

TAX JUSTICE ISSUES IN THE EUROPEAN UNION

CUESTIONES DE JUSTICIA TRIBUTARIA EN LA UNIÓN EUROPEA

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Abstract: One of the basic preliminary issues that would contribute to a better development of EU Tax Law should consist on a definition, within its own judicial discipline, of the material principles of Tax Justice. We cannot expect to make progress in the technical development of the community tax rules and in the enlargement of their scope of action, without having previously defined certain taxation parameters. These, in turn, could be seen as a reassurance by the taxpayers of the various Member States of the European Union regarding its tax rules. It should be able to define some principles that were somewhat similar to those included in the Constitutions or the Constitutional Law of the various member States.

Keywords: law, European Union, states, tax justice, European taxpayers.

Resumen: Una de las cuestiones preliminares básicas que contribuirían a un mejor desarrollo del Derecho Tributario de la Unión Europea, sería la concreción de una definición, sin perjuicio de su propia disciplina jurisprudencial, de los principios materiales de justicia tributaria. No podemos pretender progresar en el desarrollo técnico de las normas tributarias comunitarias y en una ampliación del alcance de su actuación sin haber definido previamente ciertos parámetros tributarios. Éstos, a su vez, podrían verse como una garantía para los contribuyentes de los Estados miembros de la Unión Europea con respecto a sus Ordenamientos jurídico-tributarios internos. Esto podría desembocar en la definición de algunos principios que en cierto modo serían paralelos a los recogidos en las Constituciones de los Estados miembros.

Palabras clave: derecho, Unión Europea, estados, justicia tributaria, contribuyentes europeos.

Summary: I. Parameters of Tax Justice Regarding Indirect Taxation in the Context of the EU. II. Additional taxation and high public revenues. III. Right of ownership and tax justice. IV. EU Tax Law and ban of confiscation as regards tax matters. V. Non confiscation in tax matters and fundamental right to private property. VI. Private property in the EU Charter of Fundamental Rights and the material principles on Tax Justice. VII. Rational solutions. VIII. Excise duties. IX. Realization of the parameters of the current non-taxation purposes. X. Ethics and Environmental Tax Law from a globalized perspective. XI. States, Governments, Law-makers and taxpayers. XII. Courses of Action. 1. Preliminary considerations. 2. State Level. 3. European Union Level. XIII. Case-Law Considerations. XIV. The Prominence of Certain Taxes. XV. The Different Degree of Realization of the Material Principles of Tax Law in the Various EU Member States. XVI. The Idea of an Ignored Progressive Taxation before the Development of Indirect Taxes in the Tax Policy of the EU. XVII. Conclusions.

I. Parameters of Tax Justice Regarding Indirect Taxation in the Context of the EU

1. In the tax policy of the European Union development without a previous delimitation of the basic parameters of Tax Law cannot exist. The material principles of tax law to take into consideration, regarding the European Union judicial discipline, should never have a smaller reach than the principles applied in the various member States.

2. In spite of the fact that almost all the European Union member States have similar principles of tax justice, there is not an express specification about them in the Primary Law of the Union. The institutions of the European Union have some tax competences given by their member States, specially highlighting fiscal harmonization of certain state taxes. The tax harmonization directives, despite this lack of express specification, cannot forget these principles of tax justice.

3. The extra-tax or environmental perspective cannot be used to completely shut down or disregard the material principles of Tax Law. Especially, this perspective cannot be used to reach excessive taxation. The argument of the environmental taxation of hydrocarbons has been used to increase the fiscal pressure over the gasoline until a point where its legitimacy should be discussed, not only from the constitutional point of view, but also from the European Union Treaties. Individual States are not the only ones responsible for this situation but also European Union institutions are, since the tax on mineral oils has been harmonized by European Union directives.

4. Hydrocarbons represent one of the fields in which multi-taxation affects the most. It is necessary to delimit that problem in this context, by determining its own limits, at both internal and international levels, thus providing an answer to its current perspectives, particularly in the European context. In spite of the fact that almost all the European Union member States have similar principles of tax justice, there is not an express specification about them in the Primary Law of the European Union. The institutions of the European Union have some tax competences given by their member States, specially highlighting fiscal harmonization of certain state taxes. The tax harmonization directives, despite this lack of express specification, cannot forget these principles of tax justice.

5. Although some taxes are described by the legislator as environmental taxes, with the purpose of reducing CO₂ (carbon dioxide) emissions, the observance of their structures reveals that their principal purpose is to obtain public revenues. With the excuse of environmental taxation, there are some taxes with the single objective to obtain high public incomes.

6. The blame for this situation lies with Member States and European Institutions, because energy taxes are harmonized by directives at European level. So we have to check if this kind of taxation is against tax justice principles. The problem is that in the European Union a definition of these principles does not exist. Nevertheless, in European Union Law the property right exists as a fundamental and human right. We have to analyze if this kind of taxes represents (or not) an infringement of the property right as the origin of some tax justice principles.

II. Additional taxation and high public revenues

7. Sometimes, on the pretext of “additional taxation”, certain taxes are used only to achieve high public revenues. Certain taxes are presented by the tax legislator as environmental taxation, aimed at reducing emissions of CO₂ (carbon dioxide), although their structure seems to indicate that at the end their main purpose is not this, but to get more public revenues.

8. For example, think about the excise duty on hydrocarbons, with regard to the taxation of petrol and diesel fuels. The consumer is to pay indirectly an amount greater than the value of the product

through taxation. Therefore, the consumer when buying gasoline, pays out a price that is the sum of the value of the product and the levy, which represents most of the final amount, including the excise duty indirectly charged, and the Value Added Tax.

9. Individual States are not the only ones responsible for this situation but also EU institutions are, since the tax on mineral oils has been harmonized by EU directives. However, after all, the Union with this type of tax rather than thinking about environmental protection has mainly thought to protect free competition in the European petrol and diesel market, with the aim of ensuring that the final price of this product would not be too different from one Member State to another. The EU sets a rate or minimum tax load, which may be increased by the Member states.

10. Pollution control should be achieved mainly through tax breaks for biofuels, and not so much, as specified above, with exorbitant tax levies on still needed fuels.

11. Such high taxation on petrol and diesel will eventually cause a damaging effect on the people living in areas where there are not many opportunities for public transportation, compared to the inhabitants of big cities. Hence the residents of rural areas are going to pay for this taxation.

12. It has not been proven at all that a higher tax levy corresponds to lower fuel consumption. We are talking about products which cannot be set aside in the current way of life. Only the economic crisis, with a decrease in economic, commercial and industrial activities, has succeeded in decreasing the consumption of these products. Not even the rise in the oil price can considerably reduce fuel consumption; neither could an increase in taxes could actually reduce it.

13. Then we should wonder whether a tax which is so high is contrary to the material principles on tax justice. The problem is that in European Union Law there is not a definition of the so-called principles involved. However, in this Law, there is a consecration of the right to property as a fundamental and human right¹. Therefore, we should analyze if these cases of high tax levy represent or not a violation of the right to property, a right from which in some states the principles of tax justice are deduced.

III. Right of ownership and tax justice

14. The search for tax justice is a pending issue in the process of European integration. However, this lacuna may make it difficult for such integration to be built on sufficiently firm legal and economic bases. Therefore, the principles of tax justice in European Union Law are still a not fully explored subject of investigation.

15. The institutions of the European Union hold a series of taxation jurisdictions granted by Member States, among them there is particular harmonization of certain State taxes.

16. The constant tension between direct and indirect taxes affects socio-economic policy, so that it is appropriate to identify the constitutional and legislative principles that could in some way limit the role of the latter in comparison to the former, and find their basis in EU Law.

17. Even though in most EU Member States the material principles of tax justice correspond in their essential content, to the Primary EU Law, an explicit statement of those principles does not exist.

¹ Regarding the human rights discipline on a tax law standpoint, see M.T. SOLER ROCH, *Deber de contribuir y derecho de propiedad en el ámbito de los derechos humanos*, Lección Inaugural, Curso Académico 2011-2012, 2011, Universidad de Alicante, p. 5.

18. In Spain², the study of Tax Law has focused on the primacy of the principles contained in paragraph 1 of Article 31 of the Constitution: the tax justice of material principles. Article 131 of the Spanish Constitution, at the end of paragraph 1, in relation to income and wealth, proclaims “its fairer distribution”. This final declaration sanctions Spain as a “social and democratic Constitutional state”, in paragraph 1 of Article 1 of the Constitution. This suggests that the nature of the tax and social justice of our state, often poorly analyzed, instead was the object of the first precepts of the Constitution.

