraine there was a cooperative effort to combat tax avoidance. To achieve the goal all countries should work together while the majority of finances would come from developed countries and tax revenue would be distributed to resource countries. It is not surprising that during previous economic downfalls some jurisdictions mostly focused on internal problems and put aside global sustainability, economic nationalism grew, and existing models of cooperation were threatened (Kahler, 2013). In 2022, the year after the global pandemic and during the Russia/Ukraine conflict according to the CEIC statistics US government debt rose to 126.8 percent of GDP (CEIC Data, 2022). Most of the EU countries have debt to GDP higher than 100 percent. To compare Greece defaulted on its debt when debt to GDP increased from 127% to 179%. Although last year the USA supported OECD minimum global tax initiative (The White House, 2021), the Inflation Reduction Act mentioned above promised to raise more than $700 billion from different sources including from a 15 percent minimum corporate tax on adjusted book income. This tax is applicable to US corporations with average annual adjusted financial statement income above $1B in any applicable three-year period. What is interesting is that the minimum corporate tax clearly addresses internal US problems and is not aligned with Pillar Two. The FACT coalition supporting tax transparency wrote that since the tax is not applied country by country, it therefore increases incentives to offshore investment and profit shifting (FACT Coalition, 2022). Another concern is since the tax is on the book's income, there is an incentive to adjust books to minimize book income. Also, it will be more difficult to reconcile the tax for the shareholders.

These facts are telling us that the fight for tax transparency is not over. Since the national tax debts of developed countries are very similar to ones right after WWII, can we expect a similar tendency toward disintegration and unfair competition? It is still not clear yet if the US authorities in the future align the US global intangible low-tax income (GILTI) and foreign tax credit (FTC) with Pillar Two, but now it looks like a sign of slowing tax transparency and global cooperation movement. On the other hand, on September 9, 2022, five European countries, France, Germany, Italy, Netherlands and Spain reconfirmed intention of moving forward with the minimum tax implementation according to the OECD Agreement in 2023 (Joint Statement by France, Germany, Italy, Netherlands and Spain, 2022).

3 SOCIAL BEHAVIOR AND TAX AVOIDANCE

In 1984 R. Edward Freeman introduced his Stakeholder Theory. In this theory he identified the purpose of business as creating value for its stakeholders, such as employees, customers, communities, investors, and suppliers (Freeman et al., 2012). We can view this theory as an extension of social contract theory, where society members gave up some of their rights to the government. The government in return has an obligation to the society members to protect the members and work for the whole society's good. Or even as the logical extension of the John Donne's philosophical poem that no man is an island, and directly addresses the global sustainability problem. One of the core questions Freeman asks in his 2012 book is how we can understand both business and ethic and align them conceptually and practically.

Tax transparency can be viewed as a part of social contract (Mangoting et al., 2015) and stakeholder theory. Business has to give back to society their "fair" share. The whole society, all stakeholders must ask the government to work on achieving greater sustainability and transparency. The above-mentioned tax avoidance tools create great risk for sustainability and society morale, shifts tax burdens on individual taxpayers and local businesses and shake the whole trust society has in government. The existence or magnitude of the risk is not clear or even visible until times of crises.

It is not a surprise that the global awareness of the problems started in 1989 with the EU tax harmonization attempt after the economic crisis in the 1980s. Unfortunately, first attempts to harmonize taxes failed. Later with the decay of the Soviet Union the crisis was postponed, and the liberation of capital movements accelerated. As we briefly described above, the quantity and availability of tax havens and other tools increased significantly, which stimulated OECD in 1998 to approve the first study of harmful tax competition. Although according to some research like the one done by J.C. Sharman this effort wasn't successful (Sharman, 2011), the report laid the foundation for future development and shed some light on the problem. It became obvious that the first step would be achieving tax transparency.

4 TAX TRANSPARENCY 21ST CENTURY

Later in the 2000s the tax transparency movement started to gain speed. In 1999 the EU published its first Code of Conduct (Code of Conduct for the Members of the European Commission, 1999) and in the next decade in 2006 established the EU's Joint Transfer Pricing Forum. The same decade the EU Capital Requirements Directive IV was signed into law. Under this directive large banks and other financial institutions within the European Economic Area are required to publicly disclose information on a country-by-country basis. In 2015 G20 leaders adopted OECD BEPS Action plan including mandatory non-public country-by-country reporting for multinational companies with income above a certain threshold. In 2017 Norwegian Sovereign Wealth Fund announced a new set of guidelines for its investments in multinational corporations (Norges Bank Investment Management, 2017). Among these requirements is expectation that the multinational companies will publish their country-by-country reports and if not would explain why. In 2018 the first automatic exchange country-by-country reports took place. In September 2019 Global Reporting Initiative organization launched its GRI 207 transparency reporting requirements that call for further public disclosure of tax and other payments to governments in order to achieve the sustainable development goals as defined by the United Nations (Initiative Global Reporting, 2019). In November 2021 the European Parliament approved the EU Directive on public Country-by-Country reporting (CbCR), formally known as the Directive of the European Parliament and the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches (Directive (EU) 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, 2021). Non-European multinational companies doing business in the EU will be required to comply with this reporting requirement. As we mentioned in the beginning of our paper investors joined the government and are asking for more disclosure and making CbCR public. Another organization we haven't mentioned yet is the Principles for Responsible Investment, an independent network of investors, sponsored by the United Nation and helping investors to better understand the effects investing may have on environment, society, and governance (PRI Association, n.d.). This organization recently started pressing the companies to become more transparent on their tax strategies.

As we can see the global multilateral pressure on tax transparency for multinationals is growing. Although in parallel as we can see the law is becoming more complex to comply

and understand even for professionals. US minimum tax or OECD initiative Pillar I are very complex to implement and difficult to align with local tax laws. The letter to the members of US Congress stated that "Corporate Book Minimum Tax would be the antithesis of sound tax policy and administration. Its introduction would be neither simple nor administrable and would … increase the incidence of unrelieved double taxation" (Coalition Letter on the Inflation Reduction Act, 2022). Another tendency as we said above is unilateral policies that are not aligned with global tax transparency movements, like tax haven or policies indirectly allowing profit shifting. The groups that now fight with these tendencies are tax authorities, investors, or parties who have knowledge and understanding of tax laws and finances. As we can also see they are always one step behind, having limited resources and needing to push for global cooperation to really succeed.

While tax transparency is still in progress, EU and US companies have mandatory disclosure of certain non-financial information in their financial statements regarding environmental impact, diversity, and other social obligations (Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance, 2014) and (David A. Katz, Laura A. McIntosh, 2022). For example, The US Financial Conduct Authority (FCA) has published a policy statement (PS22/3) setting out rule changes that will require premium and standard listed companies to make disclosures in relation to gender and ethnic diversity at board and executive management level for financial years starting on or after 1 April 2022. In March 2022, the American Securities and Exchange Commission (SEC) released a proposed rule governing climate disclosure for U.S.-listed public companies (both domestic and foreign) amending Regulation S-K and Regulation S-X (SEC, 2022). In November 2021, the International Financial Reporting Foundation (IFRS) announced the foundation of the International Sustainability Standards Board (ISSB). The ISSB intends to develop a global baseline of sustainability reporting standards. The European Financial Reporting Advisory Group published the first set of the European Sustainability Reporting Standards (ESRS).

Some companies with great brand names like Starbucks, Apple, pioneered the movement and showed real concern about environmental impact. Starbucks consistently announces itself as a "deeply responsible company" and stated that they are "focusing on ethically sourcing high-quality coffee and tea, reducing (their) environmental impact, and contributing positively to communities around the world. Starbucks Global Social Impact strategy and commitments are integral to (their) overall business strategy. As a result, we believe we deliver benefits to our stakeholders, including employees, business partners, customers, suppliers, shareholders, community members and others''. In 2008 as a result of a financial crisis Starbucks CEO Howard Schultz introduced a "Transformation Agenda'' to address these challenges and to create a rescue plan but confirmed that the company will stay true to its social responsibilities. The plan was a great success and by 2012 its revenue grew by more than 12 per cent. In the same year UK HM Revenue & Custom tax authority noticed that although the company's officials during shareholders meetings described the UK business as highly profitable, but Starbucks paid very little taxes. As Reuter published in 2012 "an average tax rate of 13 per cent, one of the lowest in the consumer goods sector" (Bergin, 2012). This article sparked protests all over the UK. UK social groups organized protests that said "Offering to pay some tax if and when it suits you doesn't stop you from being a tax dodger. This is just a PR stunt straight out of the marketing budget in a desperate attempt by Starbucks to deflect public pressure – "hollow promises on press releases don't fund women's, refuges, or child benefits"… Kara Moses, at the UK Uncut protest in Birmingham, said "So many people have come to this protest because there is genuine public outrage that multinational companies are being allowed to avoid taxes while benefits and essential services are cut. Starbucks' admission that they have not been paying enough tax is a clear admission of guilt and shows that direct action by the public works. We will keep

the pressure up to end tax avoidance and these cuts that are devastating women's lives around the country" (UK Uncut, 2021).

The company tried to defend itself by saying that they are investing in the UK economy by building hundreds of new stores, offering thousands of new jobs and creating many other income opportunities for UK companies. The public answered negatively to this explanation, and the company after losing millions in the UK due to protests agreed to pay more taxes than it was legally due (Engskov, 2012). As we said above there was no tax evasion, only unethical tax avoidance, which was very easy to hide because of the lack of tax transparency, and complexity of interborder transactions. No public, neither minority shareholders had enough knowledge and information to call the company on unethical decisions. Lack of transparency and training on global financial sustainability created risks for the shareholders and the company, while the local government lost income tax revenue.

As we said in the beginning of our paper many wealthy individuals and multinational companies enjoy a comparatively low effective tax rate (World Inequality Report, 2022). Although when it is getting exposed to the public, the companies feel social pressure to give an explanation of such an arrangement. For example, On November 6, 2017, in response to questions from the ICIJ, the New York Times and others, Apple had to issue a letter explaining its tax policy emphasizing that their subsidiaries in Ireland and Jersey created many jobs and were set up "specifically to ensure that tax obligations and payments to the US were not reduced" (Apple, 2017), mentioning deferred taxes in such jurisdictions and taxes paid. The same month on November 5, 2017, the Institute on Taxation and Economic Policy issued a fact sheet on Apple's tax avoidance (Institute on Taxation and Economic Policy, 2017). These two letters while both mentioning deferred taxes, contradict one another and are very difficult to reconcile for untrained individuals. The Apple letter is lacking transparency and country-by-county information on paid taxes as a percentage of revenue, which makes it difficult for the public as well as minority shareholders to understand the risk associated with unpaid tax obligations. This is the reason, why as well as Amazon shareholders, Apple's shareholders keep pushing the company for more transparency on social matters. Microsoft and Cisco shareholders are following the same path asking for voluntary disclosure. Most of the companies use the same excuses as Starbuck in its open letter referring to creating jobs and other than income taxes that are paid in such jurisdictions, which indicate that whoever wrote the letters clearly lacked global financial sustainability understanding and training.

5 STAKEHOLDERS EDUCATION ON TAX SUSTAINABILITY

While jurisdiction tax authorities and shareholders organizations, like ISSB have their voices and push for the public financial disclosure to address investors or authorities needs and concerns regarding risks and sustainability of the shareholders and jurisdictions, the other stakeholders, private citizens, are mostly unaware of the issues with some exceptions like the Starbucks case we mentioned above when the UK tax payments of the company were exposed to the public and explained in plain language to the public. Such standards as GRI addressing the companies' impact on the economy, environment and people are from the multi stakeholder perspective in comparison with investors oriented and, are mostly unknown or misunderstood by the general public to the point that some companies and even authorities are opposing complete public tax transparency, considering it may be harmful for the business, disturbs fair competition and the general public will not be ready to comprehend all the complexity of business[2].

2 See the article written by Justin Huskins in August 2022 for Fox Business News and referring to ESG as a leftist corporate attempt to control how people live. The legislation proposed by the Florida's Governor would allow State Board of Administration to focus only on maximizing the return on investments.

