

National Report Portugal

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I. Taxing competences within the legal framework of the European Community

1. The Commission report “Financing the European Union”

The Commission’s report “Financing the European Union” has not been extensively discussed among tax law scholars, as far as the authors have been able to ascertain. The authors consider that Portugal is more preoccupied with the cost side of the European budget, the idea of fair return and how the admission of new countries will affect Portugal.

Professor Manuel Porto has specifically commented on this report, and is very critical of the introduction of a new tax resource. According to Prof. Porto, the only feasible tax would be the personal income tax. However, according to him, it will nevertheless be very difficult because it would require the harmonization of the tax bases and Member States will not accept it. With regard to the other candidates, he considers that they lack transparency and accountability and will prejudice European competitiveness in relation to the rest of the world. Accordingly, the author defends the position that the best option is still to develop the GNI-based resource, because it is more efficient, easier and cheaper to apply, and furthermore always provides enough resources.¹

2. The Notion of “Tax” in Community Law

The Portuguese tax literature on the EC Treaty tax provisions has not found or focused on one single concept of tax for EC Treaty purposes. The academic discussion has centred on which of those articles provides the legal grounds that might enable the EC to harmonize the Member States tax legislation.²

The academic discussion has generally not resorted to any different concepts of tax when analysing the different provisions of the EC Treaty. The authors’ understanding is that the different terms used should not be read in too narrow a technical sense and should reflect a broad and general concept of tax, akin to that which has been construed in the Portuguese tax literature as referring to “tributo”, which refers to any mandatory final pecuniary liability collected by a public entity that also pursues a public activity and which does not have punitive purpose as

¹ Manuel Porto, *O Orçamento da União Europeia. As Perspectivas Financeiras para 2007-2013* (2006), pp. 75 et seq.; in the sense that the introduction of a European tax could have the political effect of bringing the citizens in closer contact with the EU budget, see José Quelhas, *A Agenda 2000 e o sistema de financiamento da união Europeia, Temas de Integração* (1999), p. 85.

² See, *inter alia*, Ana Paula Dourado, *A Tributação dos Rendimentos de Capitais: A Harmonização na Comunidade Europeia* (1996) or Gabriela Pinheiro, *A fiscalidade directa na União Europeia* (1998).

construed from its definition in the Portuguese General Tax Law.³ The term “tax” for Community law would hence cover all types of taxation treated as such in Member States.

The authors’ opinion is that, as stated in *AGF Belgium*, the tax concept used by the Protocol refers to “*all types of taxation, whether direct or indirect; it therefore extends to contributions or taxes of any type which constitute internal taxation under Community law*”. Since we have referred to a broad concept for the purposes of interpreting the term “tax” in the EC Treaty, we believe that no distinction is required to be made in the interpretation of the concept specifically referring to the Protocol on the Privileges and Immunities of the European Communities.

3. EU Tax based on Art. 269 EC Treaty?

The scope of Art. 269 is to ensure that the Community has the necessary resources to perform the tasks determined by Art. 2 within the limits established by Art 5 EC Treaty. In Portugal, academic scholars have not yet discussed the possibility of Art. 269 as a legal basis for an EU tax. The authors believe that Art. 269 might be interpreted as granting taxing powers to the Community, but subject to the limitation derived from the idea that such power must be exercised in the pursuit of the objective of economic integration in an economic and monetary union. Therefore, the taxing powers for the financing of the Community should only concern taxes “*that transcend the national markets of the Members of the Member States, or on taxes that are essential to maintain the unity of the economic and monetary union*”.⁴ The taxes mentioned in the Special Issues section that from the onset appear suitable to fulfil such criteria are the modulated VAT, energy tax, excise duties on tobacco and alcohol, communications tax, tax on financial transaction on European-wide trading platforms and the climate charge on aviation.

Portuguese scholars have not addressed the issue. The authors agree that Art. 269 alone could not serve as a legal basis for the introduction of an EU tax. The interaction with Art.5 requires that the precise objective for introducing such a tax is established in a specific provision of the Treaty.