19. Reading in conjunction Articles 1.1, 31.1 and 131.1 of the Constitution, it is inferred that in a social and democratic constitutional state redistribution of wealth can be implemented through public revenue and expenditure. For this reason, before exorbitant fiscal pressures on goods and products, for which the price/value of the asset becomes lower than the taxes, there is the need to find a constitutional provision that would prevent such excesses.

20. All this forces us to say that in tax matters we must respect the right to private property, questioning the maximum tax levy on property, also in relation to the acquisition costs of goods and products.

21. It is obvious that in order to consume a good it is necessary to acquire it: the problem arises when the taxation on a good or product obstructs the possibility of acquisition disproportionately and unlawfully. One more clarification, when it comes to property, the mind turns to the traditional patterns of property of real estate; instead, it is necessary to think that property is a concept applicable to any type of product, since, in principle, in order to consume, you must first purchase the property. Therefore, we cannot limit ourselves to state legislation, but must take into account the impact on EU Law, as most of the indirect taxes are harmonized by the Community.

22. The concept of non-confiscation does not explicitly appear in the European Community discipline, although it should be a fundamental right sanctioned not only in the Constitution, but also by the European Community discipline of fundamental rights.

23. The crisis experienced by the European and world economy has highlighted the need for closer economic integration between the Member States of the European Union. There are two essential tools to achieve a real economic integration: monetary policy and tax policy. In monetary policy matters, greater integration in the Euro zone and a major limitation of the public deficit has been reached. In fiscal policy, the rule of unanimity in tax harmonization matters is still applied. Thus, only with the unanimity of the representatives of the Member State Governments is it possible to adopt the directives on tax harmonization. This lack of democratic legitimization in the field of tax harmonization, which does not depend on the will of the Parliament elected by European citizens, renders even more real the prediction by the material principles of tax justice as a limit and guarantee in the tax harmonization for EU Member State taxpayers, by virtue of the primacy of its Law with respect to the Law of the Member States. Pursuing the contemplation of the material principles of tax justice in tax harmonization seems a necessary step for the extension of the powers of the European Union in relation to the tax harmonization mentioned.

24. Then, it must be emphasized that, within the Member States, the development of the material principles of tax justice occurred mainly with regard to direct taxes. By contrast, the powers of EU institutions in the field of tax harmonization essentially concern indirect taxes. Thus, the prediction of the material principles of tax justice with respect to tax harmonization would result in the implementation of these principles with regard to indirect taxes.

25. There is no express provision for such material principles of tax justice in the Primary Law of the European Union, though, as Bosello said, with regard to EU member states “The constitutional

² With respect to the Spanish legal reality, see Y. MARTÍNEZ MUÑOZ, E. GIL GARCÍA, J. MARTÍN FERNÁNDEZ, F. ALONSO MURILLO, National Report of Spain, *Observatory for the Protection of Taxpayers' Rights*, IBFD, 2018, p. 1.

principles that inspire the tax legislation in individual States are substantially the same”³. However, some of these principles might be inferred, as mentioned, from the consecration of the right to property as a fundamental right in the Primary Law. In a way, it would be a parallel process to that achieved by the Member States, which have derived some of these principles from the provision of property rights in their relative national Constitutions⁴. This approach would allow observance of the principles of economic capacity and especially the principle of non-confiscation.

IV. EU Tax Law and ban of confiscation on in tax matters

26. As a first approximation, we could define the principle of non-confiscation as the duty of the tax legislator not to apply taxes that cause the cancellation of the economic capacity of the taxpayer, leading to unreasonable taxation. For this reason, non-confiscation could be seen as a manifestation of the right to private property in the tax field.

27. Article 31 of the Constitution, paragraph 1, provides that the tax system cannot result in the confiscation of property. At the same time, the tax system should be set according to the parameters of equality and progressiveness, the “guiding” principles of it. On the other hand, Article 33 guarantees the right to private property and shows at the same time its social function. This social function can be observed from many points of view, one of which, without a doubt, is the duty to contribute.

28. The doctrine, though with varied forms, has recognized the link between the ban on confiscation and the right to private property⁵.

29. Both concepts are defined in two different precepts of our Constitution. The question should be whether this means that they have different or distant meanings, when we consider tax matters. In our opinion, the answer to this question must be negative, and a link between the two concepts or ideas has to be recognized.

30. From a purely technical legal point of view, in a more rigorous and systematic way, it would not be possible to think that two provisions can say the same thing, because one of the two would be unnecessary and normally the legislator, or in this case the constituent, does nothing useless. Thus, one might say that two different rules have to identify two different concepts.

31. The concept of private property is actually a general concept that is applicable in all branches of law, and thus in tax matters. If so, you might think that the general consecration of the right to private property would be sufficient to prevent taxes taking on a confiscatory character. So, what advantage would there be to have an express provision of non-confiscation? Would it have a different meaning?

³ F. BOSELLO, “Costituzioni e tributi negli Stati della Comunità economica europea”, *Rivista trimestrale di Diritto e procedura civile*, 2, 1959, p. 1513.

⁴ An important benchmark about comparative law of tax justice principles could be the German law. In this respect, regarding the German constitutional case law see P.M. HERRERA MOLINA, “Una decisión audaz del Tribunal Constitucional Alemán: el conjunto de la carga tributaria del contribuyente no puede superar el 50% de sus ingresos. Análisis de la Sentencia del BverfG de 22 de junio de 1995 y de su relevancia para el ordenamiento español”, *Impuestos*, II, 1996, p. 1033.

⁵ C. PALAO TABOADA, *La protección constitucional de la propiedad privada como límite al poder tributario*, in *Hacienda y Constitución*, Madrid, Instituto de Estudios Fiscales, 1979, pp. 319-320; G. Núñez Pérez, “La prohibición constitucional de tributos confiscatorios: dos supuestos”, *Impuestos*, 22, 1991, p. 8; L. Sánchez Serano, “Principios de Justicia Tributaria”, Capítulo IV, *Manual General de Derecho Financiero*, Tomo Segundo, *Derecho Tributario. Parte General*. Granada, Comares, 1996, pp. 91-92; G.J. Naveira De Casanova, *El principio de no confiscatoriedad. Estudio en España y Argentina*, Madrid, McGraw-Hill, 1997, p. 448; L.M. Cazorla Prieto, *Derecho Financiero y Tributario (parte general)*, Cizur Menor, Aranzadi, 2000, p. 112; F. García Dorado, *Prohibición constitucional de confiscatoriedad y deber de tributación*, Madrid, Dykinson, 2002, p. 90; M. Poggioli, *Indicatori di forza economica e prelievo confiscatorio*, Padova, CEDAM, 2012, p. 105.

32. The jurisdiction of European Union institutions on taxation essentially concerns indirect taxes, although there are certain Community provisions relating to direct taxes. The Law under the legislation enactment of the EU institutions has to respect the postulates sanctioned by the regulations of the Primary Law of the Union. Actually, we do not find, in the cited Primary Law, an express manifestation of the essential principles in the field of tax justice. However, nothing prevents the principle of non-confiscation being inferred from some provisions of the Primary Law of the European Union, and in particular from the right to private property.

33. Basically, as concerns tax matters, it is possible to identify a dual line of protection against violations of these principles, deriving both from state regulations and from Community regulations. Consequently, in the presence of violations of these principles, alongside the possibility to bring the action before the Constitutional Court of each state, within the Community, the Court of Justice of the European Union would have competence on the matter of tax harmonization or proper Union resources.

34. A first analysis could lead us to define the principle of non-confiscation in tax matters as the duty of the tax legislator not to set taxes that lead to a levy which can wipe out the economic possibilities of the taxpayer, and that would result, therefore, in unreasonable taxation.

35. When we speak of a tax that wipes out the economic possibility of the taxpayer we do not intend to refer to a tax which allows the taxpayer to have only the minimum subsistence. As a matter of fact, we believe that in order for the levy to be legitimate, what is left in the hands of the taxpayer after the levy should be as close as possible to the economic result of his or her productive capacity (meant as a capacity to produce revenue) and never less than the amount of the tax collected in respect of the participation in the maintenance of public expenditure. In this regard sometimes the doctrine, in our opinion, has been extremely restrictive in identifying the economic resources that should be legitimately left over for the taxpayer as a result of the tax levy.

36. As we will see later, the consecration of the right to private property sanctioned in the Charter of Fundamental Rights of the European Union goes in this direction.