The last one is a valid concern. In 2002 Jan Aart Scholte stated that "the vast majority of citizens across the world have scarce if any awareness of the rules and regulatory institutions that govern global finance. Few governments, mass media organizations or schools have taken initiatives of public education to improve this sorry situation. Likewise, limited efforts by civil society groups to inform citizens about global finance have generally not reached large circles. Even academic textbooks on globalization often omit a chapter on the governance of global finance" (Scholte, 2002). Even less information the public has about the regulations. After 20 years the situation hasn't changed a lot. Even in 2022 we are still asking, although governments and nonprofits (NGOs) are pushing for more tax transparency, would the public be able to comprehend the reports without proper training or should there always be a middleman explaining the statements in plain language? A survey that Lusardi and Mitchell designed for Health a retirement study, and which included a special module on financial literacy and retirement planning showed that less than a third of Americans older than 50 understood the concepts of inflation and interest rates and had basic knowledge of risk diversification (Lusardi & Mitchell, Financial Literacy Around the World: An Overview, 2011). Findings from a FLAT world survey conducted around 15 countries showed "that financial literacy is very low around the world, irrespective of the level of financial market development and the type of pension provision" (Lusardi & Mitchell, Financial Literacy Around the World: An Overview, 2011). While as we demonstrated that lack of tax transparency and tax avoidance are the well-known issues there were very little positive changes in this direction. Even such companies as Shell, who adopted GRI207 reporting standards, and stated that "Shell does not condone, encourage or support tax evasion, and is committed to implementing procedures to prevent anybody employed or contracted to Shell or acting on Shell's behalf facilitating the evasion of tax" (Shell), according to the latest report "in 2018 and 2019, Shell earned more than $2.7 billion - about 7% of its total income in those years - tax-free by reporting profits in companies located in Bermuda and the Bahamas that employed just 39 people and generated the bulk of their revenue from other Shell entities", company filings show "massive tax savings for royalties when Dutch SPEs are used as an intermediate station compared to direct flows between the origin and destination country" (Tom Bergin, Ron Bousso, 2020). While tax avoidance is legal, tax authorities are less equipped than their contenders and the public is in majority uneducated about tax, tax sustainability cannot be reached even if the transparency is achieved, though the transparency is the mandatory step. In the case of Starbucks only public interference made it possible for the government to collect more and "fair" tax revenue since all the tax arrangements were legal. One of the latest studies highlighted that the problem of tax avoidance cannot solved if there is disagreement over the normative standpoints on the matter (Mayer & Gendron, 2022). In the case of Starbucks citizens and the press relied on different norms in evaluating and precepting the problem and succeeded. The UK HM Revenue & Customs went further starting a campaign "Tax avoidance: don't get caught" to educated individual taxpayers on tax avoidance schemes, specifically connected with personal service companies (Her Majesty's Revenue & Custom, n.d.). They also wrote to all customers suspected of being involved in the scheme. The UK Government clearly sees the benefits of appealing to individual taxpayers educating them on tax avoidance matters, when laws don't always work. Research made by Michael Razen and Alexander Kupfer confirms the observations. According to the research the individual taxpayers who are educated (given "additional" information) on the cost of tax avoidance in addition to basic knowledge that certain companies avoiding taxes do adjust their buying behavior, and companies are sensitive to this information (Razen & Kupfer, 2021).

Although institutional investors' awareness of ESG is growing, ESG reports in general and such reports as GRI 207 although intended for all stakeholders are going mostly unnoticed by the general public (Fukuyama et al., 2018). Very little was done to educate the public about the reports, while there are plenty of training resources for tax administration

on report submission. Tax transparency is a great tool to fight tax avoidance when all stakeholders are formally educated on tax matters and social contract theory (Mangoting et al., 2015) and the public is aware of the issues. One of surveys done to assess the awareness of Portuguese and Swiss individual taxpayers of the various tax matters tested voluntary tax compliance. It is interesting to note that the majority of the respondents agreed with the statement that they pay taxes because "they regard it is as their duty as citizens", while the lowest score receiving answer that they pay taxes because "it is obvious that this is what you do" (Rodrigues et al., 2019), which may be viewed as indirectly confirming out hypothesis that social contract theory is the valuable and irreplaceable part of taxpayers education.

In 2019 UNESCO issued a report on the current progress on climate change education, training, and public awareness (United Nations Educational, Scientific and Cultural Organization, 2019). In general, while most governments were more or less successfully raising the awareness of environmental issues, and "settings a range of climate change education target audiences … in formal education settings (primary, secondary, or tertiary education or formal education generally), … the next largest sector being the 'public and other' audiences". The financial sustainability movement started approximately the same decade as the environmental movement, but as we demonstrated above with somewhat less success. Tracing a parallel between environmental impact and financial sustainability[3] education and training should be done starting with elementary school and further through all levels of formal education. The research done among 142 countries show that the "quality of overall education, quality of math and science education, and quality of management schools are all influential in curbing tax evasion" (Uyar et al., 2022). While most people are aware about pollution, clean water, greenhouse gases, and the amazon forests problem and actively expect mandatory and voluntary reporting on environmental protection, a much lesser percentage has even a basic understanding of international taxation and tax avoidance tools, while having the instinctual understanding of what "fair" taxes are.

While many multinationals prefer not to disclose openly their tax avoidance techniques, it would be very interesting to research if the public would oppose "too high" taxes as much as "not enough" taxes. Fair contribution is giving back to society, such as who invested in the education of employees, built roads, improved the environment in addition to companies that establish factories, create jobs and produce products. In our opinion multinational companies should be the first to invest in tax transparency and financial education of individual taxpayers, especially in such countries as the US, where most of the policies are bottom up, initiated by nongovernmental organizations fighting for fair treatment of all stakeholders.

6 CONCLUSION

Tax transparency is a road that eventually should bring us to global financial sustainability. The OECD, UN, EU and local governmental and non-governmental initiatives, like public country-by-country reporting, GRI207 and similar reports are effective and workable tools to increase transparency and gain trust among investors. Although, given the complexity of the legislative standards, ambiguous understanding of tax morality especially in term of multinational companies, financial crisis that can potentially lead to disintegration, the most substantial way to achieve the desired result is to simultaneously with tightening current laws and loopholes and pushing for voluntary and mandatory reporting, develop a plan to formally educate and train current and future tax payers on financial sustainability

3 Many scholars stressed the interrelation between these two issues. See "Environmental Sustainability and the Financial Crisis: Linkage and Policy Recommendations" published by The Center for International Governance Innovation.

matters and tax morality. Stakeholders and social contract theories, and global sustainability are interrelated concepts, working models to boost global morale, because ultimately global sustainability is the result of individual moral choices.

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Article

Avoidance of the Permanent Establishment: by the Digital Economy and Tax Cooperation as its Solution

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KEYWORDS:

Data collection, tax avoidance, permanent establishment, tax cooperation, international tax law, global tax governance.

ABSTRACT:

This article analyses the obsolescence of the concept of permanent establishment in the context of the growth of the digital economy.

More precisely, we will see how the quality of permanent establishment is eluded in the data collection trade. The legal vacuum of this new type of business is a problem, as is its international dimension.

Therefore, we will examine the proposed solution of virtual permanent establishment.

In a second part of this article, we will broaden the scope of reflection, considering that tax cooperation must be the means and the solution to counterbalance the structural flaws of the permanent establishment.

We will define the concept in depth to consider how the development of international law and global governance in tax matters can and should be the key to reform international taxation

PALABRAS CLAVES:

Recogida de datos, evasión fiscal, establecimiento permanente, cooperación fiscal, derecho fiscal internacional, gobernanza fiscal mundial.

RESUMEN:

Este artículo analiza la obsolescencia del concepto de establecimiento permanente en el contexto del crecimiento de la economía digital.
Más precisamente, veremos cómo se elude la calidad del establecimiento permanente en el comercio de recopilación de datos. El vacío jurídico de este nuevo tipo de negocio es un problema, al igual que su dimensión internacional.
Por lo tanto, examinaremos la solución propuesta de establecimiento permanente virtual.
En una segunda parte de este artículo, ampliaremos el alcance de la reflexión, considerando que la cooperación fiscal debe ser el medio y la solución para contrarrestar los defectos estructurales del establecimiento permanente.
Definiremos el concepto en profundidad para considerar cómo el desarrollo del derecho internacional y la gobernanza global en materia tributaria puede y debe ser la clave para reformar la tributación internacional.

MOTS CLES :

Collecte de données, évasion fiscal, établissement stable, coopération fiscale, droit fiscal international, gouvernance fiscale mondiale

RESUME :

Cet article analyse l'obsolescence du concept d'établissement permanent dans le contexte de la croissance de l'économie numérique.
Plus précisément, nous verrons comment la qualité de l'établissement permanent est éludée dans le commerce de collecte de données. Le vide juridique de ce nouveau type d'entreprise est un problème, tout comme sa dimension internationale.
Pour cela, nous examinerons la solution proposée de l'établissement permanent virtuel.
Dans une deuxième partie de cet article, nous élargirons le champ de réflexion, considérant que la coopération fiscale doit être le moyen et la solution pour contrebalancer les failles structurelles de l'établissement stable.
Nous définirons le concept en profondeur pour examiner comment le développement du droit international et de la gouvernance mondiale en matière fiscale peut et doit être la clé de la réforme de la fiscalité internationale.

CONTENTS:

1 INTRODUCTION

As it is well known, the concept of permanent establishment contained in the OECD Model Tax Convention (hereafter "Model Convention") entitles a state to tax foreign taxpayer revenues, by allocating taxable incomes pursuant to a physical presence in said state. (Monsenego, 2016; Steenkamp, 2014) Such physical presence constitutes the permanent establishment status. It is thus a fundamental tool in the field of the international tax law. (Bellemare, 2019)

Notwithstanding, the physical presence requirement is becoming less and less determinant, (Cockfield, 2003) in the context of a fast-growing digital economy, as one could say that the definition of permanent establishment adopted in 1977 no longer reflects the conduct of business across borders. (Bellemare, 2019)

This so-called "digital era" is characterized by technologies that significantly increase the speed and volume of information in the economy. (Sheperd quoted in Chen Siew et al.)

Also known as 'Big Data', the data driven economy relies on in the increasing capacity of stocking, thanks notably to the clouding technology and the technical infrastructure allowing to quickly and in bulk exchange de data's. The volume of collected data is also considerably extended by the collection through connected items. Utterly, the data are used to predict customer comportment or tendencies. The personnel data have the most value and are part of the essential of the digital economy, as we fairly can speak of "data economy". (Jacquemin, 2018)

Besides, digitalization allows to dissociate economic activities and profits, facilitating the tax savings.

As stated SOUILLARD

> For example, it has been shown that multinational firms artificially shift profits towards low-tax countries and especially towards tax havens (Dharmapala, 2014; Beer, de Mooij, and Liu, 2020). Given that these firms are major actors in the economy, losses in corporate income tax revenues arising from profit shifting could be substantial. According to Clausing (2016), they might reach $100 billion annually for the US. (Souillard, 2020)

The news business models arisen from the digital economy, as that of the data collection business, also make more difficult to define where the value is created. (Caussade, 2017)

According to the OECD

> A digital business model common in today's digital economy is multi-sided platforms. Examples of multi-sided platforms are Uber, Airbnb, and Amazon Marketplace. These businesses connect 'end users' (i.e., 'the ultimate user of a finished product'72) from different groups, enabling them to trade information, goods, and services between each other. Such platforms facilitate communication, but do not produce anything themselves. Businesses administrating such platforms usually have no responsibility towards end users, the liability lies with suppliers. (OECD, 2018)

The digital economy urges then the need for international tax law to establish a fair repartition of the taxation where the benefits are appeared in the problematical cross-borders operations. (Boulanger, 2013)

On the other hand, the reform of the international should encompass the interest of the states, safeguarding their sovereignty. Therefore, international cooperation in tax

matters must be promoted in the search for solutions to the obsolescence of the effectiveness of the concept of permanent establishment.

2 PERMANENT ESTABLISHMENT IN THE DATA COLLECTION BUSINESS

2.1 ARTIFICIAL AVOIDING OF A PERMANENT ESTABLISHMENT STATUS

The artificial avoidance of the permanent establishment status is a special problem addressed by the OECD in its BEPS report (OECD, 2015) whose goal is to intend to impede for a non-resident taxpayer the status of a permanent establishment in a given state. Basically, the taxpayer ought to avoid the qualification of fixed place of business, that rely on a physical presence (Monsenego, 2016) to crash the permanent establishment characterization.

To this end, the non-resident taxpayer would choose a form of conducting its business in the other state that falls within the exemption of the in the OECD convention of the permanent establishment, by some artificial techniques, such as *inter alia* the splitting of contract in order to crush the temporality threshold in case of a construction worksite or the use of a false independent agent. (Marpillat, 2018)

In addition, in its BEPS Report, the OECD notes that permanent establishment status is avoided primarily using commissioners' agreements and similar strategies, as well as exemptions from specific activities (OECD, 2015b; Legwaila, 2016). The notion of an independent agent is used on the one hand, diverting or distorting its meaning, and on the other hand abusively employing the list of preparatory and auxiliary activities of the Model Convention. (Marpillat, 2016: p. 46)

With the advent of the digital economy, the main problem turns out to be in the obsolescence of the fixity of a commercial installation, implying an establishment in a precise place and a staff dedicated to the activity. Although certain jurisprudence established a link between a person and a foreign company to establish the existence of a permanent establishment, the provisions of the OECD Model of double taxation agreements, as well as its commentaries, do not favour such interpretations. (Caussade, 2017) Furthermore, the criterion of fixity implies a certain rate of permanence, since the installation does not have to be temporary, but used for a certain period. (Malherbe & Schotte, 2001)

2.2 EVOLUTION AND OBSOLESCENCE OF THE CONCEPT OF PERMANENT ESTABLISHMENT

An old version of the principle of permanent establishment can be found at the end of the nineteenth century in a European context. However, after the First World War, the League of Nations sent a group of experts to imagine a mechanism to prevent international double taxation. These experts developed the concept of permanent establishment in 1927, which was adopted in the OECD Model of double taxation agreements in 1963, which was followed by revisions in 1977 and 1992. The League of Nations already supported in 1940 that a permanent establishment should consist of a fixed post, but also reserved the possibility of taxation in the source state for significant sales without a fixed place of business. (Cockfield, 2003; Checa González, 1987)

Little by little, a dilution of the requirement of physical presence has be seen to adapt to the new commercial practices of the second half of the twentieth century: service economy, globalization, increase in the mobilization of capital and other factors of production. Thus, the definition of permanent establishment has been expanded to include even independent agents who regularly hire in the source state. (Bellemare, 2019: p. 746) In fact, each time the OECD re-examines the notion of a permanent establishment, it is to

broaden the concept, to allow the state in which this establishment is located to tax the income generated through it. (Douenias, 2017)