The authors’ understanding is that a solid democratic basis for the introduction on a EU Tax would be achieved under the procedure envisaged in Art. 269, since the requirement of a unanimous resolution and further ratification would allow the Member States to rely in a latter stage on their constitutional and legal requirements on taxation matters to determine the creation of the new tax.⁵

³ See Nuno Sá Gomes, *Manual de Direito Fiscal*, Vol. I, 1995, pp. 59 and J.L. Saldanha Sanches, *Manual de Direito Fiscal*, 2002, pp. 16.

⁴ See Frans Vanistendael, Memorandum on the taxing powers of the European Union, *EC Tax Review*, 2003-3, pp. 127.

⁵ See VIII for details on constitutional issues raised with the introduction of an EU Tax.

The authors believe that for the introduction of an EU Tax one should rely on shared competence to enforce the democratic legitimization of such a tax by virtue of relying on the legitimacy granted by the participation of a body directly elected by EU citizens.

4. EU Tax based on Art. 308 EC Treaty?

In Portugal, scholars have not yet discussed the possibility of Art. 308 as a legal basis for an EU Tax. The authors' understanding is that one can rely on Art. 269 as a legal basis for the introduction of an EU Tax in combination with a specific provision in the EC Treaty. Therefore, Art. 308 does not seem suitable as a legal basis since one can argue that the EC Treaty already grants the necessary powers and thus it should not be construed as a proper legal basis for the introduction of an EU Tax due to the specific nature of Art. 269.

5. EU Tax based on the last sentence of Art. 37 (2) EC Treaty?

In Portugal, scholars have not yet discussed the possibility of Art. 37 (2) as a legal basis for an EU Tax. The authors' understanding is that Art. 37 (2) alone cannot be perceived as a legal basis for an EU Tax. However, in combination with Art. 269, that same article would serve as a specific provision of the EC Treaty that specifies an objective that requires financing.

The authors believe that the chargeable levies based on Art. 37 (2) are of a very specific nature that cannot be equated to a tax on the sense construed in the Portuguese tax literature and a viable option for an EU Tax.

6. EU Tax based on Art. 175(2)(a) EC Treaty?

The authors' understanding is that the term "*provisions primarily of a fiscal nature*" should be construed along the lines of the interpretation similar to those already established in the literature for Chapter 2 of Title VI. In fact, the concept should be used as far as possible in a uniform manner throughout the EC Treaty.

Our understanding is that Art. 175 (2) can be construed as providing a legal basis for EU environmental taxes, notably on energy taxation (although up till now the harmonization initiatives in this field have relied on Art. 93). Therefore, the article might provide a legal basis for the introduction of an EU Tax in the environmental area.

The legal basis granted under Art. 175 (2) in tax matters is aimed at achieving other goals than the mere financing of the Community. The use of tax as an incentive to promote other goals besides the mere collection of revenue distinguishes the purpose and function of this legal basis from the one derived by virtue of Art. 269.

The authors believe that for the introduction of an EU Tax one should rely on shared competence to enforce the democratic legitimization of such a tax by relying on the participation of an EC body directly elected by the EU citizens.

7. EU Tax based on other articles of the EC Treaty?

No other provisions of the EC Treaty seem suitable for providing a legal basis for attributing taxing powers to the Community.

8. “No taxation without representation”

The principle of legality plays a specific role in a constitutional state that is connected with the idea that as taxes represent an interference in the right of every human to the peaceful enjoyment of his possessions every tax must be determined and accepted by the citizens through their democratically elected representatives in the parliament who are responsible politically before the electorate on the taxes so created.⁶ Although this view may be summarized by the old adage «no taxation without representation» and is the prevalent view, the introduction of an EU Tax raises some difficulties because European laws are approved by the Council and not by the European Parliament. Nevertheless, scholars recognize that the elimination of obstacles to European integration that is taking place by the decisions of the ECJ is less democratic than if it were by the Council.⁷