V. Non-confiscation in tax matters and the fundamental right to private property

37. In our opinion, in virtue of what was claimed above, non-confiscation on taxation matters presents itself as a manifestation of the right to private property⁶ in the tax matter.

38. The Constitutions of European States expressly consecrate the fundamental right to private property in the Tax Law. We believe that the ban on confiscation should be linked to the right to private property.

39. Yet, we must wonder whether the right to private property, which is a general right valid for the different branches of the legal system, may also be relevant in the field of taxation. If so, it might be thought that the general consecration of the right to private property would be sufficient to prevent taxes from producing effects of confiscation.

40. Non-confiscation can be understood as a limitation to taxation which presupposes respect for private property in the Tax Law.

41. Private property plays a social function, and Tax Law must implement a redistributive function of the wealth of a social and democratic State of Law. Therefore, although the tax levy ne-

⁶ The right to property is born in the civil field, it is consecrated in the constitutional field and it is used in the taxation field. On the relations between civil law and tax law, see M.C. FREGNI, *Obbligazione tributaria e codice civile*, Torino, Giappichelli, 1998, pp. 6-9.

cessarily implies a limitation of private property, that levy, in order to be legitimate, cannot completely empty of content the right to property. The levy may limit private property, but it should not completely destroy its contents. In other words, the tax levy may limit the property only up to a certain limit. What is this limit? The one determined by a threshold of maximum taxation which, if exceeded, would affect the very nature of property debasing the private-law content.

42. To put it differently, State constitutions give property an essentially private-law qualification. This is to say that the property and its use must be valid to a greater extent for the taxpayer than for the State. If not, the provisions of the right to private property in the constitutions would have no sense.

43. Private property of the taxpayer cannot have too public a projection; the goods and rights of the taxpayer should never be at the service of the tax authorities to a greater extent than at the service of the taxpayer. This rule would be violated by a tax system that imposes a confiscatory levy type.

44. We could just say that if the State⁷ took over 50 percent of the income, we would be in the presence of confiscatory taxation, as in the pockets of the taxpayers there would remain a *quantum* inferior to the revenue of the State. The same thing would occur, in consumption taxes, if in purchasing a good, the taxpayer ended up *sustaining* tax of more than half of the final price of the goods (tax included); for example, if the product cost 100 € and more than 50 of these corresponded to value added tax and excise duties, we would be dealing with a confiscatory situation, in principle.

VI. Private property in the Charter of Fundamental Rights of the European Union and the material principles on Tax Justice

45. The prohibition on confiscation in the European tax system could be derived from the protection of private property in the European Union. Within Union Law, there is a consecration of the right to private property although not even in this field is protection of the principle of non-confiscation in the tax system expressed. Consecration of the right to private property as part of European Union Law, can be identified from jurisprudence of the EU Court of Justice, which has claimed that the general principles and fundamental rights in the Constitutions of the Member States are an integral part (also) of European Union Law. In addition, there is the consecration of the right to private property contained in the European Charter of Fundamental Rights. In this Charter, the right to property is covered aseptically, without being classified as private. Yet, the context, in which it appears, leaves no doubt that the meaning of the EU provision refers to private property as the essential core of the right to property.

46. The draft treaty by which the intention was expressed to subscribe to a Constitution for Europe, later replaced by the Lisbon Treaty (from which the content of this Charter has been deleted), sanctioned in Paragraph 1, Article II-17, stated that: Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as it is necessary for the general interest. In any case, it is possible to find a similar text in paragraph 1 of Article 17 of the Charter of Fundamental Rights of the European Union, both in the 2000/C 364/01 version, and in the 2007/ 303/01 version, solemnly proclaimed on 12th December 2007, the day before the signing of the Treaty of Lisbon. Thus, the content of the mentioned Charter has attempted to incorporate the text of the draft of European Constitution, which never came to light. However, although this has not been well understood, the Treaty of Lisbon, as we shall see below, provided an express reference to the provisions of the mentioned Charter. On the other hand, in the fifth paragraph of the Preamble of the Charter it is stated that: This Charter reaffirms, with due regard for the powers and tasks of the

⁷ And, of course, other public bodies.

Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on the European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.

47. Together with this, and well beyond Community legislation, it must be noted that Additional Protocol 1 of the European Convention on Human Rights⁸ establishes in the first paragraph of Article 1, that “Every natural or legal person is entitled to the peaceful enjoyment of his possessions” stating later that “No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law”. The second paragraph of the same Article provides that “The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”. This article is entitled with the inscription “Protection of Property”⁹. The fact that, this article, has to do at the same time with private property and taxes, does not mean that taxes are able to render property meaningless, as this would be, obviously, against the recognition of the protection of private property sanctioned in the very Convention.¹⁰

48. At the same time, it must be noted that the Treaty on the European Union already established in the first paragraph of Article 6, that “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”. It is then stated in the second paragraph of the same article that “The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law”. Paragraph 8 of Article 1 of the Treaty of Lisbon (signed in Lisbon on December 13 of 2007), which amended the Treaty on the European Union along with the founding treaty of the European Community, rewrote article 6 of the Treaty on the European Union. Following this change, in the first line of paragraph 1 of Article 6 of the Treaty on the European Union it was stated that “The Union recognizes the rights, freedoms and principles enshrined in the Charter of Fundamental Rights of the European Union on 7 December 2000, as adapted on 12 December 2007 in Strasbourg, which has the same legal value as the Treaties”. In paragraph 2 of the new version of Article 6 it is also stated that “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties”. Finally, paragraph 3 of the amended Article 6 of the Treaty states that “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”.

49. Focusing, specifically, on the issue of fundamental rights with regard to the right to private property, it is useful to start from the Judgment of the Court of Justice of the European Union of 13 December 1979 (Case 44/79), and the more recent judgment of the same Court of 10 July 2003 (Joined Cases C-20/00 and C-64/00). In these judgments it was declared that “fundamental rights form an inte-

⁸ A treaty provided for also in the Treaty of Lisbon, as we will see.

⁹ In this regard, see, inter alia, L. SERMET, “The European Convention on Human Rights and property rights”, *Human rights files*, n° 11 rev., 1999, p. 25; R. ERGEC, “Taxation and Property Rights under the European Convention on Human Rights”, *Intertax*, Vol. 39, n° 1, 2011, p. 2; A. QUINTAS SEARA, “The protection of taxpayers’ property rights in light of the recent ECtHR jurisprudence: anything new on the horizon, or just more of the same?”, *Intertax*, Vol. 42, n° 4, 2014, p. 218.

¹⁰ Among the explanations on the Charter of Fundamental Rights (2007/C 303/02), in the penultimate paragraph of the explanation on the “right to property” it is stated that this law has the same extension and meaning as the one guaranteed by the ECHR.

gral part of the general principles of law which the Court ensures compliance and that, for that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have signed or cooperated in,” adding further that “ECHR has, in this regard, special significance”. It is necessary to highlight, along with the other fundamental rights thus protected, the importance of the right to property, and also, according to the quoted judgments, that in the exercise of fundamental rights some restrictions would be allowed only if “they do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights.”

50. Although in European Union Law the principle of non-confiscation in Tax Law is not expressly sanctioned, the right to private property is definitely recognized. Prohibition for Community rules to imply confiscatory situations in Tax Law therefore arises from the will to enforce the respect of the right to private property, which is also enacted, as we have stated, by the Community legal discipline. Moreover, contemplation of a fundamental right like this must be considered part of the Primary Law of the European Union, to which its derived legislation must necessarily be subordinated.

51. It follows that the Tax Laws enacted by the Community institutions, whether they are intended to regulate the European Union’s own resources or to regulate EU tax harmonization, will never produce a content that produces confiscation effects in tax matters; if that were the case, it would violate a fundamental right of the European Union.

52. As long as in the Primary Law of the European Union, there is not an express provision of the material principles of tax justice that could protect European taxpayers and curb the excesses of tax harmonization, protection of taxpayers will not rest on solid foundations. To ensure the protection of the taxpayer and to build solid fiscal harmonization it is necessary to establish the principles of the Primary Law of the Union. To do this a reform of the EU treaties is needed. Currently, within the Primary Law of the European Union the main treaties are the Treaty on European Union and the Treaty on the Functioning of the European Union. In view of its content, it could be said that the latter treaty is the most likely to provide the express statement of the material principles of tax justice in European Union Law.