In addition, permanent establishment fictions have been developed to exceed the requirement of geographical and temporary permanence, ensuring that certain temporary and mobile activities are included in the definition of permanent establishment. (Cockfield, 2003: p. 406). In that sense, a gross sales threshold of 1 million USD ensures that source states only impose non-residents if they have a consistent business in it. (Cockfield, 2003: p.414)

That being said, the current definition of permanent establishment has been edited when a physical presence was presumably necessary for the conduct of a business in a given jurisdiction. (Douenias, 2017) Therefore, in the digital economy and its subsequent technological advances, this requirement of physical permanence is not still valid in whole or in part. (Bellemare, 2019: p. 737)

The fixed nature of the permanent establishment is decisive. According to the OECD, the word "fixed" in the definition of permanent establishment applies to the place of establishment in the sense that it must be established in a precise place with a certain degree of permanence. The OECD also considers that the exercise of the activity of an enterprise must be carried out through this fixed place, and that this means that the personnel carry out the activity of the company in the country in which the fixed place of the same is located. (Lavin & Wyatt, 1969: p. 224)

We can summarize the fall into disuse of the definition of permanent establishment with the following words:

> Four decades ago, when the PE definition in the OECD model was last modified, foreign operations were largely bricks-and-mortar businesses. However, the evolution of the virtual world over the past 40 years has led to complex modern business models. Enterprises can now carry out significant economic activities in a country without having a physical presence in that jurisdiction, and their business functions may be spread across many countries. The PE framework has not kept pace with these developments, affording opportunities for the artificial reduction of taxable profits by the dissociation of tax from the location of income-earning business activities. (Bellemare, 2019: p. 728)

In response to the ineffectiveness of the concept, we saw in the jurisprudence the development of the notion of permanent establishment of services, falling on the provision of technical or advisory services. (Bellemare, 2019: p. 731; Legwaila, 2016: p. 823)

As an illustration, we consider the following example. Xa is an independent contractor serving Xb on an arm's length basis. Xa and Xb are not located in the same territory. In addition, Xa should have the exclusive right to supervise, administer, control, direct, acquire, perform all work, duties or obligations necessary under the terms of the agreement. In no case should Xb control Xa's business or its internal management. However, Xb may carry out management activities (limited to quality control activities, inform and provide preliminary training to personnel involved in the provision of services). (Raghavan, 2012)

Accordingly, on the basis of the above case, a foreign enterprise may be considered to have a permanent service establishment in India if it delegates employees or other personnel to India, and such personnel remain in India for more than the period specified in the Model Convention to provide services other than the services included, as defined in the Model Convention. (Raghavan, 2012: p. 19)

In addition, tax jurisprudence and practices, especially in developing countries, tend to consider that a permanent establishment does not require more physical presence, but a

provision of service in a certain period of time with a certain amount of value. (Traversa et al., 2017: p. 72)

With respect to commission agreements and similar strategies, courts in some countries appear to have adopted a broader interpretation of the concept of permanent establishment and independent agent than might otherwise be suggested by the pre-2017 OECD Model Convention. In Italy, for example, the Philip Morris case gave the tax authorities the possibility of applying a broad approach to the form of the interpretation of a permanent establishment. In France and Norway, however, court decisions have stated that commissioners' provisions and similar strategies have not resulted in a permanent establishment. While France and the UK have also challenged these schemes on transfer pricing grounds, this response has had limited success. (Bellemare, 2019: p. 731; IFA, 2020: p.26)

In addition, several jurisdictions often include in their treaties a broader definition of permanent establishment than the Model Convention definition, such as permanent meeting and supervision establishment (India), permanent service establishment (Chile), resource exploration and development (Denmark and Norway) and insurance companies (Australia). (IFA, 2020: p. 27) In the case of AB LLC and RD Holdings LLC v Commissioner of the South African Revenue Services, the concept of permanent establishment was interpreted as meaning that: "a non-resident person may create a permanent establishment even if the foreign person has not created a fixed place of business, but has limited himself to providing services for more than 183 days in any twelve-month period, and this 183-day period doesn't have to be in a fiscal year." (Legwaila, 2016: p. 833)

However, the concept of permanent establishment now seems too restricted to apprehend the set of activities concerning the digital economy. Its definition poses problems that threaten the imposition in the source state to the benefit of the state of residence (even if it is artificial). (Marpillat, 2018: p. 28)

HINNEKENS, for its part, proposed the creation of a virtual permanent establishment where source states would be allowed to impose cross-border profit on non-resident companies, if they do business continuously and significantly in the same state. (Cockfield, 2003: p. 415)

2.3 THE LEGAL GAP OF THE CROSS-BORDER TAXATION OF THE COLLECTED DATA

According to the United Nations the digital avoidance of the permanent establishment status can be achieved through the following techniques:

> Migrating services that can be provided in person to cyberspace and keep in-person services at a minimum which gives no rise to PE.
>
> Converting royalties into services fees and avoid withholding tax by transforming technical services or provision of software etc. into services delivered online; and
>
> Monetizing location relevant data created by local customers without any compensation. (United Nations quoted in European Parliament, 2016: pp. 28-29)

The latest case is specifically referring to the data collection business and is the one it will be focused on. The problem here is the following: one multinational company collects personal data of users o compartmental data of users for free through digital supports. Then these data are sold or by any other means valuated in other jurisdiction, mainly for marketing and advertising purposes.

It seems from the prior paragraph that huge chunks of the digital economy would escape the qualification of permanent establishment and its subsequent legal

consequences, as the data collection business is the first resource of such economy. (Augagneur, 2015: p. 465) Also, according to the European Commission: "In 2014 alone, cross-border data flows generated $2.8 trillion in economic value exceeding the value of global trade in goods". (European Commission, 2017: p. 7)

For the European Commission, this hypothesis does not cause problem at a domestic level if the internal law covers all value creation inside its jurisdiction. Yet, in a cross-borders situation the rules do not cover the user participation, what leads to a potential no taxation of the value creation in any jurisdiction (European Commission, 2018: p. 16)

At the first sight though, one could argue that there is no *per se* illegitimate tax avoidance, whereas it is case of free work, which is the fact for consumer to collaborate freely in the production process of a foreigner taxpayer, for instance, in the sector of data collecting. (Collin & Colin, 2013: p. 2) Neither could one says that it is a premise for artificial avoidance of the permanent establishment status since its OECD definition does not include yet the criterion of the significant digital presence.

However, if the data are freely collected in this business model, that does not preclude the fact that there is counter-performance non-monetary, that could the access to digital contents, and that this data's have a value comparable to money. (European Commission, 2018)

In a nutshell, the problem lies in the fact that data collected by the multinational firms of the digital sector are not considered at the moment as a new form of taxable financial stream. (Marpillat, 2018: p. 31)

2.4 THE SOLUTION OF THE VIRTUAL PERMANENT ESTABLISHMENT?

The problem of the no taxation of certain large sectors of the digital economy remains strongly linked at the inoperancy of the definition of the establishment permanent to this matter.

Therefore, discussions have times ago been held about the characteristics of the components of the digital economy.

For instance, the question to know if a server can be constitutive of a permanent establishment has been debated in the doctrine. (Vaca Bohorquez, 2016: p. 94) Following the OECD, an electronic equipment such a server has to be fixed (Malherbe & Schotte, 2001: p.229) to qualified as a permanent establishment, what leads to exclude of the said definition any platform of cloud computing. (Collin & Colin, 2013: p. 122)

Furthermore, it appears that a webpage, as a combination of software and data is not deemed to be a "fixed place of business" and then a physical asset that has the capacity to link an enterprise to a specific location. (Vaca Bohorquez, 2016: p. 94)

In the AB LLC and RD Holdings LLC v Commissioner of the South African Revenue Services case, the concept of permanent establishment was interpreted in the sense that: "a non-resident person can create a permanent establishment even if the foreign person has not created a fixed place of business, but has merely rendered services for more than 183 days in any twelve-month period, and this 183-day period does not have to be in a tax year". (Legwaila, 2016: p. 833)

In the same idea, ones have advocated the proposition of creating a virtual permanent establishment, whose purpose is to habilitate the source state to tax transborder benefits from companies doing continuously and significatively business in their state. (Cockfield, 2003: p. 415)

This fiction would broaden the definition of permanent establishment, including the virtual fixed place of business. The new nexus would be, according to the OECD, the significant digital presence "based on a test for the presence of a virtual permanent establishment." (European Parliament, 2016: p. 43)

This proposal refers to the economic presence of a taxpayers in the state of his client, through an electronic interaction without physical fixed place and aims to extend the application of the permanent establishment concept to the virtual fixed place of business, virtual agency and on-site business presence. (Marini, 2012: p. 31)

Beside the qualitative criterion of the presence of a virtual permanent establishment, a quantitative one will be settled. If the sales of a firm without a traditional permanent establishment in a source state occur to surpass a determined threshold, then it will fulfil this criterion. (Cockfield, 2003: p. 417: Ponomareva, 2019: pp. 2087-2088)

Such interpretation of the virtuality of the permanent establishment was by the way recently recognize in some jurisprudence, (US, 2016) arguing on the significant conducted business without anyway referring to a precise threshold evaluation of it. In the Dell Ireland Case (Tribunal Supremo, 2016) the tribunal decided that the taxable income were the proceeds earned from the sale of products to the Spanish market, (Vaca Bohorquez, 2016: p.98) as it "observed that Dell Ireland had a tax presence in Spain, since the activities performed there (trading, selling, and delivering) were economically significant and thus a "virtual PE" existed in Spain even though Dell Ireland had no physical presence in the jurisdiction." (Bellemare, 2019: p. 730)

On the contrary and in other occasion, it was decided by the Colombian Tax Authorities that in the hypothesis of an "electronic commerce transactions such as hosting services and access to data bases, performed by persons that are not residents", the income was not taxable under Colombian law since the services aren't provided in Colombia. In addition, "in Ruling N° 6256 of 2005, the same Tax Authorities held that electronic commerce transactions performed by nonresidents are not levied with income tax in Colombia." (Vaca Bohorquez, 2016: pp. 99-100)

The idea of the virtual permanent establishment was eventually also proposed by the European Commission in its proposal directive about the digital taxation, in his article 4, where the data collection business is specifically considered as a taxable activity:

> According to Article 4 of the Directive proposal, a company that provides digital services will be deemed to have a taxable "digital presence", i. e. a virtual permanent establishment in an EU member state. The profit will be distributed to the virtual permanent establishment based on economically significant functions, namely its activities through a digital interface associated with data and users. These activities are considered to be economically significant and include collection, processing and sale of user data; collection, processing and display of user content; sale of advertising space on the Internet and third-party content supply to the Internet market (Articles 5(3), 5(5) of the draft Directive). Taxable "digital presence" in a member state shall be recognized if considered to exist in a member state during the tax period, if the business carried on through such period consists wholly or partly of digital services supply through a digital interface and if one or more of the following conditions is met with respect to the supply of those services by the entity carrying on that business, taken together with the supply of any such services through a digital interface by each of that entity's associated enterprises in aggregate:
>
> (a) the proportion of total revenues obtained in that tax period and resulting from the supply of those digital services to users located in that member state in that tax period exceeds EUR7,000,000;

(b) the number of users of one or more of those digital services located in that Member State in that tax period exceeds 100,000;

(c) the number of business contracts for the supply of any such digital service concluded in that tax period by users located in that Member State exceeds 3,000. This approach would expand the PE definition to include digital footprints as a taxable nexus. However, since such activities do not involve any physical assets, this concept is based on such factors as number of active users, revenue, and frequency of contact with customers (which is in line with the Action 1 Final Report) — to measure significant digital presence. (European Commission, 2018)

3 INTERNATIONAL TAX COOPERATION AS THE SOLUTION

3.1 CONCEPT OF INTERNATIONAL TAX COOPERATION

As a preliminary point, it is necessary to say that the fight against tax evasion requires cooperation between the governments of all countries, multinational companies and investors, as well as individuals. International cooperation to improve domestic resource mobilization is also part of the SDGs. (O'Harea, 2019: p. 752)

Whereas, in the past, tax evasion was a domestic activity, favoured by the shadow economy, informal activities, and by inefficient or corrupt tax administrations, it is increasingly becoming global, at least for major taxpayers such as high-net-worth companies and individuals.

Thus, international cooperation is a broad concept that it is the set of actions that try to coordinate policies or join forces to achieve common objectives at the international level. (Insulza 1998: p. 73)

This concept of international cooperation breaks the traditional paradigm of purely economic aid that consists of the supply of goods and services, since it also covers other domains such as international judicial initiatives, peacekeeping missions and international cooperation in the fight against terrorism or drug trafficking. (Thuronyi, 2001: pp. 1641-1682; Benvenisti & Nolte, 2004: pp. 49-77; Hakelberg, 2016: pp.511-541; Alonso & Ocampo, 2015: pp. 73-102; Seer & Gabert, 2011: pp. 88-98, Fitzgerald, 2012; Sandemann Rasmussen, 1999: pp. 395-414; Shah, 1992)

More specifically, international tax cooperation is a form of collaboration that takes place within the framework of international relations, (Koch, 2018: p. 203) seeking to harmonize the policies of international and national institutions in tax matters. (Magraner Moreno, 2010; García Prats, 2014)

Thus, international tax cooperation turns out to be a kind within the concept of international cooperation that is projected to strengthen the efforts and objectives set in tax matters in the international sphere. (López Espadafor, 2016: p. 262)

In addition, it aims to correct those errors or failures of international trade, in a context of economic globalization, growth in the internalization of capital flow, reduction of state intervention and overcoming physical and legislative borders. (Garcímartin, 2011: p.42; López Espadafor, 2016: p.262)

Indeed, the birth of international trade dates to the birth of nations, and its development throughout history has been conceived concomitantly. However, after the Second World War there was accelerated growth in international finance, trade and investment, which has far exceeded the overall growth of the world economy. (Kaitian & Xiao, 2016: 16; Vann, 1998: p. 719)

This fact can be illustrated by the gradual elimination of barriers to international trade through the various negotiating rounds of the General Agreement on Tariffs and Trade. With regard to finance, the elimination of exchange controls in most industrial countries, since the fluctuation of exchange rates in the early 1970s, has been a notable factor that has led to the globalization of global financial and capital markets. (Thuronyi, 1998: p. 719)

In addition, there is a certain geographical dependence on the distribution of tax revenues that can be explained by trade agreements, the efficiency of tax collection may depend on the tax system of neighboring countries. (Alonso, 2015: p. 22. Godin & Hindriks, 2015: p. 45)

However, certain tensions may arise due to the different interests that concur and that determine the course of the economic relations that develop in the international arena.