According to Casalta Nabais, Community tax law that brings about the transfer of the power to tax from Member States to the European Union, which has its source in an intergovernmental organ, is far from expressing the idea of “no taxation without representation”. According to Casalta Nabais, this idea should not be lost in the transfer of taxing powers from the Member States to the EU. Therefore, either self-consent to tax is maintained at the national level in the terms that are established in the national constitutions of the Member States or the right to set taxes is transferred to the Community but in terms that reflect the ideas that modern constitutionalism instituted and which we have inherited.⁸

According to Gabriela Pinheiro, there is no tax relation between the EU and its citizens governed by legal provisions that enact the determination, assessment and collection of the tax.⁹

From the national constitutional systems’ perspective, EU tax competence is exercised in violation of the legality principle in the sense that it is a violation of the self-taxation principle (no taxation without representation).

⁶ Cardoso da Costa, *Curso de Direito Fiscal*, 2nd edition (1972), pp. 162 et seq.; Ana Paula Dourado, O princípio da legalidade fiscal na Constituição Portuguesa, *Ciência e Técnica Fiscal* 1995, pp. 47 et seq.

⁷ Casalta Nabais, *Estudos de Direito Fiscal*, p. 170.

⁸ Casalta Nabais, *Estudos de Direito Fiscal*, p. 199.

⁹ Gabriela Pinheiro, *A fiscalidade directa na União Europeia* (1998), p. 94

Gabriela Pinheiro also states that the transfer of fiscal sovereignty to the EU is not possible without the acceptance by European citizens of the European tax model. The contractual and procedural approach (namely, the accompanying, participating and monitoring by national parliaments of European issues), substituting timely and rigid compromises with a real and systematic participation in the deliberative process, has some benefits: participation in the process, publicity of the process, greater adherence to the decisions taken, continuous and historic actualization of the political will, internalization of European citizenship, and true solidarity among Member States.

Although we agree with the above authors as a matter of principle, we consider that from a Portuguese constitutional perspective there is no obstacle in creating a EU Tax, provided that the EC Treaty permits the introduction of a new comprehensive European tax. This will not be strictly illegal from a Portuguese perspective as Community law has supremacy over domestic law and a law of the parliament would ratify the introduction of this new tax as prescribed by the Portuguese Constitution.

The authors consider that the EU should modify its institutional framework in order to comply with democratic principles in introducing of an EU Tax.¹⁰

II. Interdependencies among the financial systems of the Member States

1. The national tax system

In Portuguese literature, a tax is usually defined as an instalment, coercive, unilateral without a sanctioning character¹¹. According to Art. 4(1) of the General Law on Taxes, taxes are essentially based on the ability to pay that is ascertained through income, expenditure and capital.

The ECJ has already decided a number of cases on the national concept of tax.¹² In the first case, case C-56/98 *Modelo SGPS*, one of the questions submitted by the Portuguese Supreme Administrative Court was whether notary charges may be regarded as taxes for the purposes of Directive 69/335/EEC. According to the ECJ, “*in the light of the objectives pursued by the Directive, in particular the abolition of indirect taxes having the same characteristics as capital duty, charges collected by public officials for notarising a transaction covered by the Directive,*

¹⁰ Presenting the same view, José Quelhas, *A Agenda 2000 e o sistema de financiamento da união Europeia, Temas de Integração*, p. 94.

¹¹ Teixeira Ribeiro, *Lições de Finanças Públicas*, 5th edition (1995) p. 258; Sousa Franco, *Finanças Públicas e Direito Financeiro* Vol. II 4th edition (1995) p. 72.

¹² See ECJ 29 September 1999, C-56/98 *Modelo SGPS* [1999], ECJ 21 September 2000, C-19/99 *Modelo Continente SGPS* [2000], ECJ 26 September 2000, C-134/99 *IGI* [2000], ECJ 21 June 2001, C-206/99 *SONAE – Tecnologias da Informação* [2001].

which are in part paid to the State in order to subsidise public expenditure, must be regarded as taxes for the purposes of the Directive". Accordingly, the Court decided: "1. Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, as amended by Council Directive 85/303/EEC of 10 June 1985, must be interpreted as meaning that charges constitute taxes for the purposes of the directive where they are collected for drawing up notarially attested acts recording a transaction covered by the directive, under a system where notaries are employed by the State and the charges in question are paid in part to that State for the financing of its official business.