VII. Rational solutions

53. Under the legitimacy of some goal framed in the Constitution, although unrelated to the need for tax revenues, occasionally legislature reaches levels of indirect taxation apparently too high. Thus, it is necessary to determine what quantitative limit can be derived, even in such cases, from the material principles of tax justice. Defining limits in this regard may help to curb indirect versus direct taxation, making our tax system more progressive and thus more fair, in light of the constitutional principles of tax justice.

54. Article 31 of the Spanish Constitution, a predicate of the tax system, expresses the principle of non-confiscation, which would play its role in relation to this system as a whole, beyond all taxation.

55. However, at the same time we have seen the bond that exists between the ideas of non-confiscation in tax matter and of private property. Their interpretation will always have to be realized from the perspective of justice, since this, beginning from the title of “just” which appears explicitly in the aforementioned precept of the Constitution, becomes a value in itself on tax matters, solving possible doubts in the articulation of the other Principles. However, no matter how uncertain in itself the idea of justice may be, there are some elements which obviously could not be disregarded as a whole, such as the ideas of logic and rationality. The “just” will be increasingly likely to appear as illogical or irrational.

56. As we said, in relation to the tax system, we talk about “system” and “just” in our Constitution. Those requirements, contained in the first paragraph of art. 31 of the quoted text of the Constitution, can be satisfied only by the rationality of the organization of the different Tax Laws.

57. In the analysis of the idea of rationality in relation to the tax system it is necessary to start from the considerations by Sainz de Bujanda, which necessarily must be considered here. This scholar distinguishes between an “internal rationality” and an “external rationality.” He indicates that “a tax system is rational only if, giving internal rationality to each individual tax; it aims to associate it with external rationality, that is, its ability to combine harmoniously with the remaining charging procedures that integrate together.” This author stresses that “the external rationality of a tax is its capacity to integrate into the system, without breaking the rationality of the latter, which happens if any of the taxes which compose it, added to the others, destroys the basic objectives of the system, and so violates the general principles of tax justice.” He adds that “the technique to achieve this external rationality is that the legislator, when he determines any tax or substantially changes an existing one, verifies with rigor if it may be integrated in the whole without problems.” All this leads to the affirmation that “rationality can-not in any way be separated from the value of “justice” nor from other requirements associated with this, such as security and certainty.” In this way, this author notes that “a tax system, in fact, is rational only if it is right and it can be right only if it conforms to the basic and main regulations of the positive order, contained in the Constitution, and to the general principles of law, principles of natural law tradition”¹¹.

58. These words contain considerations that have necessarily to be taken into account.

59. Compared to the two perspectives of rationality mentioned, internal and external, the latter is the one most directly connected with the idea of the system, even though neither of them can be recognized of course in the realization of tax system.

60. If we really want the tax system to be precisely this, it cannot only consist of an accumulation of taxes, but also of harmonious interweaving of them. To the extent that it is not a mere sum of taxes, but also a harmonious set of these, rationality will be much greater and, in its working, as we have seen, the justice which must prevail in the tax system will be even greater.

61. Analysis of whether a tax system as a whole is confiscatory or damages the overall ability of the taxpayer can be difficult. It must start from compliance with the constitutional principles of tax justice of each tax in particular. Later, it has to move on to analysis of conformity with the Constitution regarding the confluences of taxes on the same manifestation of economic capacity and, thus, of cases of multiple taxation on the same taxpayer.

62. From the analysis of a single tax we would move on to the taxes added to it. This allows us a more precise and rigorous review and observation of the justice on tax system justice as a whole. As a result of this analysis specific cases of unconstitutionality could be highlighted or we could understand that there are none. However, what would be proven would be possible situations that, even keeping within the precise limits of the constitution, would come close to the limit of the rationality, the systematic nature, of the good technique and of the order of the tax system as a whole.

63. Therefore, we consider that a useful technique for the analysis of the rationality and constitutionality of the tax system is to begin from the rationality and constitutionality of each taxation and subsequently to move on to investigation of the implications of the technical appropriateness and constitutionality of cases of multiple taxation, as a confluence of certain taxes, thus contributing to the understanding and consideration of a more rational tax system as a whole.

64. It may happen that each aspect of the tax system individually taken, apparently responds to the principle of economic capacity. However, against unreasonable accumulation of taxes, the tax system as a whole could levy on the taxpayer a higher contribution to public expenditure than the one they would pay on the basis of their global economic capacity, reaching confiscatory limits.

¹¹ F. SAINZ DE BUJANDA, *La Contribución Territorial Urbana. Trayectoria histórica y problemas actuales* Consejo General de Cámaras de la propiedad urbana de la Comunidad Valenciana, Valencia, 1987, pp. 5-15.

65. On the other hand, Moschetti explains that elements of rationality are coherence between the objectives that the legislator has set and the means used to achieve these aims, consistency between individual provisions and the system in which the rules are set, proportionality between the means and the purposes, and proportionality between loss of a legal value and satisfaction of other legal values¹².

66. Thus, when the legislator pursues an apparent extrafiscal end, very often it leads to an illogical situation, when the means used do not help to reach that objective, as we have already had occasion to point out.

67. So ideas of rationality and justice should preside over interpretation of the ideas of non-confiscation and private property in Tax Law. In this way, the application of these ideas, which do not prove rational, are unlikely to be considered right.

68. It is very difficult to determine whether the tax system as a whole is or is not confiscatory. In relation to what was said above, all taxes (not only direct ones) above 50% of the total income of the taxpayer would begin in principle to clash with the patterns that today social consciousness would recognize as rational.

69. However, as we said, applying this limit of 50% to the tax system as a whole can be very difficult in relation to the variety of situations that may be occur in real life, and especially compared to combined direct and indirect taxation. A taxpayer may pay tax that is more than 50% of his or her income and in his or her life, not perform actions of consumption that submit him or her to sustain for these a greater tax burden than the value of what he or she buy for consumption. Moreover, we could find other taxpayers whose overall contribution for all direct and indirect taxes does not exceed 50% of their income and for whom it is usual to perform actions of consumption where the tax burden incurred for these is higher than the value of what they buy for consumption.

70. Hence, in the search for demarcation of the principle of non-confiscation, seeking that rationality we talked about and implementing a fair tax system, we have to start through the analysis of every tax and the set of taxes on the same wealth. Then, regarding neither this rationality; nor the tax system as a whole nor any tax considered individually or situations of accumulation of taxes on the same manifestation of economic capacity will prove to be confiscatory or to damage private property rights in tax matters.

71. Consequently, the resolution of situations of conflict regarding non-confiscation in tax matters, complying with the idea of private property in the most rational possible form, should start by examining each tax, determining whether it is confiscatory or not, and then, if not individually found to be confiscatory, we should evaluate the accumulation of tax on a single manifestation of wealth. Later, once its confiscatory nature was determined, its unconstitutionality would be clear, although the tax system as a whole did not reach the limit described above. And, before that, if the tax system as a whole, with a large majority of taxpayers, exceeded the aforementioned limit, the system would largely suffer from being confiscable and thus, unconstitutional, although its taxes or partial accumulations did not give this appearance examining them individually.

72. Specifying all the stated ideas and the limits of what the tax system as a whole can expect, the tax on some consumptions may already be confiscatory. Therefore, in relation to the consumption of each type of good, in particular, we must proceed by determining whether each tax individually considered can be confiscatory and then evaluate the accumulation of taxes, that is, the circumstances of double or multiple taxation on each consumption and in particular whether they can be confiscatory. To this end, neither each tax individually considered nor the set of taxes on consumption of any type of goods

¹² F. MOSCHETTI, "La razionalità del prelievo ed il concorso alle spese pubbliche", *Le ragioni del Diritto Tributario in Europa (Giornate di Studi per Furio Bosello)*, Università di Bologna, 2003, www.berliri.giuri.unibo.it, p. 4.

can be a greater tax burden than the value of what enters the assets of the taxpayer, which is what can be consumed. A violation of this limit implies rupture of the idea of private property. In order to consume it more than twice what enters would outflow. Public finance would take away more than what we have acquired is worth, and property would become more public than private. This would be something irrational and, as such, clearly unfair.

73. According to what has been said, we mean that there should be a limit on non-confiscatory taxation on consumption, and thus respect for the right of private property in this area of taxation, examining it not only in reference to consumption in general in its totality, but also in relation to the consumption of each type of good whose taxation in itself could be identified as confiscatory.