On the one hand, legal and natural persons carry out commercial and economic activities that go beyond the national level. This also comes into tension with the states in the exercise of their tax sovereignty that find in these activities a scenario of collection of tax revenues. Thus, states are faced with a kind of dichotomy.

In addition, the lack of administrative coordination can lead to situations conducive to capital flight and thus a decrease in the capacity of countries to collect, a phenomenon from which neither developed nor developing countries are exempt.

We then must begin by pointing out that all conventional provisions turn out to be, in most cases, instruments that are framed in the logic of *soft law,* that is, whose binding depends on the willingness of the states to comply with the guidelines, not having a direct binding character beyond good diplomatic relations and the principle of good faith.

Moreover, in addition to states and private individuals, there are also other actors such as organizations or entities of the international government that seek to create spaces for harmonization, cooperation, coordination and collaboration, to strengthen tax collection.

Therefore, international tax cooperation is coordinated in various international structures. Most of them being the following:

> 6. The World Bank and the IMF work with 183 countries on a global basis and are the main providers of bilateral technical assistance in tax policy and administration issues. They are the pre-eminent repositories of expertise in respect of these issues in developing countries. In addition, the concerns that underlie the call for new international co-operation relate directly to their operational mandates. Clearly, the efficiency of their work would be enhanced by deeper co-operation with other interested organizations. This would allow for the exploitation of synergies between them in respect of working methods and expertise and help avoid duplication of effort.
>
> 7. The Committee on Fiscal Affairs of the OECD has a key role in the formulation and pursuit of the international tax policy agenda. Its model tax convention and transfer pricing guidelines are especially influential. While it represents the views of only 30 developed countries, it holds around 60 events a year, primarily on a multilateral and regional basis, which enhance the dialogue with economies outside of the OECD area on such key policy and administrative issues as tax treaties, transfer pricing, international tax avoidance, electronic commerce and exchange of information. Although it has extensive contacts with non-OECD countries and considerable awareness of developing country issues through its non-member programs, the OECD does not represent the views of developing countries.
>
> 8. The UN Ad Hoc Group of Experts on International Co-operation in Tax Matters focuses on international tax issues and meets on a bi-annual basis. The group comprises about 20 representatives of both developing and developed countries and has particular expertise on tax treaty relations between developed and developing

> countries. The experts, who attend meetings in their personal capacity, are not all serving government officials.
>
> 9. A number of regional development banks and other organizations are also active in the tax area. In particular, the Committee of International Organizations on Tax Administration (CIOTA) is a recently formed umbrella group composed of a number of regional and international tax organizations (including the Inter-American Center of Tax Administrations (CIAT), the Commonwealth Association of Tax Administrations (CATA), the Intra-European Organization of Tax Administrations (IOTA), the Centre de Rencontre et d'Etudes des Dirigents des Administrations Fiscales (CREDAF) and the OECD). CIOTA covers more than 140 countries, its primary function being to promote greater coherence in the work programs of the participating tax organizations. (IMF et al., 2002, 2.6-2.9)

In summary, it can be said that tax cooperation can have three levels. First, we have the cooperation that aims to define global rules administered by a global tax organization. Then, there is a level of cooperation that is aimed at establishing intergovernmental or multilateral rules. Finally, at the lowest level, we will find the rules that the actors give themselves. (Deblock & Rioux, 2008)

3.2 INTERNATIONAL TAX COLLECTION AND COOPERATION

The tax collection of domestic resources is the basis of development, both socially and economically. Cracking down on tax evasion is therefore a priority in many governments, especially in developing economies. (Li et al., 2020: p. 384) According to the Economic and Social Council (ECOSOC), greater international cooperation in tax matters allows developing countries to increase their domestic resources to finance their development. (United Nations & ECOSOC, 2012)

The EU also stressed the importance of tax collection, characterizing it as the cornerstone of an efficient and egalitarian tax system. (Andrés Aucejo, 2018: p. 234)

Therefore, the internationalization of the economy causes tax agencies to face more and more the limitation of their executive powers in the matter. Hence, international tax cooperation in administrative matters, in the determination of the tax, but also in its application, becomes crucial. (Rekenhof, 2011: p. 11)

Notwithstanding, we have stated that international tax evasion is a phenomenon that represents a problem affecting the tax collection of states. For developed countries, which have a solid financial system and higher levels of industry, this phenomenon does not affect them so much. But it is a detriment to domestic resource mobilization, especially for developing countries, which translates into multimillion-dollar losses and impedes development. (Alonso, 2015: pp. 23-24; Tax Justice Network, 2020: p. 14)

In this sense, global problems also require global measures that seek to contain the fraudulent reduction of taxes.

Therefore, national tax laws do not enjoy the capacity to have effects in other territories and neither can one go directly to the courts of other states to claim their direct enforcement, regardless of the tax relevance that is granted to economic events that occurred outside that territory. (García Prats, 2001: p. 92)

Likewise, the fact that the same taxable event may interfere with two different tax administrations generates a conflict of interest on them. Consequently, the limit of the collection turns out to be the equality of sovereignty in matters of international rights that states have, the impossibility of being able to exercise their right outside the borders under penalty of generating an international illicit act, (Jestin, 2008) and the increasing absence of

the materiality of their borders. (López Espadafor, 2016: p. 26; Johnson et al., 1979: p. 470; Avi-Yonah & Xu, 2016: p. 12)

On the contrary, the primary purpose of international tax cooperation is to articulate the legal systems to achieve the execution of those tax obligations pending in other jurisdictions, which implies crossing that barrier of sovereignty, when national tax laws do not enjoy the capacity to have effects in other territories. (Virto Aguilar, 2020: p. 20)

The question that then arises is whether there is an objective duty of international collaboration in the field of collection or a principle that succeeds in binding states in this regard. The answer according to international doctrine is that the mutual recognition of states obliges them to cooperate in the enforcement of the tax prerogative. (Virto Aguilar, 2020: p. 20) Therefore, some governments do not see the added value of intensive multilateral tax cooperation and try to manage most of their own fiscal problems unilaterally and bilaterally. (Lesage et al., 2010: p. 158)

For MICHELI, the recognition of the sovereignty of the states that are part of the community determines the need, for all the other states belonging to the community itself, to respect the exercise of the activity of empire of any other state, without having to accept the imperative effectiveness of the specific foreign administrative act. (quoted in López Espadafor, 2016: p. 274)

On the other hand, and in relation to the materialization of the objectives in this matter, it is important to note that:

> While the best solution would be to adopt agreements – whether bilateral or multilateral – devoted entirely to mutual assistance, a more realistic solution could be limited to the inclusion of an optional provision on mutual assistance in the area of collection, in the Model Convention or its commentary, of global scope or limited to the improper obtaining of tax benefits. Currently, nineteen OECD Member States have mutual assistance clauses on global collection in one of their double taxation agreements; the experience accumulated by the most active States could be analysed and, as far as possible, aimed at standardized procedures. (Virto Aguilar, 2020: p. 42)

From the above, there is a clear legal possibility of international assistance and cooperation in the field of collection, such that we can speak of a kind of international tax collection. (Virto Aguilar, 2020: p. 28)

In conclusion, in order to be effective and at the same time dissuasive, the fight against evasion must lead to the recovery of the amounts evaded. The unlawful recovery of debts must therefore be regarded as an integral part of the fiscal control action. To achieve this, the effective exchange of information is paramount and essential. (Dickinson, 2014: p.126; Andrés Aucejo, 2018: pp. 243-245)

In addition, a new holistic vision of tax cooperation must emerge, considering international trade and including not only economic aspects, but also cultural, ethical and environmental. (Andrés Aucejo et al., 2022: pp. 5-22)

3.3 TAX COOPERATION AS THE SOLUTION TO THE DIGITAL TAX EVASION

An interesting case illustrating the limitation of national sovereignty with international law is the relations that EU states are governing with their supranational bodies.

It was therefore envisaged that a project for the harmonisation of direct taxation in the EU would be adopted as an alternative to the adoption of the principle of globalisation at both national and international level by states. However, the European Commission was of the view that there was no need for full harmonisation of Member States tax systems and

that, while they respected European Union law, Member States were free to choose the tax system that best suited their preferences. (Marpillat, 2018: p. 80; Berthet, 2015: p. 67)

The political and economic level of the European Union remains both a means of weight and action, although until now it has not been sufficiently used in fiscal matters, due to a decision-making process that preserves national sovereignty. This raises the question of defining what could constitute Europe's sovereignty and interests in this area. In the case of the EU, one may ask whether, following the introduction of the single currency, direct Community taxation can follow. (Perraud, 2021)

Indeed, Europe is a problem area for international tax planning because there are significant differences in corporate tax rates and in the tax base between countries. (Medus, 2017: p. 36)

According to the Court, the European Community constitutes a new legal order of international law, for the benefit of which states have limited, albeit in small areas, their sovereign rights. The Treaty on the Europan Union is more than an agreement which only creates mutual obligations between Contracting States. The Community regulation therefore also applies to international conventions signed by the Member States.

However, Article 110 TFEU gives Member States a wide margin to draw up their fiscal program and recognises the principle of fiscal sovereignty, the power to tax is recognised as one of its main functions. (Barnard, 2013: p. 284; Tudor, 2015: p. 144)

The Treaty contains tax provisions, which enshrine an express harmonisation competence of the EU in the field of taxation. Moreover, the relatively contained nature of Community harmonisation in the field of taxation does not exempt the Member States from a limitation of their sovereignty in this field by reason of the application of other rules of Community law, which are of a non-fiscal nature. (Traversa, 2010)

Consequently, the competences formally conferred on the EU cease to be the prerogatives of the Member States and therefore limit their sovereignty in the areas concerned. (Traversa, 2010: p. 32)

Following the EU model, the alternative of a supranational tax organisation would be a progressive harmonisation of state tax regimes. (Vazquez, 2017: p. 24) Then, soft law from world governance takes the form of a hard law in the jurisdiction of states. (Andrés Aucejo, 2021 & 2018b) Therefore, we believe that this harmonization before becoming concrete at the global level is implemented at the regional level between states that have a considerable number of economic ties and that consequently found it very necessary.

It is important to note that the mere lack of harmonisation creates great complexity and uncertainty. It also encourages aggressive tax planning, as well as possible and probable losses of tax revenue.

However, some authors consider that harmonization is not necessary unless simple coordination and cooperation is sufficient in order to achieve regulated international taxation. Even more, government networks today promote convergence, compliance with international agreements, and better cooperation among nations on a wide range of regulatory and judicial issues. (Li, 2004: pp. 146-147; Chayes & Handler Chayes, 1995: p.261)

The progress made in transparency, stemming from a global cooperation effort, not only allows tax administrations to have new means to fight fraud, but continues to have a strong deterrent effect, because tax evasion feeds on opacity and encourages actors to continue efforts towards more international cooperation in tax matters. (Perraud, 2021: pp. 74-75; Andrés Aucejo, 2018: pp. 55-60)

Indeed, as EVA ANDRÉS AUCEJO said:

> The fact that [...] a general principle of administrative cooperation in tax matters in the international regulatory framework has not been codified, has perhaps influenced the so called acquis of 'soft law' enhancement to perform an important action to purposes establishing relations of tax cooperation between States in order to prevent tax evasion and avoidance, and to ensure the survival of States. (Andrés Aucejo, 2018b: 67)

Consequently, history strongly suggests that such a radical change in the international tax system is less likely than the continuation of the traditional process of marginal adjustments by different jurisdictions attempting to address specific problems within the existing framework. In this regard, the development of the MLI could be the path by which global harmonization of the taxation of states despite their effective sovereignties will be achieved. (Bird, 2018: 1389; Lesage, 2008: 288-289)

This is important in the international tax context, since the exercise of legitimate sovereignty in the areas of tax enforcement and control may depend at least in part on whether the state appears, before the international community, to be acting responsibly. (Bradley & Bright, 2016: 467)

Therefore, in the processes through which global tax policy is developed, unlike domestic legislation and multilateral treaty-based regimes, states are not formally obliged to take concrete measures. As a result, it is more difficult to assess whether they are converging around consensus positions. The structure of *Soft Law* thus creates a lack of clarity between tax rules and laws that makes it difficult to identify the factors that lead Member States to adopt more autonomy or more cooperation in tax policy. (Christians, 2010: 34)

As SLAUGTHER said:

> These national government officials would never cede power to a world government, although they would certainly recognize that, with respect to some specific problems, only genuinely powerful supranational institutions could overcome the collective action problems inherent in formulating and implementing global solutions. In most cases, however, they would seek to work together in a variety of ways, recognizing that they could only do their jobs properly at the national level by interacting—whether in cooperation and conflict—at the global level. Their ordinary government jobs—regulating, judging, legislating—would thus come to include both domestic and international activity. Over time, they would also come to recognize responsibilities not only to their national constituents but to broader global constituencies. If granted a measure of sovereignty to participate in collective decision making with one another, they would also have to live up to obligations to those broader constituencies. (Slaugther, 2005: 270)

Finally, it should be noted that international organizations currently cannot effectively fix the cross-border taxation problems induced by the digital economy. However, in the case of a minimum tax, a solution favored to impose the digital economy, such an international organization would only be necessary for the coordination of the bases. (Touchelay, 2020)

The OECD indicates that the minimum tax respects sovereign autonomy, as it must be approved by the participating countries, and that it is in fact necessary to protect fiscal sovereignty. (OECD, 2015c: p. 16)

It can therefore be concluded that the solution on the technical plan comes more likely and in a more realistic sense from coordination and cooperation between states, prior to harmonization, recognizing their mutual interests in the fight against international tax evasion, than in the supranational edition of rules. The OECD seems to be undoubtedly the most propitious framework for this development, despite the criticism that may affect this

organization. Indeed, by aggregating the shared fiscal priorities of its member states, the OECD gives these nations the opportunity to adopt a uniform approach. (Andrés Aucejo, 2018b: pp. 68-69) However, these norms can be ignored, and even contradicted, whenever it is perceived that they are replacing the legislator or the interest of the nation, thus safeguarding tax sovereignty. (Verdier, 2009: pp.113-115; Devereux & Vella, 2014: p. 18)

4 CONCLUSION

The digital economy represents nowadays a prominent share of the business activities, which is called to increase more and more in the coming years. Subsequently the traditional principle of the international tax law will be strongly questioned.