2. A charge payable for drawing up a notarially attested act recording an increase in share capital or a change in a company's name or registered office is, where it amounts to a tax for the purposes of Directive 69/335, as amended by Directive 85/303, in principle prohibited under Article 10(c) thereof.

3. 'Fees or dues' within the meaning of Article 12(1)(e) of Directive 69/335, as amended by Directive 85/303, do not cover a charge collected for drawing up a notarially attested act recording an increase in share capital or a change in a company's name or registered office, such as the charge at issue in the main proceedings, the amount of which increases in direct proportion to the share capital raised and in respect of which there is no upper limit."

The Portuguese Constitutional Court was called on to decide a similar case, which involved notary fees, charged in a transaction involving the acquisition of immovable property. The Constitutional Court was asked to decide whether the notary charge in question constituted a tax, in which case it would be unconstitutional as the charge in question was not approved by a law of the parliament as required by the Portuguese Constitution. The Portuguese Constitutional Court considered in that situation that the notary fee in question represented a fee for a public service provided to the taxpayer and therefore it was not a tax even if the fee was greater than the cost of the service. Only in cases where the fee is grossly disproportionate to the cost of the property will the fee be considered a tax.

According to the Portuguese Constitution, municipalities have financial autonomy. This implies – once more according to the text of the Constitution – that the municipalities may have the power of taxation in such cases and under such terms as are laid down by law [Art. 238(4)]. Furthermore, municipalities share in the revenue from direct taxes and have their own tax revenues (Art. 254). However, the municipalities' power to levy taxes is severely limited. Basically, the law allows (i) the municipal assemblies to establish annually the tax rate on immovable property within a range determined by law, which varies between 0.2% and 0.5%; (ii) the additional surcharge on corporate income tax that may increase to 1.5% of the company's taxable profit for the year earned in the area of the municipality. The amount of profit generated in each municipality is determined by a formula that takes into consideration the company's payroll in each municipality; (iii) the power to offer tax benefits in relation to taxes that are

the municipalities' revenue in relation to investment projects that are considered of special interest to the development of the municipality.

If one considers the municipalities' power to levy taxes minute, it is not the same in relation to their tax revenues. In effect, the municipalities are entitled to the revenues from the municipal tax on immovable property (a property tax due annually by owners of real estate)¹³, the municipal tax on vehicles, the municipal tax on the acquisition of immovable property and the additional surcharge on the corporate income tax. However, in relation to all these taxes, the central tax authorities that are responsible for transferring the revenue collected to the municipalities make the determination, assessment and collection.¹⁴ According to the new 2007 law on municipal finance, there is a trend to increase the municipalities' power to assess and collect their tax revenues. However, new laws to define the terms in which these powers may be used have not yet been enacted.

Municipalities may also charge tariffs on the services provided to their citizens. The Constitutional Court has been called on several times to decide whether these tariffs were true taxes and therefore in violation of the requirement that all taxes must be created by a law of the parliament that has to establish its fundamental elements (tax base, tax rate, benefits and taxpayers' guarantees) [Art. 103(2)]. In relation to tariffs and duties other than taxes within the meaning of Portuguese law, which is different from Community law, the constitutional requirements are not so demanding, as the Constitution only requires that its general framework has to be determined by a law of the parliament.