74. Excise duties were born with an intended extra fiscal purpose, looking for a higher tax burden for certain consumptions which the Governments were trying to limit, thus making up for their high social cost or environmental impact. What happens is that this tax burden, higher because of certain specific consumption through excise duties, should be added to the tax burden by consumption itself, as any product or service in general, through Value-Added Tax. What really happens is that in the latter tax you must pay not only for the price of the consumed product itself, but also for the tax burden which has represented the corresponding excise duty, with the exception of the excise duty on certain means of transport.

VIII. Excise duties

75. In the perspective of the EU legal system, the debate concerning the current issues of the excise duties is normally focused on two points. On the one hand, the question is if these indirect taxes are compatible or not with their non-tax rationale of the protection of the environment. On the other, we find the consideration that the lack of a tighter fiscal harmonization of these taxes in the EU could imply an issue for the free competition in the Member States, considering that some differences on the taxation of the energy or of the energetic products between the single States could distort the competition, pushing the companies that have to consume a lot of energy to establish themselves in other countries, where the taxation on the energy is lower.

76. In other cases, however, the creation of new indirect taxes on specific consumptions by the European countries, out of the category of the harmonized excise duties, rises the discussion over this new indirect taxes, concerning their compatibility with the Value- Added Tax, regulated also by the article 401 of the Directive 2006/112/CE of the Council, of the 28th November 2006, related to the common system of the Value-Added Tax. This directive replaced the former Sixth VAT Directive; specifically, the article 401 of the Directive 2006/112/CE replaced the well-known article 33 of the former Sixth VAT directive in a similar way.

77. The EU Commission through different proposal for directives, tried to harmonise the indirect taxes on the circulation of the vehicles in the Union, with the purpose of adapting further these indirect taxes to the protection of the environment, taking into consideration the CO2 emissions of the vehicles. Pursuing the same perspective, the Commission made as well an effort to abolish the registration taxes, but even after a transitionary period, still hasn't reached its goal.

78. At the same time, the EU Commission also tried to raise the minimum harmonized tax rates of the fuels on the tax on hydrocarbons in the Member States, but also this go as hasn't been achieved, yet.

79. Facing some indirect taxes like the excise duties where the tax rate is remarkably high, the lack of a consolidated European doctrine on the subjects of the principles of tax justice and, more specifically, of tax harmonization is even more noticeable.

80. Excise duties were born with an intended extra fiscal purpose, looking for a higher tax burden for certain consumptions which the Governments were trying to limit, thus making up for their high social cost or environmental impact. What happens is that this tax burden, higher because of certain specific consumption through excise duties, should be added to the tax burden by consumption itself, as any product or service in general, through Value-Added Tax.

81. What really happens is that in the latter tax you must pay not only for the price of the consumed product itself, but also for the tax burden which has represented the corresponding excise duty, with the exception of the excise duty on certain means of transport. We would be dealing with a problem in relation with Excise Duties on Fabrication and the Excise Duty on Coal.

IX. Realization of the parameters of the current non-taxation purposes

82. It may be difficult to find an indirect tax that has a purely non-taxation purpose, *i.e.* a tax through which the tax legislator tries to limit, or even remove, the activities harmful for the environment, the health or any other value constitutionally guaranteed. Indeed, the indirect taxes tailored as taxes that have a purely non-taxation purpose, normally, or even primarily, have a clear tax collection function. Among these, many of them apply to products connected to the old tax monopolies existing before the accession of a Member State to the European Communities. In particular, these are products that generate plentiful tax revenues which the tax legislator does not want to lose. In relation to these taxes, therefore, non-taxation models pertaining to the indirect taxes that purely has non-taxation purpose are not in line with the political / social purposes that such taxes should put in place, due to the great role of the taxation and of its collecting tax function mentioned above. In addition, the European Union, when it comes to harmonize the indirect taxes to which the referred products are subjected to, mainly try to avoid problems of tax free competition between Member States instead of finding a really non-taxation purpose. These can only lead to a non-taxation policy without coherency in its development which does not cease to be a mere excuse to keep an excessive taxation.

83. The principles of tax justice should apply also to a tax that has a non-fiscal purpose though this does not always happened. Moreover, the fact that these taxes are usually indirect taxes and that – in these cases – the principles of tax justice do not apply adequately (and even less in the European Law), eliminate useful parameters that could be used for the implementation of these taxes. Also for these reasons, the implementation of a system of taxes that have a purely non-fiscal purpose may be difficult to set up.

84. The non-tax purposes do not have to respect only the constitutional discipline, but also the European one.

85. In most countries, when the tax system becomes confiscatory has not been specified. The few attempts to specify when the prohibition of confiscation is violated have focused primarily on direct taxes, which are those that can be more adjusted to progressivity. The greater weight of direct taxes – mainly of progressive direct taxes – than the indirect ones – essentially proportional – is what can help ensure the tax system as a whole to act progressively. This requires moving towards a specification of the principle of non-confiscatory in relation to indirect taxation, as a limit to this and, thus, as an impulse to greater progressivity of the tax system.

86. In some way it could be said that the legal certainty of the European Union taxpayer does not conform to the schemes of modern constitutional States. The tributary systems of the different States necessarily are shaped from the basis of the principles contained in their Constitutions, essentially their material principles of tax justice. These should be dealt with both in their specific configuration, where appropriate in the corresponding constitutional text, and in the deduction of them made by constitutional jurisprudence, sometimes starting from the constitutional recognition of fundamental rights.

If European Union Law aspires to further development and legitimacy, it should necessarily start from the articulation of principles of tax justice in the discipline of the Union. In the absence of a European Constitution, the deduction of such principles is only possible from the fundamental rights included in the Law of the Union. Moreover, even the failed draft European Constitution did not expressly address this need. Later, in the norms derived from Treaty of Lisbon neither the Treaty of the European Union nor the Treaty on the Functioning of the European Union addressed expressly this need. Only by laying solid foundations in this respect, a harmonized European tax system will be legitimately achieved to be developed on such foundations.

87. The fiscal harmonization in the European Union is principally centred in the indirect taxation. At the same time, the principles of tax justice are found less developed -in the doctrine and in the constitutional jurisprudence of the States- on the themes of the indirect taxes, also considering what happens with the subject of the direct taxes. To this we have to add that neither in the Treaty on the European Union neither in the Treaty on the functioning of the European Union, we find an express consecration of these principles. To all of this we need to think also to the equilibrium that has to exist, for some of the indirect taxes that are subject to fiscal harmonization, to respect both the principles of tax justice and the non-tax purposes of the environmental protection that the institutions are trying to pursue. Against this background, there are not some clear parameters that could be used as limits in the activities of the European Union in this area and the solution could be found in the interpretation of the discipline of the fundamental rights from the taxation perspective. Facing some indirect taxes like the excise duties where the tax rate is so high, is even more evident the lack of a consolidate doctrine in the European Union on the subjects of the principles of tax justice.

X. Ethics and Environmental Tax Law from a globalized perspective

88. Discussing ethics in terms of Environmental Tax Law brings about a much broader thematic scope, such as the connection between Ethics and Rights, Moral Norms and Legal Norms, which already is a difficult topic to deal with. We would obviously be looking for Social Ethics (or a Social Morality) beyond Personal Ethics (or a Personal Morality), but it is not easy to find Social Ethics of wide dissemination. There could be as many Social Ethics as different societies or (as many) as social groups within a society.

89. All this situation becomes more complicated when we look at the International Society, since apart from it being difficult to find shared ethical aspects in the various societies within the various Member States of the International Community, it is also hard to find unequivocal ethical aspects at the (lower) level of geographic areas which group the various Member States.

90. It sometimes seems almost impossible to find common ground in the combination of Ethics and Rights when we add the problems of separating Ethics and Religion and the fact that there are far more widespread religions in the Western world and other religions in the Eastern or South-Eastern world. Whenever some religion does not value the Right to Life enough, without which the rest of the Rights could lose their meaning, it seems hard to think of finding a basic International morality. Thus, it would obviously be more difficult to find an International Law morality and far more difficult to find an International Environmental Law morality.

91. The relationship between the person and the environment is something that can, to a large extent, arise from individual sensitivity, which goes much further than the morals of the International Community's different geographical areas. As a result, a specific social group within a particular geographical area can develop Environmental Sensitivities.

92. Furthermore, the different economic options or economic ideologies and, ultimately, the great options or alternatives to socio-economic policy can indubitably influence the different options for environmental policy.

93. Although globalization is often seen as an economic issue, it could also be seen differently. Thus, it could be considered to be not only economic but also cultural or social. An example for this could be the obviously positive effects of using rightly understood globalization to improve women's rights in some geographical areas at international level.