As we saw, the digital tax avoidance of the permanent establishment obliterates the concept of the territoriality, meanwhile virtuality is a fundamental characteristic of the digital economy. (Peng, 2017: p. 346) Therefore, the permanent establishment status, relying on the concept of territoriality and the requirement of a physical presence, is easy to avoid in the case of data collection business. Moreover, the volatility and intangibility of the assets and the underlying operations of the digital economy does not seem close from the classical industry and trade, the value creation depending on data collection staying difficult to define and locate. (Caussade, 2017)

The existing solutions to tackle the tax avoidance of the digital data's collection is thus first, the concept of virtual permanent establishment through the digital significant presence, and second the attribution of profit based on the proportion of data's generating users in a jurisdiction on the total amount of data's generating users.

Although it is too soon to estimate if the virtual digital permanent establishment will provide a fair taxation of the cross-border's operations of the digital economy, it appears that it is a first encouraging step into the redefinition of the fiscal jurisdiction and the nexus approach in the age of a digitalized economy.

Notwithstanding, it is not sure that this combination of solutions will properly work, as it superposes, on the one hand the territoriality principle and, in the other hand, the globality principle with the aim of taxing the same revenue.

In any case, the international taxation of the digital economy ought to be adapted as judicial order that present legal vacuum in the tax treatment of some operations can lead to disregard consequence breaching the principle of neutrality, which is one of the recognized principles aiming to guide de state in the taxation process. (Faúndez Ugalde, 2018: p. 167)

According to ANDRÉS AUCEJO: "The last trends on International Economy and Law highlight the relevance of the tax policies in order to achieve a new social and economic global order." (Andrés Aucejo, 2018a: p. 122)

It may be thought that the development of international treaty law in tax matters leads to a positive consensus to solve the problem of international tax evasion facilitated by the digital economy. The question that generates this system is whether cooperation between sovereign States is required or rather an international organization that implements and organizes tax justice. However, we believe that a transactional distribution of taxes can fail if it is not coordinated by a supranational body that captures the necessary tax sovereignty from the States and also allows possible litigation.

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Miscellanea

Presentation

ATAD III & Holding Structures; EU proposal re “shell entities”

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Background: The beneficial ownership (BO) framework & BEPS Action 6

- OECD Model Tax Convention > BO concept on articles 10 and 11: legal and economic approach – right to use and enjoy the income -
- Differences with AML/CTF legislation (FATF Recommendations)
- BEPS Action 6 and MLI vary approach towards more sophisticated anti-abuse clauses > LOB and PPT
- EU tax law references to BO > Interest and Royalties Directive
- Significant court cases in the EU ("Danish cases")
- EU initiative 2021: fighting the use of shell entities and arrangements for tax purposes – in addition to GAAR, PPT, anti-hybrid rules, CFC rules.

European Commission's proposal to end the misuse of shell entities (22.12.2021)

Unshell

Preventing the use of shell companies for tax abuse

Transparency is the cornerstone of Fair Taxation. The European Commission made a proposal that will increase scrutiny of shell companies in the EU, to prevent them from being used for tax evasion and avoidance.

A new filtering system to identify shell companies:

Is the bulk of the company's income passive (dividends, interest on bonds, etc)?

Are a majority of transactions cross-border?

Are management and administration outsourced?

If the answer is yes in all three cases, the company will be subject to new tax reporting obligations related to economic substance. If a company fails at least one of the substance indicators, it will be presumed to be a shell and will not be able to benefit from tax advantages intended to support real economic activity.

European Commission

European Commission's proposal to end the misuse of shell entities (22.12.2021)

What will the new rules do?

The proposed new measures will establish transparency standards around the use of shell entities, so that their abuse can more easily be detected by tax authorities. Using a number of objective indicators related to income, staff and premises, the proposal will help national tax authorities detect entities that exist merely on paper.

What are the standards and indicators used to determine if a company has real economic activity?

The proposal introduces a filtering system for the entities in scope, which have to comply with a number of indicators. These levels of indicators constitute a type of "gateway". Today's proposal sets out three gateways (explained below). If a company crosses all three gateways, it will be required to annually report more information to the tax authorities through its tax return.

How do these gateways work in practice?

The first level of indicators looks at the activities of the entities based on the income they receive. The gateway is met if more than 75% of an entity's overall revenue in the previous two tax years does not derive from the entity's business activity or if more than 75% of its assets are real estate property or other private property of particularly high value.

The second gateway requires a cross-border element. If the company receives the majority of its relevant income through transactions linked to another jurisdiction or passes this relevant income on to other companies situated abroad, the company crosses to the next gateway.

The third gateway focuses on whether corporate management and administration services are performed in-house or are outsourced.

European Commission

European Commission's proposal to end the misuse of shell entities (22.12.2021)

What happens if an entity crosses all gateways?

An entity crossing all three gateways will be required to report information in its tax return related, for example, to the premises of the company, its bank accounts, the tax residency of its directors and that of its employees. These are known as "substance indicators". All declarations need to be accompanied by supporting evidence.

If an entity fails at least one of the substance indicators, it will be presumed to be a 'shell'.

What happens if a company is deemed to be a shell?

If a company is deemed a shell company, it will not be able to access tax relief and the benefits of the tax treaty network of its Member State and/or to qualify for the treatment under the Parent-Subsidiary and Interest and Royalties Directives. To facilitate the implementation of these

consequences, the Member State of residence of the company will either deny the shell company a tax residence certificate or the certificate will specify that the company is a shell.

Moreover, payments to third countries will not be treated as flowing through the shell entity and will be subject to withholding tax at the level of the entity that paid to the shell. Accordingly, inbound payments will be taxed in the state of the shell's shareholder. Relevant consequences will apply to shells owning real estate assets for the private use of wealthy individuals and which as a result have no income flows. Such assets will be taxed by the state where the asset is located as if it were owned by the individual directly.

European Commission

Proposal for a Council Directive (22.12.2021)

Article 2. Scope

This Directive applies to all undertakings that are considered tax resident and are eligible to receive a tax residency certificate in a Member State.
This Directive is without prejudice to other legal acts of the Union.

Article 3. Definitions

1) *'undertaking' means any entity engaged in an economic activity, regardless of its legal form, that is a tax resident in a Member State;*
   (...)
5) *'beneficial owner' means beneficial owner as defined in Article 3, point (6), of Directive (EU) 2015/849 of the European Parliament and of the Council;*
6) *'undertaking's shareholders' means the individuals or entities directly holding shares, interest, stakes, participations, membership rights, entitlement to benefits or any equivalent rights or entitlements in the undertaking and in the case of indirect holdings, those individuals or entities holding interest in the undertaking through one or a chain of undertakings none of which fulfils the indicators of minimum substance set out in Article 7 (1) of this Directive.*

European Commission

Proposal for a Council Directive (22.12.2021)

Article 4. Relevant income (passive income)

For the purposes of Chapters II and III 'relevant income' shall mean income falling under any of the following categories:

a) *interest or any other income generated from financial assets, including crypto assets, as defined in Article 3(1), point 2 of the proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937;*

b) *royalties or any other income generated from intellectual or intangible property or tradable permits;*

c) *dividends and income from the disposal of shares;*

d) *income from financial leasing;*

e) *income from immovable property;*

f) *income from movable property, other than cash, shares or securities, held for private purposes and with a book value of more than one million euro.*

g) *income from insurance, banking and other financial activities;*

h) *income from services which the undertaking has outsourced to other associated enterprises.*

European Commission

Seven steps: "substance test", tax consequences & exchange of information

Step 1. UNDERTAKINGS THAT SHOULD REPORT

1. Gateway: > 75% passive income in preceding 2 years / > 75% assets
2. Gateway: ≥ 60% cross border income in preceding 2 years / > 60% foreign assets
3. Gateway: outsourced management in preceding 2 years

CARVE OUT OF HIGHLY REGULATED / LOW RISK CASES

EU listed, regulated financial entities, domestic groups, or ≥5 employees.

Step 2. ANNUAL REPORTING ON SUBSTANCE

a) Own premises
b) EU active bank account
c) Resident directors / employees

Step 3. PRESUMPTION OF LACK OF MINIMUM SUBSTANCE

- Consideration as shell entities

Step 4. REBUTTAL OF THE PRESUMPTION

a) Commercial rationale
b) Employee profiles
c) Decision making site

Step 5. EXEMPTION FOR LACK OF TAX MOTIVES

- No reduction of the tax liability of the "beneficial owner" or the group
- AML definition as opposed to OECD tax definition
- Comparison overall tax due

Step 6. TAX CONSEQUENCES

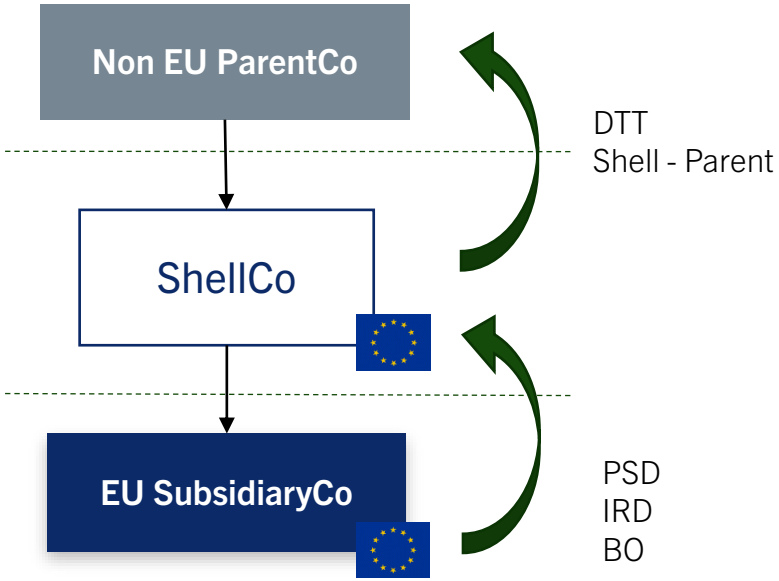
- No application of DTT to shell entity
- No aplication of PSD and IRD
- Look through shell entity.:
  ✓Income obtained by shareholder
  ✓Property owned by shareholder
- No certificate of tax residence or indication of not entitlement to DDT, PSD and IRD

Step 7. AUTOMATIC EXCHANGE OF INFORMATION

- Information on substance of entities crossing gateways
- Information on rebuttal of presumption as shell entities

Comparative chart

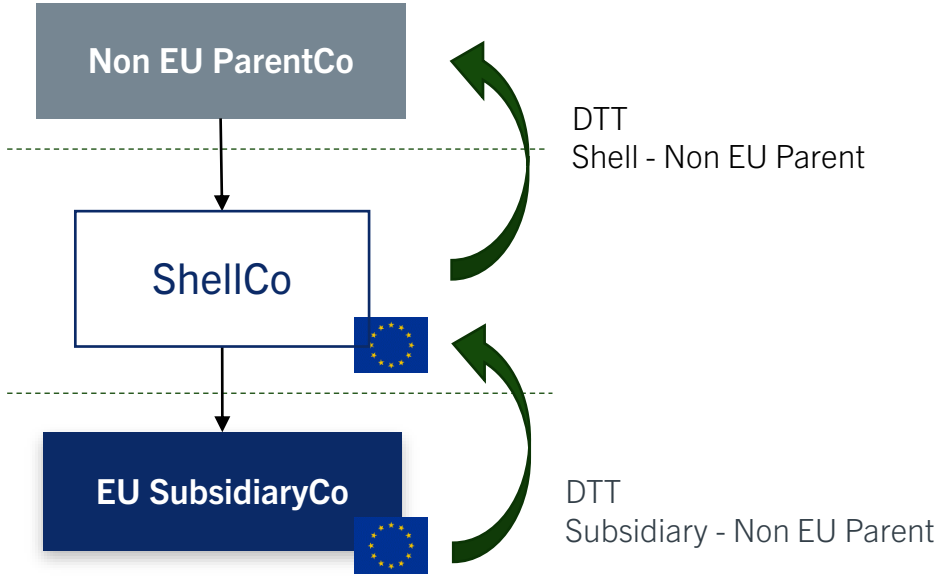
CURRENT (BO approach / GAAR)



Questions

- Exemption under PSD & IRD
- Is Shellco the BO of income paid by EU SubsidiaryCo?
- PPT? GAAR? Indicia of abusive situation?