In this context, the Constitutional Court has been called on to decide whether the power given to the municipal assemblies to define annually the exact tax rate on immovable property and the municipal surcharge on corporate income tax was unconstitutional because Art. 103(2) of the Constitution establishes that the tax rate has to be determined by law. In relation to these two taxes the law establishes a range and each municipal assembly has the power to determine the exact tax rate within that range. The Court ruled that this did not violate the legality principle enshrined in the Constitution because the range limits were established by law, the taxes in question were revenues of the municipalities and the range was not disproportionate.¹⁵

In relation to the autonomous Portuguese administrative regions of Azores and Madeira, the Constitution establishes that each region may exercise its own power to tax as laid down by law, as well as to adapt the national tax system to the specificities of the region under the terms of the framework laws passed by the parliament [Art. 227(1)(i)]. The framework law presently in force is Law 13/98, of 24 February, establishes that the exercise of the power to tax by the regions

¹³ According to the new law on municipal finances (Law 2/2007, of 5 January), 50% of the revenue collected on rural property goes to the parish.

¹⁴ See Casalta Nabais, *Estudos de Direito Fiscal* (2005), pp. 561 et seq.

¹⁵ Decision No. 57/95, available online in the internet at <http://tribunalconstitucional.pt>.

must conform to the legality principle in the sense that the determination, the rate, the tax benefits and the taxpayer guarantees have to be established by the regional parliament under regional law.

Furthermore, Art. 227 (1)(j) of the Portuguese *Grundnorm* establishes that “*in accordance with their statutes and the law governing the finances of the autonomous regions, to dispose of such tax revenues as may be collected or generated in the autonomous region in question, as well as of a part of the state’s tax revenues, to be determined in accordance with a principle that ensures effective national solidarity, and of such other revenue as may be allocated to them, and to appropriate such revenues to their expenditure*”. Accordingly, Law 13/98 establishes that each autonomous administrative region is entitled to the revenue from the corporate income tax due from companies that have their head office, place of management or permanent establishment in one single region as well as companies that have their head office or place of management in a Portuguese territory and have branches or other forms of permanent establishments in more than one region. In the latter case, the revenue of each region is determined by a formula that takes into account the total annual turnover of the company and the turnover produced in each region. In relation to corporate income tax, the rate of the corporate income tax is defined by each autonomous region by a regional law (usually lower than on the mainland). There is a case pending in the Portuguese courts in which the tax authorities argue that a company with its head office on the mainland and a permanent establishment in the autonomous region of Madeira, notwithstanding the fact that this region has the right to the revenues collected in Madeira calculated on the proportion of the annual turnover of the company in that region, the tax rate applied in this case to that proportion should be the tax rate of the mainland. The taxpayer, in contrast, argues that in relation to the portion of the turnover attributed to Madeira the lower tax rate of that region should apply and the normal corporate income tax rate should only apply to the portion of the income that is produced on the mainland.

Under the national tax system, the power to legally introduce a tax is attributed to the parliament. The power of administrative handling of a tax and the power to collect the revenues of a tax are all attributed to the tax authorities, broadly speaking. The tax authorities are then divided in two directorates, one with the task of handling and collect direct and indirect taxes and the other with the task of handling and collect custom and excise duties.

2. Requirements of an EU Tax and its impact on national tax law

According to the Portuguese Constitution [Article 8(4)], “*the provisions of the treaties that govern the European Union and the rules issued by its institutions in the exercise of their respective responsibilities shall apply in Portuguese internal law in accordance with Union law and with respect for the fundamental principles*

of a democratic state based on the rule of law".¹⁶ This important provision was introduced in the Portuguese Constitution by LC 1/2004, of 24 July. However, this rule introduced a very delicate interpretative problem, namely, its compatibility with the domestic legislative power in areas that are the exclusive competence of the Portuguese parliament. Notwithstanding this, there are two conditions that must be complied with in order for Community law to be enforceable in Portugal: (a) that this enforcement is foreseen in the Community Treaties and (b) that the norms emanate from the competent institutions of the EU. According to the best interpretation of Article 8(4) of the Constitution, only the norms of the treaties as well as those from the European institutions in the exercise of their own competences have priority over domestic law. According to some authors, in the above-mentioned article, the reference to "*with respect to the fundamental principles of the democratic state*" introduces an exception of the Portuguese constitutional public order against any provision of Community law that may contravene the basic principle on which the Portuguese Republic is founded, i.e. the principle of a democratic state governed by the rule of law and respect for the basic rights of its citizens.¹⁷

The supremacy of EC law over domestic law means that EC law cannot be declared unconstitutional by any court of Portuguese jurisdiction.