94. Often, some of the very influential States manage to impose, at a global level, globalized behavioral economics, yet they fail to take into account the importance of environmental sensitivities. Obviously, Environmental protection involves significant costs and an apparent income loss, in appropriate legal and economic terms.

95. But this financial cost is merely apparent and short-term, since climate change impacts can be unpredictable or at least known to be negative, even negative from an economic perspective. Evidently, one of the best future investments will be an environmental investment.

XI. States, Governments, Law-makers and taxpayers

96. The only way to find a meeting place legitimately shared by all within the international community could eventually lead us towards the field of fundamental rights or, at least, as part of these, of those we may rightly call human rights.

97. The tax-paying citizen cannot renounce their fundamental rights. The State has to respect their fundamental rights. Constitutional tradition of fundamental rights fused with the legal corpus of the European Union.

98. The Law-maker can only charge the full weight of environmental tax treatment on the taxpayer to the extent that it respects their fundamental rights. Within these rights we find the right to property.

99. It is the Government's duty to find ways to protect the environment through environmental tax regulation which do not damage the fundamental rights of the taxpayer. Furthermore, excessive taxes normally prove to be ineffective in terms of environmental protection.

100. This is why raising our voices against the current environmental tax regulation should not be considered unethical or immoral, especially since fiscal excesses may involve a violation of the taxpayer fundamental rights. Besides, this in turn frequently involves an infringement of the material principles of tax justice. What may well be unethical or immoral is the attempt to camouflage behind alleged environmental goals what only intends to generate tax revenue. In order to do this, certain services and goods, which the taxpayer finds almost impossible to do without, are heavily taxed, leaving them with no real alternatives.

101. The environmental policies of Governments should move beyond environmental tax regulation, or at least should not have the latter as the main actor in the process, since this has not proved effective in fighting climate change.

102. The powers that be cannot charge taxpayers with an imaginary ethical component based on false environmental extra-taxation. What has been unethical is Law-makers' attitude, which under cover of an alleged environmental aim have been simply trying to obtain easy revenue. The best environmental tax is the one which does not yield any revenue, because this would mean that no polluting taxable event or activity has taken place. If the revenue obtained from taxing a given behaviour or activity detrimental to the environment is small, we can consider it a success because it would involve that the activity in question, which would have damaged the environment, has been rare. However, this is not the idea guiding the Law-maker when they qualify as extra-fiscal taxes the purpose of which is not really to protect the environment but to collect revenue.

103. Consequently, Governments should explore ways to protect the environment and to fight climate change which go way beyond tax-collection, reducing the presence and importance of current environmental tax-regulation, which has proved to be, so far, useless.

104. Is it ethical to charge the citizens with taxes of an apparently environmental nature, when they have no other option but to employ fossil fuel vehicles? Let us think, for instance, in those citizens living in rural areas, away in the mountains, far from major urban centers. Would it be ethical to treat them in the same way than those inhabiting big cities? From a purely technical fiscal perspective, the treatment in both cases should be the same, but the former would be greatly harmed since we would be dealing with an indirect taxation on a specific consumption that they cannot escape or avoid.

105. Couldn't we consider positive, from an environmental perspective, to avoid measures damaging those inhabiting rural areas which should not be abandoned? Not only from a fiscal perspective but from a moral or ethical one, both in an individual and a collective sense, it is necessary to deeply revise the standard parameters employed in environmental tax regulation, or in that tax regulation which is only apparently environmental.

XII. Courses of Action

1. Preliminary considerations

106. Apart from what is determined in every State's Constitutional Law, if the national legislator acts wisely enough in order not to run into over-taxation, situations of apparent violation of material principles of tax justice could be avoided. It is true that when we deal with harmonized taxes according to the European Union directives, when these directives establish a minimum amount for the States to apply as a tariff rate or as charges, and when the State Law adjusts to the compulsory limit, the European Union—and not the relevant Member State—would take responsibility for the possible extra-taxation.

107. On the other hand, it is also true that the Unanimity Rule is legislated in the (community) production regulations, regarding taxes. Therefore, in order to adopt a tax harmonization directive it will have been necessary that every Member State, through their government representatives, has previously agreed to the adoption of the directive in question. Just one Member State opposing to it in the Council of Ministers would be enough to prevent the tax harmonization directive from being passed. A certainly different matter would be the political pressures that, not legally but factually, some Member States may decide to use upon others to influence their decisions regarding the adoption of a directive submitted by the EU Commission. In any case, the EU would be imputed for any over-taxation caused by a minimum set through a tax harmonization directive: a minimum to be applied by member States in the corresponding harmonized tax.

2. State Level

108. If, formally, the responsibility would correspond to the EU, we must not forget what has been explained regarding the Unanimity Rule that articulates EU Law and is required to pass any tax harmonization directive. In this sense, each and every member State would equally be responsible, on a second level, for having agreed in the Council to the approval of the directive. Consequently, it should not simply be a political and economic assessment what every Government must make before making explicit its consent to the application of a directive, but also a legal one, taking into consideration the material principles of tax justice, mostly from the status of those same principles in the State's Constitutional practice.

109. Whenever the State's national legislation establishes, for harmonized taxes, a tax rate superior to the minimum set in the Community's tax harmonization directives, considerably more attention

should be paid. The reason is that the responsibility for that excess will correspond exclusively to the States. The latter will have to make sure that the excess over the Community's minimum does not violate its Constitutional principles of tax justice.

110. In this process of regulatory creation, States must keep in mind that taking into consideration the protection of environmental constitutional interests through extra-fiscality cannot, in any way, totally cancel the –also constitutional– principles of tax justice. And, in connection with these same principles, we cannot forget either that their interpretation according to constitutional jurisprudence is almost more relevant than the literal transposition of those principles in the Constitutional text. A detailed description of such principles is of little use without a committed intervention of the Constitutional Court of each State, an intervention which should be willing to define and specify these principles.

3. European Union Level

111. According to all the above, the best option would be that, in a future reform of either the Treaty of the European Union or, more simply, of the Treaty on the Functioning of the European Union, the material principles of tax justice, to be taken into consideration by fiscal harmonization directives, were explicitly included. Since the fiscal competences of the European Union mostly fall upon indirect taxation, the specificities of the latter within the field of tax justice should be considered.

112. In the meantime, we cannot but deeply explore the field of Fundamental Rights in the EU, mostly through a redefinition of the right to property also addressed towards indirect taxation.

113. Likewise, European Union institutions must improve their production of fiscal legislation, striving for the utmost coherence when combining extra-fiscal environmental criteria with those of competition among States and with the material principles of tax justice. Neither the imperative application of a set of criteria, nor the application of others, may cancel the effects of the principles of tax justice, much less in those cases in which they stem from fundamental rights included within Community discipline.

114. European Union institutions should make possible to visualize, with more clarity and transparency, which are the specific criteria inspiring each tax harmonization directive, and they should also build the latter making sure it coheres with those criteria; the limits that cannot be left void of content cannot be ignored, though.

115. Besides, in the European Union, to the effects here seen, to recall that there is such a thing as the principle of proportionality would be in order.¹³

XIII. Case-Law Considerations

116. I have already suggested that the interpretation and introduction of the principles of tax justice in the Constitutional jurisprudence of each one of the member States of the EU may be as important as the description or consideration of these principles within those same Constitutions. The letter of each one of the Constitutions is as important as the interpretation that the Constitutional Courts of each member state makes of the aforementioned principles.

117. The actual form of the description in writing of such principles will depend on the scope and reach of the social dimension that constitutionally articulates each State as well as on the extent of the tradition of its socio-economic policies.

¹³ Section 5 of the Treaty of the European Union.

118. Occasionally, in those States whose Constitutions hardly make any reference to the principles of tax or fiscal justice we may, on the other hand, find Constitutional jurisprudence which has made a useful and coherent description of those principles. Sometimes this is achieved through the introduction in the Constitution of a fundamental right, such as, for instance, the right to property. In this sense, we can mention, as a relevant example, related pronouncements of the Constitutional Court of Germany.¹⁴

119. On the other hand, a highly detailed Constitutional description of the principles of tax justice is sometimes not adequately accompanied by a sufficient Constitutional jurisprudence. Spanish Constitutional jurisprudence is a good case in point. Thus, although the Spanish Constitution explicitly mentions in Section 31.1 progressive taxation, explaining that it will not be of a confiscatory scope, and in Section 33 it describes the right to private property, the Constitutional Court of Spain, even when it had the opportunity to do it, has not clarified from which percentage taxation is considered to become confiscatory.¹⁵

120. Furthermore, it went as far as uttering the truism that income tax should be considered confiscatory whenever its rate of taxation reaches one hundred per cent.¹⁶ It did not even refer to the top marginal rate, which –after all- would have still been a platitude.