SHELL DIRECTIVE + BO + GAAR



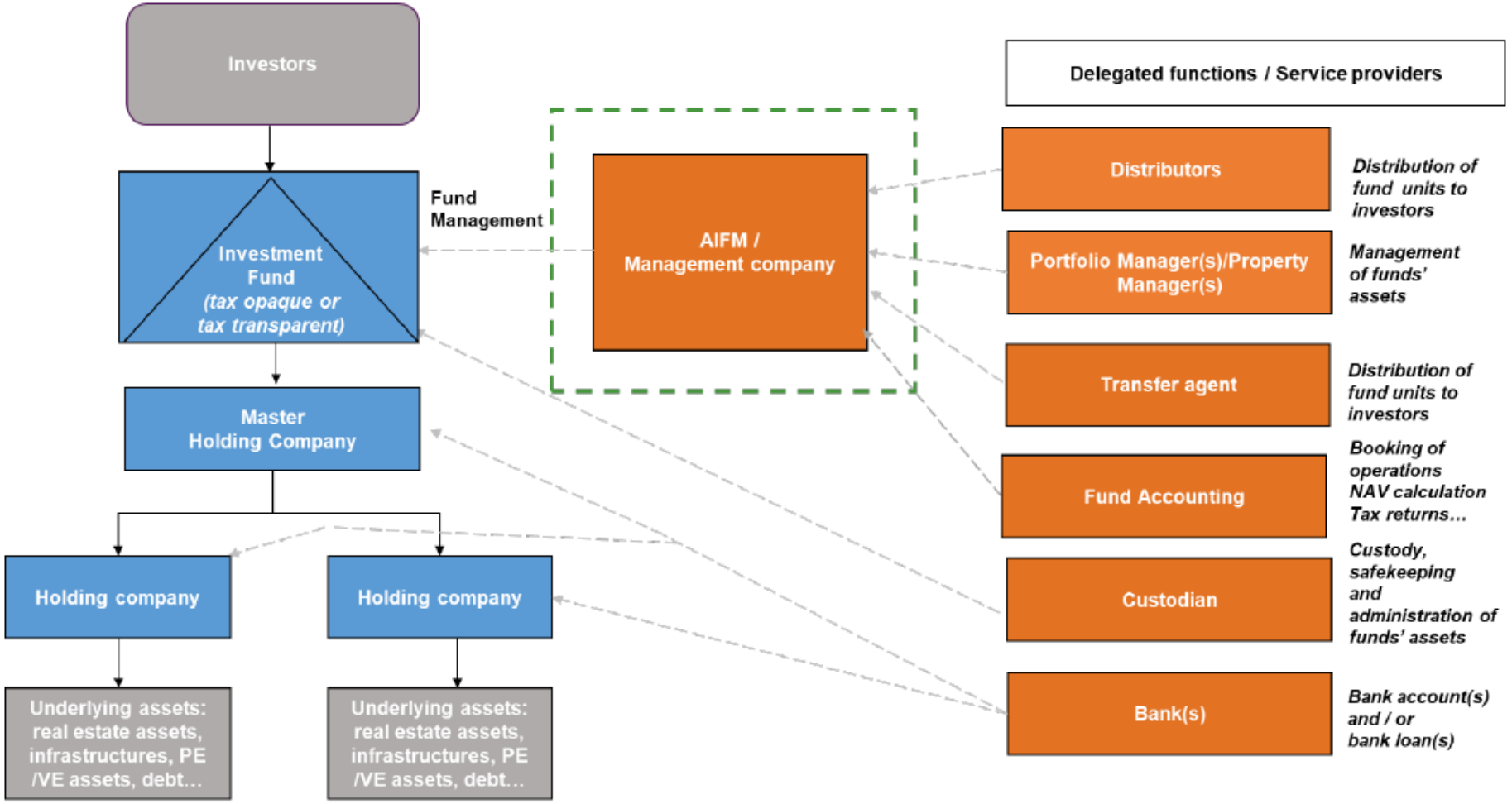
Explanatory memorandum

In this case only the source and the shell jurisdiction are bound by the Directive while the shareholder jurisdiction is not.

- EU source / payer: will tax the outbound payment according to treaty in effect with the third country jurisdiction of the shareholder(s) or in the absence of such a treaty in accordance with its national law.
- EU shell: will continue to be resident for tax purposes in a Member State and will have to fulfil relevant obligations as per national law, including by reporting the payment received; it may be able to provide evidence of the tax applied on the payment.

European Commission

Funds Industry concerns



Source: Association of the Luxembourg fund industry (ALFI) views on the proposed Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU (the "Unshell Directive" or the "Directive") (6 April 2022).

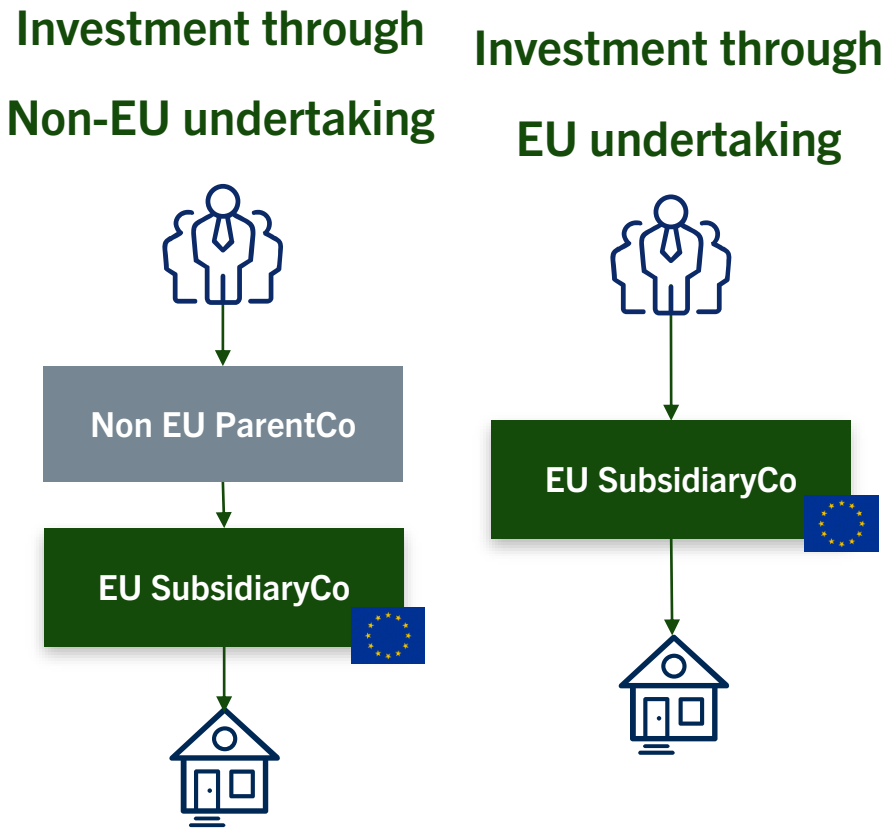
Impact on foreign structures holding assets for private use

Article 11.3

Where property referred to in Article 4 is owned by an undertaking that is presumed not to have minimum substance and does not rebut this presumption:

a) the Member State where property referred to in Article 4, pint (e) is situated shall tax such property according to its national law, as if such property was owned directly by the undertaking's shareholder (s), without prejudice to any agreement or convention that provides for the elimination of double taxation of income, and where applicable, capital, in force with the jurisdiction of the undertaking's shareholder(s);

b) the Member State of the undertaking's shareholder(s) shall tax such property in accordance with its national law as if the undertaking's shareholder(s) owned it directly, without prejudice to any agreement or convention that provides for the elimination of double taxation of income, and where applicable, capital, in force with the jurisdiction where the property is situated.



European Commission

Penalties and Tax audits

Article 14. Penalties

(...)

Member States shall ensure that those penalties include an administrative pecuniary sanction of at least 5% of the undertaking's turnover in the relevant tax year, if the undertaking that is required to report pursuant to Article 6 does not comply with such requirement for a tax year within the prescribed deadline or makes a false declaration in the tax return under Article 7.

Article 15. Request for tax audits

Where the competent authority of one Member State has reason to believe that an undertaking which is resident for tax purposes in another Member State has not met its obligations under this Directive, the former Member State may request the competent authority of the latter to conduct a tax audit of the undertaking.

The competent authority of the requested Member State shall initiative it within one month from the date of receipt of the request and conduct the tax audit in accordance with the rules governing tax audits in the requested Member State.

The competent authority which conducted the tax audit shall provide feedback on the outcome of such audit to the competent authoriry of the requesting Member State as son as posible and no later tan one month after the outcome of the tax audit is known.

Considerations

- Directive intended to be transposed into EU member states legislation and be applicable as from 01.01.2024
- Doubts on final version of the Directive as technical questions raised by stakeholders need to be addressed
- Review of existing structures to verify:
  (i) Gateways criteria in 2022 and 2023. No transitional period and retroactive impact deriving from the "2 preceding years" rule
  (ii) 5 employees for carve out purposes
  (iii) Directors and full-time employees tax resident in the undertaking's member state for reporting on substance purposes
  (iv) Potential effects of being considered as "shell entity"


TAX

4th WOMEN BUSINESS & JUSTICE EUROPEAN FORUM

22th SEPTEMBER 2022

POR UNA PLENA IGUALDAD

Inscripciones en www.icab.cat

VISIÓN

El cambio social más espectacular que hemos vivido en los últimos tiempos en nuestra sociedad ha sido la participación plena de las mujeres en la vida económica, social, política y cultural.

Ha significado un avance, no sólo para las mujeres, sino para toda la sociedad.

Las mujeres somos el 51% de la población. Queremos una sociedad en la que participamos activamente en un 50% en todas las decisiones de la economía, la política, la cultura, la ciencia y la justicia.

Es fundamental contar con toda la población, hombres y mujeres, para construir una sociedad igualitaria.

MISIÓN

Establecer las bases para una sociedad 50/50 donde las mujeres participen plenamente en todos los ámbitos, contribuyendo a mejorar la equidad, la democracia y el buen gobierno para hacer realidad una sociedad más justa: queremos visibilizar los valores de una sociedad moderna.

OBJETIVOS

1. Dar visibilidad al talento femenino a través de sus referentes en el mundo de la justicia, la empresa, las instituciones y la sociedad en general para inspirar a las mujeres para su crecimiento personal y profesional.

2. Crear una red europea para avanzar con los Objetivos de la Agenda 2030 de Naciones Unidas para el desarrollo sostenible en igualdad de género.

3. **Esta 4ª edición de Women Business and Justice (2022) quiere presentar una evolución de este congreso hacia un proyecto más amplio que continuará durante todo el año con espacios de reflexión y debate y formación.**

Durante esta edición del Women presentaremos las conclusiones del estudio de igualdad en el ámbito de la Abogacía realizado entre el CGAE, la Fundación Wolters Kluwer y el Women Business & Justice del ICAB.

22th SEPTEMBER 2022

9.30h. PRIMERA MESA: **LIDERAR EN FEMENINO**

- **Jesús M. Sánchez,** decano del Ilustre Colegio de la Abogacía de Barcelona
- **Iryna Vereshchuk,** viceprimera ministra de Ucrania *
- **Laura Pérez Castaño,** teniente Alcaldía Derechos Sociales, Justicia Global, Feminismos y LGTBI
- **Lourdes Ciuró i Buldó,** "consellera" de Justicia. Generalitat de Catalunya *
- **Pilar Llop Cuenca,** ministra de Justicia *
- **Meritxell Batet,** presidenta del Congreso de los Diputados *
- **Yvonne Pavía,** diputada, Tesorera y Responsable del área de Igualdad del Ilustre Colegio de la Abogacía de Barcelona

Relatoras:

- **Montse Pintó Sala**, diputada de la Junta de Gobierno del Ilustre Colegio de la Abogacía de Barcelona
- **Mireia Ramon Rona,** diputada de la Junta de Gobierno del Ilustre Colegio de la Abogacía de Barcelona

Keynote speaker

10.45h. SEGUNDA MESA: **LOS VALORES DE LA SOCIEDAD MODERNA EN FEMENINO**

Ponentes:

- **Meritxell Borràs,** directora de la Autoridad Catalana de Protección de Datos *
- **MªEugenia Bieto,** directora de Esade Women Initiative (EWI) y directora general de ESADE (2010-2018) *
- **Sofía Puente Santiago,** directora general de Seguridad Jurídica y Fe Pública
- **Joan Guàrdia,** rector de la UB
- **Esther Giménez-Salinas**, "Síndica de Greuges de Catalunya"

Presenta y modera:

- **Javier Orduña Moreno**, Ex magistrado de la Sala 1ª del Tribunal Supremo y Catedrático de Derecho Civil de la Universidad de Valencia

Relatoras:

- **Cristina Vallejo Ros**, abogada, coordinadora de Formación ICAB
- **Eva Andrés Aucejo,** Catedrática de Derecho Financiero y Tributario de la UB