An EU Tax based on shared competences may create problems of compatibility between EC and domestic law. However, exclusive competences do not seem advisable, as it would represent a loss of tax sovereignty for the Member States.

III. Modulated VAT

Portugal has no similar tax to a Modulated VAT in any of its indirect taxes.

IV. EU Corporate income tax

Portuguese corporate income tax is generally levied on all corporate bodies that are resident in Portugal or have a permanent establishment in Portugal. Resident companies are taxable on their worldwide income. The taxable base is generally determined on the basis of the taxpayer's tax return and accounting records by deducting from taxable profits qualifying prior years' losses and tax incentives (direct method). Relevant items of exempt income are domestic and foreign dividends qualifying for the participation exemption regime. Expenses are

¹⁶ An English translation is available online, on the internet, at <http://www.tribunalconstitucional.pt/tc/conteudo/files/constituicaoingles.pdf> (7 June 2007).

¹⁷ Canotilho/Moreira, *CRP Anotada*, Vol. 1, 4th edition (2007), p. 267.

deductible to the extent that they are indispensable for the purpose of gaining or producing taxable income or for the maintenance of its source. To be deductible, expenses must be substantiated. Where related parties are involved, the arm's length principle must be followed; otherwise the tax authorities may disregard such payments. Interest, royalties and service fees are generally deductible if actually paid. Dividends are not deductible.

Worldwide capital gains derived by resident companies are regarded as ordinary income. Holding companies (SGPSs) and venture capital companies (SCRs) qualify for a full exemption. Losses are deductible in computing the taxable base of ordinary IRC taxpayers and may be carried forward for six years. The general IRC rate in mainland Portugal is 25%. The municipalities may levy a surtax (*derrama*) of up to 2.5% on the annual taxable profit. The surtax is not deductible for IRC purposes.

Payments between resident companies are generally subject to withholding of IRC, generally as an advance levy of IRC. For dividends, the general withholding tax rate is 20%. An exemption from the withholding tax applies in respect of: (i) dividends qualifying for the participation exemption; (ii) dividends paid within a group of companies; and (iii) stock dividends representing capitalized profits or reserves. For interest, the general withholding tax rate is 20%. For all royalties (including payments in respect of know-how, leasing of equipment and technical assistance), the withholding tax rate is 15%. The withholding tax is imposed on the gross amount of royalties excluding VAT. Corporate directors' fees, agency commissions and fees for services (other than transport, communications and finance-related services) supplied in Portugal are subject to withholding tax at a rate of 20%. A 15% withholding tax applies to rental income from immovable property. These rates are applied on the gross amount of fees, commissions or rents, excluding VAT.

Accounting and tax periods coincide with the calendar year. Corporate taxpayers must file a tax return electronically and the supporting documents for a tax year by the last working day of the months of May and June, respectively, of the following year.

Tax liability must be computed by the taxpayer (self-assessment). Any outstanding tax liability must be paid upon filing the tax return. Any excess tax is refunded within three months of the filing deadline, unless the taxpayer elects to set the refundable amount off against future IRC liability. Companies must make a prepayment of IRC liability for the current tax year, which is creditable against the taxpayer's final IRC liability.

Portugal applies the ordinary foreign tax credit as a unilateral method for the avoidance of double taxation for resident companies and Portuguese permanent establishments of non-resident companies.

Non-resident companies with Portuguese permanent establishments are subject to tax with respect to (a) income and capital gains derived by or through the permanent establishment and (b) other income derived from Portuguese

sources through activities identical or similar to those carried out by the permanent establishment. Non-resident companies deriving domestic income directly (i.e. not through a permanent establishment in Portugal) are generally taxed by way of a final withholding of IRC. The tax is imposed on the gross amount of income (excluding VAT in the case of royalties, commissions and fees); no deductions may be claimed.