121. If we go from the Constitutional jurisprudence of the UE member States to that of the Court of Justice of the European Union, the shortcomings of existing case-law become much more apparent. To a certain extent this could be explained as a consequence of the non-existence of –as we saw- an explicit reference to such principles neither in the Treaty on the European Union nor in the Treaty regulating its functioning. In any case, and as we could see, the right to property is explicitly referred to and set forth within the area of fundamental rights in European Union Law. Let us remember that some material principles of tax justice could be inferred from this Right, just as the Constitutional jurisprudence of some States have done.

122. Having explained the above, it must be emphasized that the Court of Justice of the European Union did not make a pronouncement on the potential excess of some tax rates when it had the chance, sorting out the case through other procedures. We can recall, for instance, a case in which the Court of Justice was considering the taxing of vehicle registration in Denmark with a tax rate of 180 per cent¹⁷, together with the general taxing of each vehicle by the VAT. It is also true that the Court of Justice was not dealing with a tax harmonized according to EU regulations but, still, there were reasons for this Court to take cognizance of this case –as it did- although it eventually decided not to deal with all the possibilities it offered.

123. Leaving aside all of the above in connection with a non-harmonized tax, we must add to everything discussed so far the complexity proper to harmonized taxes according to EU directives, which are mostly indirect taxes. Let us remember –as we have suggested- that doctrine and jurispruden-

¹⁴ See its 22 June 1995 ruling setting a fifty per cent limit on direct taxation. For further analysis see the above mentioned P.M. HERRERA MOLINA.

¹⁵ To exemplify these ideas we may mention the following legal basis of some Rulings by the Spanish Constitutional Court: legal ground 11 of the 14/1998 Ruling of 22 January; legal ground 23 of the 233/1999 Ruling of 16 December; legal ground 11 of the Ruling 194/2000 of 19 July; or legal ground 2 of the Ruling 26/2017 of 16 February.

¹⁶ Indeed, the Constitutional Court of Spain, in legal ground 9 of the Ruling 150/1990 of 4 October, specifically argues that “the confiscatory effects of a an Income Tax with a progressivity that reached 100%” would become apparent.

¹⁷ The Court of Justice of the European Union, in the Sentence of 17 June 2003 (Case C-383/01) made a pronouncement on a preliminary ruling regarding the *Lov om registreringsafgift af motorkøretøjer* (Danish Law on Vehicle Registration) in its codified versión on 14 April 1999. This preliminary ruling dealt with the tax accrued upon the first registration of the vehicle on Danish territory, with a tax rate of 105% on the first tax bracket, and 180% over the rest of the total price. The Court of Justice settled this preliminary ruling according to the principle of the free circulation of goods, given the prohibition that a member State taxes, either directly or indirectly, the products of the other member States with internal taxes exceeding those taxing directly or indirectly similar national products. This particular case stemmed from the lack of national vehicle production in Denmark. Yet, the Court of Justice established through its sentence that the free circulation of goods had not been disrupted by the aforementioned tax.

ce regarding material principles of tax justice are far more developed, at a State level, in relation with direct taxes than they are with indirect taxes.

124. Likewise, we must be clear that –as we have already seen- harmonized taxes move across the aforementioned line of alleged justification from an environmental perspective. This activates the already mentioned related extra-fiscal files which, although including some complexity, cannot ignore or empty of significance traditional principles of tax justice.¹⁸

125. From the standpoint of tax harmonization, the relation among extra-fiscal environmental protection, free fiscal competition among States and the search of material tax justice, it entails as we could see a triple dimension which although difficult to coordinate must be faced in a coherent way.

126. Yet, beyond tax harmonization, the presence of the right to property within the European list of fundamental rights opens new opportunities for the Court of Justice of the European Union, protected by other potential Community implications, to go beyond strictly harmonized taxes according to EU directives.

127. To be sure, in relation with the fiscal relevance of fundamental rights –even from a material point of view- the progress of the jurisprudence of the European Court of Human Rights¹⁹ is more remarkable than that of the Court of Justice of the European Union.

128. In this sense, it should be emphasized that a Court not belonging to the institutions of the European Union, such as the European Court of Human Rights, has even made a pronouncement regarding the tax percentages of a member State of the EU, establishing whether they are excessive or illegitimate.²⁰

XIV. The Prominence of Certain Taxes

129. Whilst in the States' judicial discipline income taxes tend to be in the limelight, in the European Union indirect taxes play the leading role. Within these, in addition to the Value Added Tax as a general tax on consumption, the excise duty -or excise- as taxes on specific consumptions, some of which have environmental profiles, are of great importance.

130. Sometimes, these environmental profiles are used to reach excessive tax loads, which forget the specific European regions' needs, with an even broader rural relevance and great difficulty in communications, and where the population has no real or economically accessible alternatives as opposed to the usage of regular fuel.

¹⁸ Now a reference to some rulings by the Constitutional Court of Spain seems to be in order. This Court has asserted that the establishment of “taxes of a mostly extra-fiscal nature” can only be implemented “respecting the demands and principles stemming directly from the Constitution (art. 31)». In this sense, see legal ground 13 of the Ruling 37/1987, of 26 March. Likewise, see legal ground 4 of the Ruling 186/1993, of 7 June. Among the demands and principles mentioned, that of not being allowed to create confiscatory situations should be included. It is remarkable that the Constitutional Court of Spain specifically states that extra-fiscal taxes also have to respect the material principles of tax justice. Yet, it is nonetheless questionable, in connection with these rulings and as we also saw in relation to others, that the legal reasons exposed did mention confiscation in fiscal issues only to reject that it occurred in the cases studied; the Court, on its part, did not bother to explain in these rulings when taxes may become confiscatory.

¹⁹ On the jurisprudence of the European Court of Human Rights regarding the balance between the right to property and the fiscal interest of the State, see M. POGGIOLI, *Indicatori di forza economica e prelievo confiscatorio*, cit., pp. 181-184.

²⁰ In this sense we may, for instance, refer to a case related to Hungary. This State imposed a special taxation on rents based on compensations for cessation of work in the public sector, taxing at a rate of 98 percent the amount exceeding the equivalent of (Hungary does not have the euro) approximately 12,000€. Because of this, without limiting the foregoing, the European Court of Human Rights, through its ruling of 14 May 2013, condemned Hungary for violating, through this fiscal measure, the right to private property.

XV. The Different Degree of Realization of the Material Principles of Tax Law in the Various EU Member States

131. At times, a greater level of realization within a Constitution of a specific principle does not necessarily imply a greater respect by the legislator. This is precisely what happens with regard to the principle of non-confiscatory taxes on revenue. If we had to focus on one of the Constitutions where the taxation principles are described in a more detailed way, we could choose the Constitution of Venezuela²¹; however, it is well known this is one of the states with fewer Tax Law guarantees on account of its problematic political system.

132. Young or recent Constitutions have better chances of using other earlier ones from other states as benchmarks. The main problem lies in the fact that the maturity of a political-constitutional system is more relevant to the effectiveness of a specific principle of Tax Law than the greater or lesser specificity expressed in the Constitution.

133. Thus, in this sense, we should necessarily focus on the example provided by the German political system. The Constitution of Germany does not specifically gather in its document the principle of non-confiscatory taxation in tax matters, but the Constitutional Court of Germany has inferred from the Right to Private Property –enshrined by the Constitution– the prohibition to confiscate by the tax system, even providing precise percentages as a boundary to the legislator, although this has been essentially done in terms of indirect taxes²².

134. We can use the example provided by Germany to stress that the explicit degree of realization of a principle in the Constitution is not as important as the specific interpretation of the latter by constitutional jurisprudence.

135. We could also claim that constitutional texts seem to brag about what they lack, as in the Spanish aphorism A constitutional document may not specifically emphasize the principle of non-confiscatory taxation but be found within a system where the jurisprudence of its Constitutional Court fully explores the possibilities of the Constitution. This, as previously stated, is what takes place in the system of Germany.