11.45h. **COFFEE BREAK**

*** pendiente de confirmar**

12.15h. TERCERA MESA: **LIDERAZGO EN MOMENTOS DE CRISIS EN FEMENINO**

Ponentes:

- **Sophie Müller,** alta Comisionada de las NNUU para los Refugiados en España (ACNUR) *
- **Cristina Gallach Figueres,** alta comisionada del Gobierno español por la agenda 2030, años 2018 a 2020. Comisionada especial por la Alianza de la Nueva Economía de la lengua, del Gobierno de España
- **Friba Quraishi,** jueza afgana exiliada en España
- **Blanca Garcés Mascareñas,** investigadora senior del área de migraciones y coordinadora de investigación del CIDOB (Barcelona Centre for International Affairs)*

Presenta y modera:

- **Mar Serna**. Magistrada de lo Social Barcelona y "consellera" de Trabajo (2006-2010)

Relatoras:

- **Erika Torregrossa Acuña**, abogada y vicepresidenta Observatorio Derechos de las Personas ICAB
- **Isabel Giménez García,** Coordinadora de la Asociación de Mujeres Juezas de España

CÓCTEL COMIDA-NETWORKING

15.30h. CUARTA MESA: **CRECIMIENTO ECONÓMICO EN FEMENINO**

Ponentes:

- **Asa Gunnarson,** co-owner and Senior Consultant at K6 Konsulter AB *
- **Emma Gumbert,** vicepresidenta de PIMEC
- **Maite Barrera,** presidenta de Barcelona Global
- **María Bastida,** docente e investigadora de la "Universidad de Santiago de Compostela", especializada en Economía Social y Solidaria de Género
- **Isabel Tocino,** vicepresidenta del Consejo de Administración del Banco de Santander *

Presenta y modera:

- **Maria Teixidor Jufresa**, abogada y CEO de Vuca Solutions

Relatoras:

- **Raquel Iglesias Pajares**, vicedecana del Colegio de Notarios
- **Adriana Flores Romeu,** vicedecana del Colegio de Procuradores

*** pendiente de confirmar**

17.00h. QUINTA MESA: **SPEECH: UN NOU HORITZÓ EN FEMENÍ**

Ponente:

· **Natalia Olson Urtecho,** asesora de Obama. Fundadora de the Disruptive Factory

17.30h. SEXTA MESA: **REDEFINIMOS LA ABOGACÍA EN FEMENINO**

Estudio sobre la Igualdad en el Sector Legal realizado CGAE - ICAB – Fundación Wolters Kluwer

Ponentes:

· **Marga Cerro,** presidenta de la Comisión de Igualdad del CGAE y Decana del "Colegio de Abogados de Talavera de la Reina"

· **Cristina Sancho,** presidenta de la Fundación Wolters Kluwer

· **Yvonne Pavía,** diputada, Tesorera y Responsable del área de Igualdad del Ilustre Colegio de la Abogacía de Barcelona

· **Núria Flaquer,** diputada responsable de la Comisión de Mujeres Abogadas

Presenta y modera:

· **Encarna Orduna**, decana del Ilustre Colegio de la Abogacía de Reus

Relatoras:

· **Mar Hermano**, diputada del Colegio de la Abogacía de Sevilla

· **Rosa Isabel Peña,** diputada de la Junta de Gobierno del Ilustre Colegio de la Abogacía de Barcelona

- Exposición Conclusiones.

· **Victoria Ortega**, presidenta del CGAE

18.45h. **ENTREGA PREMIOS WOMEN BUSINESS &JUSTICE'22**

· **Victoria Ortega**, presidenta del CGAE

· **Jesús M. Sánchez,** decano del Ilustre Colegio de la Abogacía de Barcelona

19.15h. **CLAUSURA WOMEN BUSINESS &JUSTICE'22**

· **Susana Ferrer Delgadillo**, vicedecana del Ilustre Colegio de la Abogacía de Barcelona

*** pendiente de confirmar**

****Durante el acto se registrarán imágenes por parte del ICAB, sobre las cuales se hará difusión a todas las personas que asistan**

Comité Científico:

- **Yvonne Pavía,** diputada, tesorera y responsable del área de Igualdad del Ilustre Colegio de la Abogacía de Barcelona
- **Susana Ferrer Delgadillo**, vicedecana del Ilustre Colegio de la Abogacía de Barcelona
- **Rosa Peña Sastre,** diputada de la Junta de Gobierno del Ilustre Colegio de la Abogacía de Barcelona
- **Paz Vallés Creixell,** diputada de la Junta de Gobierno del Ilustre Colegio de la Abogacía de Barcelona
- **Mireia Ramon Rona,** diputada de la Junta de Gobierno del Ilustre Colegio de la Abogacía de Barcelona
- **Carmen Valenzuela Hidalgo,** diputada de la Junta de Gobierno del Ilustre Colegio de la Abogacía de Barcelona
- **Nuria Flaquer Molina,** diputada de la Junta de Gobierno del Ilustre Colegio de la Abogacía de Barcelona y responsable de la Comisión de Mujeres ICAB
- **Montse Pintó Sala,** diputada de la Junta de Gobierno del Ilustre Colegio de la Abogacía de Barcelona
- **Cristina Vallejo Ros,** abogada, coordinadora de Formación ICAB
- **Emma Gumbert Jordan,** vicepresidenta de PIMEC
- **Olga Arderiu Ripoll,** abogada y Presidenta de la Comisión de Mujeres ICAB
- **Marina Roig Altozano,** abogada y Vicepresidenta de la Comisión de Mujeres ICAB
- **Cristina Sancho Ferran,** presidenta de la Fundación Wolters Kluwer
- **Mar Serna Calvo,** Magistrada del Social Barcelona y "consellera" de Trabajo (2006-2010)
- **Maria Teixidor Jufresa,** abogada y CEO de Vuca Solutions
- **Erika Torregrossa Acuña,** abogada y Vicepresidenta Observatorio Derechos de las Personas ICAB
- **Paula Fernández-Ochoa,** Consultora & Docente en Branding, Marketing Jurídico y Marca Personal. Socia de +MoreThanLaw
- **Eugenia Navarro,** Socia Directora en TAMA Projects Legal Marketing
- **Eva Andrés Aucejo,** Catedrática de Derecho Financiero y Tributario de la UB
- **Belén Marrón Reigosa,** Directora corporativa de RSC y Directora Fundación Quironsalud
- **Gemma Calvet Barot,** Directora Agencia Metropolitana de Transparencia de Barcelona
- **Katharina Miller,** Presidenta de European Women Lawyers Association (EWLA)
- **Helena Torras,** Founder and Managing Partner at PaoCapital
- **Adriana Flores Romeu,** Vicedecana del Colegio de Procuradores
- **Raquel Iglesias Pajares,** Vicedecana del Colegio de Notarios
- **Anna Gener Surrell,** Presidenta-CEO Barcelona Savills Aguirre Newman
- **Mercè Martí,** presidenta de la Comisión de Equidad de Género del Colegio de Censores Jurados de Cuentas de Cataluña
- **Isabel Perea,** auditora y miembro de la Comisión de Equidad de Género del Colegio de Censores Jurados de Cuentas de Cataluña
- **Dolors Vidal Besora,** Marketing Director del Ilustre Colegio de la Abogacía de Barcelona
- **Rita Bayó Llibre,** Responsable de actos del Ilustre Colegio de la Abogacía de Barcelona

CRÓNICA:

4TH WOMEN BUSINESS & JUSTICE EUROPEAN FORUM
(IV FORO EUROPEO DE MUJERES, NEGOCIOS Y JUSTICIA)

Celebrado en el Ilustre Colegio de Abogados de Barcelona, en fecha 22 de septiembre de 2022, en la ciudad de Barcelona.

Yvonne Pavía[1]

Eva Andrés-Aucejo[2]

Dolors Vidal Besora[3]

César Martínez Vaquerizo[4]

Relatoras del Congreso[5]

Un Congreso lleno de emociones, debate y reflexión

La celebración del "4th Women Business & Justice European Forum" en la sede del Colegio de la Abogacía de Barcelona el pasado 22 de septiembre de 2022 ha supuesto, una vez más, la demostración del compromiso de la abogacía por la plena igualdad.

En la presente edición nos habíamos propuesto como objetivos, los siguientes:

- Dar visibilidad al talento femenino a través de sus referentes en el mundo de la justicia, la empresa, las instituciones y la sociedad en general, para inspirar a las mujeres en su crecimiento personal y profesional.
- Crear una red europea para seguir avanzando en los Objetivos de Desarrollo Sostenible de la Agenda 2030 de las Naciones Unidas, donde la igualdad y la perspectiva de género resultan imprescindibles para la consecución de los mismos.

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[1] Diputada y Tesorera responsable del área de igualdad del Ilustre Colegio de Abogados de Barcelona
[2] Catedrática de Derecho Financiero y Tributario de la *Universitat de Barcelona*
[3] Directora de Marketing del Ilustre Colegio de Abogados de Barcelona
[4] Letrado del área de secretaría de la junta de gobierno del Ilustre Colegio de Abogados de Barcelona
[5] ***Relatoras (1 mesa)*** *Montse Pintó Sala, diputada de la Junta de Gobierno del Ilustre Colegio dela Abogacía de Barcelona y Mireia Ramon Rona, diputada de la Junta de Gobierno del Ilustre Colegio dela Abogacía de Barcelona*

Relatoras (2 mesa) *Cristina Vallejo Ros, abogada, coordinadora de Formación ICAB y Eva Andrés- Aucejo, Catedrática de Derecho Financiero y Tributario de la Universitat de Barcelona*

Relatoras (3 mesa) *Raquel Iglesias Pajares, Vicedecana del Colegio Notarial de Cataluña y Adriana Flores Romeu, vicedecana del Colegio de Procuradores*

Relatoras (4 mesa) *Rosa Isabel Peña, diputada de la Junta de Gobierno del Ilustre Colegio de laAbogacía de Barcelona y Isabel Giménez García, coordinadora de la Asociación de Mujeres Juezas de España*

Relatora: (5 mesa). *Paula Fernández-Ochoa. Consultora y docente en branding, Marketing jurídico y marca personal. Socia de +MoreThanLaw*

Relatoras (6 mesa) *Paz Vallès Creixell, diputada del ICAB y Olga Arderiu Rupoll, Abogada y Presidenta de la comisión de mujeres del ICAB*

- Constituir un primer paso de la evolución que se pretende del presente Congreso, hacia un proyecto más amplio que continuará todo el año con espacios de reflexión, debate y formación.

Asimismo, en el marco del presente Congreso se ha presentado el "Estudio sobre la Igualdad en el sector Legal", elaborado de manera conjunta por la Comisión de Igualdad del CGAE, la Fundación Wolters Kluwer y el propio Women Business and Justice European Forum del ICAB, así como el Informe "Análisis y Propuestas de las Abogadas de Cataluña para promover la Igualdad de Género en el Sector Legal", realizado por la Law Society of England and Wales y la Comisión de Mujeres Abogadas del Colegio de la Abogacía de Barcelona.

También, durante la Jornada se anunció la creación del Observatorio para la Igualdad Plena del ICAB con la finalidad de analizar la realidad en términos de paridad y equidad, y promover acciones para fortalecer las redes de liderazgo de las mujeres, crear alianzas y conseguir la paridad completa 50/50.

El *4th Women Business & Justice European Forum*, celebrado en 22 de septiembre de 2022, tuvo la fortuna de contar un año más con la lección magistral de *Doña Meritxell Batet,* Excelentísima presidenta del Congreso de los Diputados de España, quién un año más, ofreció un extraordinario discurso, en el cual puso en valor la Plena Igualdad como mandato constitucional del artículo 9 de la Constitución Española, cuyo apartado n. 2 llama a remover los obstáculos que lo impedimenten. Dicha igualdad, es también, recordó, un derecho fundamental reconocido en el artículo 14 de la Constitución Española y uno de los valores superiores de nuestro ordenamiento jurídico (art. 1 Constitución Española); reconocido, asimismo, en la legislación española y europea de desarrollo. Frente a los múltiples desafíos que todavía restan por alcanzar en materia de igualdad de género, alentó a poner todos los esfuerzos posibles para lograr reducir la brecha de género en pro, no sólo de la sociedad presente sino también de las generaciones venideras.

El acto concluyó con la entrega solemne de los Premios Women Business & Justice 2022 a la Decana emérita y actual Delegada de Gobierno en Cataluña, Mª Eugènia Gay Rosell, y a la presidenta de la Confederación Española de la Abogacía Joven y secretaria del Ilustre Colegio de Abogados de Alcalá de Henares, Maia Román Fernández. Y, en lo que fue uno de los momentos más emotivos de la Jornada, se reconoció, a título póstumo con el referido Premio, a la abogada y activista por los derechos de las mujeres, Cecilia Monzón, a quien le arrebataron la vida el pasado 21 de mayo, víctima de un feminicidio.

Fue, sin duda, un Congreso lleno de emociones, debate y reflexión, realizado gracias, por un lado, gracias al infatigable compromiso de su Comité Científico integrado por casi una treintena de mujeres con perfiles muy diversos pero todas ellas excepcionales y, por otro lado, gracias a la generosidad de los sponsors y colaboradores, así como unas ponentes de auténtico primer nivel, de cuyos parlamentos hemos podido extraer algunas conclusiones tan valiosas como las que se refieren a continuación:

1. La igualdad es un caso de éxito en el que llevamos 300 años luchando y que ha precipitado muchas conquistas históricas. Se puso encima de la mesa en la Ilustración y en la Revolución Francesa, especialmente con Olympe de Gouges y su Declaración de Derechos de la Mujer y de la Ciudadana de 1791.