Capital gains derived by a non-resident company directly from the disposal of, or a gratuitous acquisition of, Portuguese-*situs* movable and immovable property are taxed at the standard rate of 25%. Capital gains derived by non-resident companies directly from the disposal of shares and other corporate rights and securities of resident companies are generally exempt from tax.

Dividends (other than stock dividends) are subject to a 20% tax rate. Under the domestic law implementing the provisions of the EC Parent-Subsidiary Directive (90/435/EEC), as amended, outbound dividends and other profit distributions by Portuguese subsidiaries to their EU parent companies are exempt from withholding tax. In general, interest payments to non-resident companies are subject to a 20% final withholding tax. The EC Interest and Royalties Directive (2003/49/EC) precludes any taxation on interest and royalty payments to associated EU companies generally with effect from 1 January 2004. Utilizing the transitional regime set out in Art. 6 of the Directive, Portugal will levy a 10% withholding tax on interest and royalty payments made between associated companies from 1 July 2005 until 30 June 2009 and a 5% withholding tax from 1 July 2009 until 30 June 2013. All royalties (including payments in respect of know-how, leasing of equipment and technical assistance) are subject to a 15% final withholding tax. Royalties are exempt from withholding tax if paid within a group of companies.

We have no knowledge of exact figures; however, according to the Budget for 2007 it is estimated that the revenue of corporate income tax will be around 13.9% of the total tax revenue.

According to Gabriela Pinheiro, the EU's opting to finance its own resources through the apportionment of the revenue of corporate income tax will bring about the harmonization of this tax in order to be able to comply with equity requirements in the transfers. As a result, the use of EU competence in relation to its own resources may be a greater threat to Member States' sovereignty than if it were tax harmonization *per se*. Harmonization of direct taxes motivated by the need to increase receipts, besides centralizing in the EU the extra fiscal element of taxes, also centralizes the fiscal element.¹⁸

The Council has managed to achieve the required consensus (unanimity) to pass specific measures (namely, on the distribution of dividends among parent and subsidiaries in different Member States and on a special regime for the taxation of corporate reorganizations) based on Art. 94 EC Treaty. Progress in the area of

¹⁸ Gabriela Pinheiro, *A fiscalidade directa na União Europeia*, p. 76.

direct taxation is substantially lower as citizens are much more sensitive to these taxes and they collide more directly with state sovereignty as they are often used to promote public policies.¹⁹

Pitta e Cunha, a tax professor from the University of Lisbon, wrote in 2001 that once the monetary union has been achieved, it would be expected to progress in fiscal coordination. With the abolishment of exchange risks, the differences between different income tax systems become more visible and the need for harmonization grows. However, the reluctance of Member States to abandon their veto power veto combined with the subsidiarity and proportionality principle in the Community, point in another direction. Finally, according to this author, even if the path to an increasing harmonization prevails, it seems that the idea of advanced tax integration, such as the idea of introducing a single tax on companies' income, is not possible in the foreseeable future because the atmosphere in the EU is not favourable to federal types of integration.²⁰

The authors' understanding is that the corporate income tax does not seem suited as candidate for an EU Tax because of the complexity of the harmonization of national systems in terms of definition of a possible CIT base ("profits"). This can be seen in the discussion of the Common Consolidated Corporate Tax Base (CCCTB) and Home State Taxation (HST) in the harmonization scenario as part of a piecemeal approach. Also, taxation involves political choices and a trade-off between pure economic efficiency and other legitimate policy goals, which are particularly evident in corporate taxation. It appears doubtful to the authors that Member-States might at this stage of EU integration surrender the power of making such types of political choices. Furthermore, one could question whether compatibility with the existing ECJ case law could be achieved upon the drafting of such an EU-CIT. The drafting of an EU-CIT would also face other complex issues such as the question of coordination of shareholders' taxation and the integration of CIT and PIT, notably whether any kind of economic double taxation relief would be granted (i.e., adoption of a classical system, imputation credit, split-rate, etc...). The international issues raised by the introduction of an EU-CIT would also raise particular issues, such as the (i) taxation of non-EU source income; (ii) double taxation relief (i.e., adoption of an exemption or credit system and the underlying policy decision on adopting a «capital import neutrality» or «capital export neutrality» policy); (iii) criteria to determine the residence of a legal entity subject to an EU-CIT; and (iv) issues on entitlement to treaty benefits under the existing tax treaty network of the Member States or possible conclusion of multilateral tax treaties with non-EU states.