136. On the contrary, in Spain we find a very detailed declaration of the principles of taxation in its Constitution (art. 31.1), as compared to the majority of the Constitutions of neighbouring states. However, the Constitutional Court of Spain, when given the chance, has not made the most of this opportunity to specify, in a precise manner, which percentages of the taxes could be considered confiscatory. It is true, though, that the legitimacy of a tax system is shown on the level of public services, but taxpayers have certain rights regarding this –and regarding their condition as citizens and as governed citizens– which the legislator cannot empty of significance. Let us consider, especially, the Right to property, as a constitutionalized, fundamental right and even as a right enshrined in international documents.

137. At the same time, the Constitution of Spain recognizes the principle of progressivity as an inspiration for the Spanish tax system. The advancement of progressive indirect taxes as opposed to proportional indirect taxes is what could bestow greater progressivity on a tax system. Obviously, granted that, within indirect taxes, progressivity is well structured. Progressivity within indirect taxes, even though it may exist, is minimal compared to that within direct taxes.

138. Furthermore, the doctrinal development of the principles of taxation has been a lot greater in comparison with direct taxes than with indirect taxes. The main core of indirect taxes is harmonized

²¹ Bear in mind article 317 of the Constitution.

²² See P.M. HERRERA MOLINA, “Una decisión audaz del Tribunal Constitucional Alemán: el conjunto de la carga tributaria del contribuyente no puede superar el 50% de sus ingresos. Análisis de la Sentencia del BverfG de 22 de junio de 1995 y de su relevancia para el ordenamiento español”, *cit.*, pp. 1033 et ff.

according to EU directives, which set a harmonized minimum level of taxation in every Member state. Therefore, tax harmonization represents a clear reinforcement of indirect taxes --and an excessive increase of the harmonized minimum levels of taxation could clearly restrain the progressivity of the tax system, strengthening indirect taxes. Thus, by defining the principle of non-confiscatory taxation in revenue, regarding indirect taxes, the principle would not only materialize, but it would also ensure the effectiveness of the principle of progressive taxation as it determines a limit on indirect taxes, in such a way it will never be able to be illegitimately excessive as opposed to direct taxes.

139. According to this, the European Union is responsible for the failure of the principle of progressive taxation in fiscal issues, a principle attached to the Constitutions of the Member states.

XVI. The Idea of an Ignored Progressive Taxation before the Development of Indirect Taxes in the Tax Policy of the EU

140. The principle of progressive taxation is presented as an inspiring principle of the Tax systems, its limit being never to reach a confiscatory nature. For example, it is thus specifically stated in the article 31.1 of the Constitution of Spain.

141. Still, progressive taxes represent an unresolved issue within Tax systems. What is more, the principle of progressive taxation, as the core principle of tax justice, represents, as we have stated, an unresolved issue within Constitutional Tax Law.

142. It was almost two decades ago that I heard Professor CORTÉS DOMÍNGUEZ explain in Baeza that, eventually, the only principle that would earn true virtuality in the EU would be the principle of deficit spending, whilst the concern for the material principles of Tax Law would be sidelined. Prof CORTÉS argued that he had really made a living out of the implementation of the principle of equity. The speech was filled with irony and still genuinely rational.

143. Even beyond the real concern for controlling the public deficit and the search of a balanced budget in the Member states of the EU, which was also mirrored in many of their Constitutions -whose similarity is now beginning to be problematized - we must not lose sight of the disastrous influence that tax harmonization in the European Community has had over the effect of the principle of progressive taxation.

144. If progressive taxation is a material principle of tax justice inspiring Tax systems, it will find effective implementation as long as, within these, the weight of progressive taxes --the more progressive the better- is greater than that of the non-progressive taxes. Usually, it is the structure of direct taxes that can more easily acquire a progressive dimension in its tax rates levels. On the other hand, although with few exceptions, indirect taxes do not usually include progressivity to their tax rates.

145. EU Tax harmonization has mainly focused on indirect taxes. Let us say that the skills of the EU institutions on tax harmonization reach, essentially, indirect taxes --and much less direct taxes. Moreover, the most important indirect taxes, although belonging to the State, are harmonized according to the directives of the EU. In this sense, let us consider the Value Added Tax or the excise duties, already mentioned. The Member states of the EU are forced to levy these taxes in their territory and they must do it within the boundaries set by the tax harmonization in the Community directives. These directives usually set minimum levels of tax, which must be respected by every Member state in their national Tax Laws.

146. This way the EU establishes in every Member state some minimum levels of indirect taxation, which they must comply with. That way, every Member state, when it is time to determine the amount of revenue from indirect taxes as opposed to revenue from direct taxes within its own Tax

system, runs into these unavailable minimum levels of indirect taxes set by the EU according to its tax harmonization skills.

147. However, with this issue or obstacle, the responsibility falls not only on EU institutions, but also onto every single one of its Member states, since the method of tax regulation within the Community is still operating the Unanimity rule; this means that it would only take one Member state opposition to prevent a tax harmonization directive from being approved. But still, as a matter of fact, the pressures of EU institutions and of some stronger Member states may influence to obtain the consent of other Member states, weaker or in need of some aid, to approve a certain tax harmonization directive. Furthermore, when the European Council adopts tax harmonization directives, not national parliaments but Governments are included in the Council²³.

148. These issues blend with the fact that, at times, the various Governments boost fiscal reforms which sometimes do not completely correspond with the budgets of its regular economic policies. As a consequence, these reforms take place in a rather disorganized manner, which does not lead to a clear projection of the principle of progressive taxation.

149. Progressive taxation can never reach such a level that leads to a confiscatory Tax system, or that articulates a particular tax which contravenes the right to the taxpayer's private property, emptying of meaning this right, and, exceeding its social function. Nor can we fall into an upward swirl of indirect taxation, within the mentioned tendency boosted by the EU institutions that would ignore the principle of progressive taxation, as a material principle of tax justice.

XVII. Conclusions

150. The definition of the material principles of tax justice in the fiscal discipline of the European Union would represent the necessary basis upon which to set an EU Tax Law that is more in line with the constitutional parameters, which have been regulating the Tax Law in every Member state of the European Union.

151. It is quite difficult to combine these four concepts or ideas, namely: indirect taxes, principles of tax justice, fundamental rights –or even human rights- and, lastly, environmental extra-taxation. Most approaches have neglected the analysis of the relations among these four concepts. But, at the same time, jurisprudence has not attempted either to clarify them, especially when given the chance to specify in some detail this legal situation. It has, instead, tried to sort some of these issues out through other more limited interpretive devices. We are persuaded that the European Union Court of Justice should play a major role here, especially since the more important indirect taxes, such as VAT and excise duties, are harmonized according to EU directives and through the shaping of some of these duties environmental purposes are aimed at. All the above with the additional burden of having to determine what are the limits of a true articulation in terms of environmental issues, and when we start to deal with an attempt to avoid free fiscal competition issues among States.

152. Within European Union Law we find various areas related with fiscal issues: firstly, we find community fiscal harmonization, which attempts to bring together the fiscal legislation of different member States in various fields. Then, we have the resources of the Community itself, which constitute a source of funding for the EU. Lastly, we have the cooperation in the implementation of taxes which the Community's institutions impose on all member States. This final area of European Union Law, that is, this obligation to cooperate among different fiscal institutions sometimes has an effect on the Community's

²³ As a general rule, according to the principle of legality and its materialization in the principle of reservation as to legislation, the essential elements of the tax can only be approved in the States by their Parliaments, which are the ones that approve the laws and the bodies that directly represent the citizens.

own taxes, and sometimes on harmonized State taxes. This means that this cooperation could be included within one of the two areas previously mentioned: either that of the Community's own resources of a fiscal nature, or that of fiscal harmonization. Yet, this regulatory action by the EU, which consists on imposing upon the member States the duty to cooperate among them in order to apply taxes, occasionally affects taxes which are neither part of the EU's own resources nor harmonized taxes according to directives of the Community. In this sense, we would be facing another, third, area different from the previous ones. This will be so unless we understand we are carrying out the fiscal harmonization on a formal level, that is, not in terms of the material or essential nature of the tax, but of their effective, or formal, application.

153. Out of the various fields pointed out in the above, the quandary of the principles of tax justice within European Union Law basically affects the area of fiscal harmonization, although it may well also have an impact on some specific fiscal tools of the European Union, such as customs duties. However, when giving shape to these the priority should be, for its own nature, the protection of the common market against those goods coming from overseas, non-EU, markets.

154. The European Union should be aware of the fact that an excessive strengthening of indirect harmonized taxation according to the directives of the Community, would eventually lead to a loss in the progressivity of the state tax systems.