De hecho, la palabra feminista surgió como un insulto que el novelista y dramaturgo francés, Alejandro Dumas, utilizaba para referirse a los hombres que defendían a las mujeres.

En España, hace 91 años la mujer luchaba por el sufragio pasivo. E incluso en el debate que en aquel entonces se suscitó, entre Clara Campoamor y Victoria Kent, se planteó si las mujeres tenían la misma capacidad que los hombres o si eran lo suficientemente frías y no se dejarían llevar por las emociones.

En la conceptualización del acervo jurídico no ha habido neutralidad, sino que ha estado masculinizado tradicionalmente, como ejemplifican figuras como la del buen padre de familia o la del empresario diligente.

Hoy estamos hablando de liderar en femenino. Y, aunque nos queda aún mucho camino por recorrer, las mujeres tienen más poder que antes, gracias sobre todo a la educación primero, y a los derechos civiles y políticos que vendrían después, como el sufragio universal o la igualdad retributiva.

No obstante, aún no tenemos todo el poder que necesitamos, pues si bien hemos alcanzado unas cotas envidiables en términos de igualdad formal, seguimos lejos de una igualdad sustantiva y realmente efectiva.

Asimismo, no podemos olvidar el mandato que la Constitución Española, en su art. 9.2, dirige a los poderes públicos de remover los obstáculos que impiden o dificultan la igualdad en toda su plenitud. Precisamente, el referido precepto permite la discriminación positiva, que abre la puerta a una proyección real de valores y principios como la libertad y la igualdad de oportunidades.

2. Las facultades universitarias, la concurrencia a los procesos de oposiciones, la presencia en los cuerpos funcionariales, como la judicatura o el notariado, son hoy mayoritariamente femeninas.

   Sin embargo, no hay representación equitativa de las mujeres en las áreas de poder. Tanto en el ámbito público, funcionarial (gubernativo y altas instancias), como privado, principalmente empresas y corporaciones, los puestos de mayor responsabilidad y representatividad siguen estando ocupados en su mayoría por hombres.

   En el ámbito universitario, según fuentes estadísticas facilitadas por el Rector Magnífico de la *Universitat de Barcelona* el Dr. D. Joan Guàrdia (ponente), en el año 2022, el 54,7% de la población activa con carrera superior es mujer, pero en los centros de poder, tres de cada cuatro personas es hombre. El 64% de las universitarias son mujeres. Se doctoran el 50%, pero solo un 20% son jefas de grupos de investigación.

   Reflexiona el catedrático de psicología referenciado, sobre el riesgo significativo de involución en igualdad, junto a otros riesgos y debilidades como por ej. los derivados de sociedades tecnocráticas con efectos en el factor de la discriminación. La Universidad Pública, a su juicio, ha de ocupar un papel crucial, al servicio de la sociedad; en defensa y la protección de los derechos públicos y, por supuesto, al servicio de la igualdad plena como derecho fundamental, pero, y, sobre todo, lo que es mucho más difícil de conseguir, trasladando la “Norma” a la “Conducta”, para allanar la brecha que nos lleve a la verdadera igualdad, equidad y justicia real.

Cambiando de registro universitario y pasando al plano político, de los más de 200 “Consellers” nombrados por la Generalitat de Catalunya desde 1978, solo 37 han sido mujeres y únicamente 4 han sido nombradas como independientes (es decir, teniendo en cuenta no su trayectoria política o de partido, sino solo criterios de méritos técnicos y objetivos).

Desde el año 2009, más mujeres (que hombres) aprueban las oposiciones para la Abogacía del Estado. En los partnership de los despachos y firmas de servicios legales solo hay un 20% de socios (hombres), aunque la plantilla suele estar integrada en un 50/50.

Por eso, políticas como las de cuotas de género para asegurar la paridad, resultan necesarias para mejorar la representatividad de las mujeres en los ámbitos de poder.

3. Muchas veces las mujeres no se postulan para concurrir a esas áreas de poder, o lo hacen en menor medida en comparación a sus compañeros varones.

   Formalmente somos iguales, materialmente no; y si las mujeres no se postulan para un ascenso o para concurrir a un puesto de poder, es que tenemos un problema.

   Ha habido avances en la protección (formal) de la diferencia, sobre todo en el ámbito de la maternidad. Pero el circuito de poder sigue estando dominado por el lado masculino.

   No hay que tener miedo a sobresalir, a destacar y a liderar (en femenino). Tenemos que superar el “síndrome de la impostora”, ya que indudablemente somos capaces de llegar a lo más alto.

4. Pese a la actual infrarrepresentación femenina en los puestos de decisión, y a que hay que seguir animando a las mujeres a concurrir a las áreas de poder, sí se percibe un incremento del volumen de quienes están convencidas e intentan alcanzarlo.

   Estamos en momentos duros, de mucho trabajo. Pero también en un momento dulce en términos de sororidad, que las mujeres debemos aprovechar para seguir *“empujando el techo para arriba”*.

5. Formación hasta la enésima potencia. Lo que nos va empoderar realmente es saber que estamos preparadas para ello.

   No debemos contentarnos, tenemos que ir más allá con una formación exquisita y la convicción (y valentía) de asumir el riesgo.

   La seguridad empieza en una misma.

6. Tenemos que superar el principio del “*siempre se ha hecho así”*.

   No cambiar la manera de analizar las cosas tiene consecuencias nefastas. Hay que hacer *“pedagogía de la mirada”*, estar atentas, vigilantes, pues la realidad es muy compleja y eso hace que, necesariamente, existan varias formas de hacer las cosas.

7. Es importante el respaldo de los poderes públicos, y el de los hombres; pero la red de apoyos, que entre todas debemos tejer, resulta fundamental para alcanzar mayores cotas de poder.

La sororidad no suma, sino que multiplica.

8. Cuando tras formarnos y conciliar vida personal y familiar llegamos a las áreas de poder, tenemos que pensar en cómo transformar las cosas.

   No todas tienen las mismas posibilidades de prosperar, por las condiciones laborales a las que se ven abocadas. Por eso, hay que trabajar para ampliar el éxito y hacerlo más inclusivo, para que toda la población pueda llegar al mismo en sintonía con una auténtica igualdad de oportunidades.

   Cuando una mujer se presenta a una lista electoral y tiene posibilidades de gobernar, se encuentra con unas estructuras que condicionan los procesos de decisión, que dificultan el cambio. Muchas, al acercarse a esas áreas de poder, optan por mimetizarse con esos entornos para "sobrevivir" y permanecer en los mismos.

   El reto es llegar a los espacios de poder para transformar las cosas. Y por eso, cuando las mujeres llegamos a esas áreas o esferas de poder, tenemos que incidir en estas cuestiones.

9. Respecto a los liderazgos y las cualidades que muchas veces identificamos e incluso reivindicamos como femeninos, debemos superar la construcción de ideas basadas en estereotipos.

   La firmeza, pero también la empatía, deben estar presentes en un líder, sea hombre o mujer. El objetivo del liderazgo es procurar el bien común.

   Hay que huir de la idea prototípica de "superwomen" y evitar el desgaste de la mujer, a quien se le exige tener que estar continuamente brillando (para demostrar su valía).

10. En toda carrera hay dos momentos clave para una mujer: antes de ser madre y después de serlo.

    Las empresas tienen que diseñar e implementar políticas decididas y que apoyen el desarrollo profesional.

    El networking se hace tras el trabajo, en momentos que coincide con las obligaciones familiares, tradicionalmente asumidas por las mujeres.

11. Respecto a la juventud, se advierte de un cierto riesgo de involución, ya que las nuevas generaciones no han percibido el ambiente reivindicativo y revolucionario de otras épocas. Muchos viven desconectados de los acontecimientos políticos que se producen en su entorno.

    Ese riesgo de involución también está presente en la percepción que la juventud puede tener respecto a la posición de la mujer.

    No obstante, en determinados sectores, como en el del "influencer marketing", las jóvenes salen de la universidad con mucho empuje, con muchas ganas de provocar un cambio.

    Precisamente, en el ámbito de las Redes Sociales, que han cambiado las reglas del juego horizontalizándolo todo, se percibe una reivindicación por parte de los jóvenes, de hacer cosas que realmente generen un impacto positivo en su entorno, que valgan la pena.

12. La 4IR va a perjudicar sobre todo a las mujeres.

    La pandemia ha demostrado que muchísimas mujeres pueden quedar descolgadas: muchas ni siquiera saben acceder a una notificación electrónica.

    En Cataluña el sector TIC representa el 13% del PIB. Además, se prevé un crecimiento sostenido del mismo de un 5% durante los próximos años. Sin embargo, la presencia de la mujer es del 17%, y si nos fijamos en el perfil de tecnólogos, dicho porcentaje se reduce hasta el 8,6%.

    Los números son demoledores. No estamos en el sector. Aunque ya existen grupos de trabajo enfocados en revertir dichas cifras.

    Tenemos matriculadas un 20% de mujeres en el ámbito TIC; aunque si se trata de un área relacionada con la salud o el marketing, el porcentaje se eleva hasta el 30%.

    Lo positivo es que se trata de un sector emergente en el que hay mucha demanda.

    Es muy importante que la mujer esté presente en las tecnologías del futuro y domine el lenguaje tecnológico. Pues se tiene que diseñar teniendo en cuenta las necesidades específicas de la mujer.

13. Desde el punto de visto económico, nuestra actual forma de medir las cosas muestra que los hombres tienen una mayor presencia en actividades donde el efecto multiplicador es aparentemente mayor. Mientras que las mujeres se concentran en actividades cuya aportación al PIB es menor.

    Por eso, hay que hacer una contabilidad distinta y más social. El cuidado de ancianos, por poner un ejemplo, tiene también un indudable valor y hace posible que otras personas actúen en otros ámbitos, contribuyendo por tanto al valor económico que éstos generan.

14. En función de cómo sea el urbanismo de una sociedad, mejor le irá en términos de desarrollo y ciudadanía.

    Actualmente, el 50% de la población vive en ciudades. Porcentaje que se incrementará hasta el 70% en un futuro no muy lejano. Concentrados, además, en un espacio que en conjunto representa el 2% del globo terráqueo.

    No podemos dejar que las ciudades crezcan de cualquier manera. Tenemos que descarbonizar la economía, que sea más respetuosa con el medio ambiente. Europa es quien está liderando este debate a nivel global, aunque solo somos responsables del 10% de las emisiones del planeta. Por eso, es un debate en el que no podemos ir solos, sino que se debe plantar globalmente.

    Debemos abrazar las nuevas tecnologías. No nos podemos quedar atrás en términos de cohesión social. Una ciudad no será exitosa si no crea oportunidades para todos.

15. La pandemia ha servido para tomar conciencia e impulsar muchas medidas en perspectiva de género en las empresas, como el teletrabajo o la visualización de la mujer.

    Asimismo, la obligatoriedad de los planes de igualdad está ayudando mucho a impulsar la igualdad de género en las empresas.

16. Nos encontramos en un momento sin precedentes, tras una pandemia, en mitad de una guerra en pleno corazón del continente europeo y con una galopante crisis energética que debe hacernos reflexionar sobre muchas cosas.

    Son tiempos de retos globales, de gestionar la vulnerabilidad en tiempos de crisis.

    Más del 60% de las personas refugiadas en el mundo (100 millones) son mujeres, y muchas de ellas han sufrido situaciones de violencia o discriminación por motivo del género.

    Como dijo Simone de Beauvoir *"bastará una crisis económica, política o religiosa para que los derechos de las mujeres vuelvan a ser cuestionados".* En este sentido, los derechos de las mujeres nunca deben darse por sentados, sino que hay que reivindicarlos y defenderlos de manera continua.

    Afganistán e Irán constituyen ejemplos de la vulnerabilidad sistemática de los derechos de las mujeres. El testimonio de la Jueza afgana Friba Quraishi ha sido revelador, pues cuando los talibanes accedieron al poder, 70 mujeres juezas perdieron sus trabajos.

17. Ante el panorama internacional actual los mecanismos multilaterales deberían tener un papel más activo.

    Disponemos de diferentes instrumentos y organizamos internacionales. Conocerlos puede ser un primer paso para mejorar la eficacia de los mismos, especialmente en lo que se refiere al avance en los derechos de las mujeres y la infancia.

Ciertamente, ha sido un Congreso intenso y necesario, en el que, además, y como novedad respecto a ediciones anteriores, ha contado con la participación también de los hombres. Todos y todas han coincidido en la igualdad como un valor propio de una sociedad moderna y del siglo XXI, que hay que reivindicar.

Como broche de cierre y atendiendo a las palabras de la *Excelentísima presidenta del Congreso de los Diputados de España,* ***Doña Meritxell Batet,*** no podemos sino cerrar este *excursus* con algunas de sus destacadas reflexiones. A saber: pese a los grandes avances experimentados en los últimos cincuenta años… la igualdad plena, condición *sine qua non* para una sociedad justa, dista mucho de haberse alcanzado como demuestran brechas todavía abiertas en: comparativa de salarios, techos de cristal, reducción del número de mujeres en consejos de administración, violencia de género y relaciones de dominación, etc. De ahí, su satisfacción por la realización de todo tipo de actividades que se incardinen a revertir la realidad expuesta, en el marco del Objetivo de Desarrollo Sostenible n. 5 de la Agenda 2030 de las Naciones Unidas y, en especial, a este tipo de foros desde los que, expertas en la materia, trabajan hacia una plena igualdad y valores de género, para una sociedad más justa presente y también futura, allanando la brecha de la plena igualdad a nuestras pequeñas.