¹⁹ Pitta e Cunha, A harmonização fiscal no processo de integração europeia, in *Estudos em homenagem ao Professor Doutor Manuel Gomes da Silva* (2001), pp. 507 et seq.

²⁰ Pitta e Cunha, A harmonização fiscal no processo de integração europeia, *Estudos em homenagem ao Professor Doutor Manuel Gomes da Silva* (2001), p. 517.

Finally, as noted by Portuguese scholars, direct taxation is a particularly sensitive issue for EU corporate taxpayers. The introduction of an EU Tax would probably face severe opposition since taxpayers have benefit from “tax competition” between Member States and have also been able to use tax planning to achieve tax efficiency gains by exploring the disparities between EU jurisdictions tax systems.

V. Energy tax

In Portugal there is the tax on oil and energy products that covers mineral oils and energy products designated to be used as fuel.²¹ This tax is determined on the basis of specific tax rates fixed annually in the national budget. The persons responsible for the payment of this tax are the persons who introduce and use mineral oils. There are several exemptions foreseen such as when the mineral oils and energy products are not used for fuel purposes or are used in public transportation. Natural gas, kerosene and bio fuels are also exempt under certain conditions.

According to Casalta Nabais, the fact that this tax plays a significant part in global tax revenue (9.8% of the tax revenue expected for 2007) and is a tax on environmentally sensitive products could result in this tax playing a more important ecological role that it now plays.²²

In relation to the question of what would be the best tax among the options referred to in the Report for financing the European budget, the energy tax at first glance could be a solution to seriously consider as it has the appearance of a sanction. This gives it the possibility of being a fair tax. However, it is incongruent to finance the EU budget with an incentive tax the scope of which is not to constitute a supplemental resource but to change economic patterns in a more environmentally friendly way.²³ Furthermore this tax is unjust because energy expenditure represents a much larger portion of the budget of poor families; poor countries tend to spend more in energy because they have older equipment that uses more energy; and peripheral Member States may be at a disadvantage in relation to Member States located closer to the centre of Europe as they would have to bear more transportation costs.²⁴ According to Manuel Porto, there are several studies

²¹ See Pitta e Cunha, O regime fiscal dos produtos petrolíferos em Portugal, *Ciência e Técnica Fiscal* (1995), pp. 9 et seq.

²² Casalta Nabais, Direito fiscal e tutela do ambiente em Portugal, *Fiscalidade* (2005), p. 27. About the creation of an Eco-tax, see Ramos Pimenta/Mota Lopes, Os limites da tributação ambiental. Um estudo empírico do crédito fiscal à defesa e protecção ambiental em Portugal, *Fiscalidade* 2006, pp. 65 et seq. Also, Maria Odette Batista de Oliveira, Os impostos ambientais – alguns aspectos da sua temática, *Fiscalidade* (2004), pp. 75 et seq; Cláudia Dias Soares, O imposto ambiental. Direito Fiscal do Ambiente, *Cadernos CEDOUA* (2002).

²³ Gabriela Pinheiro, *A fiscalidade directa na União Europeia* (1998), p. 79.

²⁴ Manuel Porto, *Teoria da Integração e Políticas Comunitárias* 3rd edition (2001), pp. 359 et seq.

demonstrating the economic inefficiencies of this tax, mainly in comparison with income tax. On the other hand, the author emphasizes that the introduction of this tax may represent a significant growth of investment in environmentally friendly industries and products, with a consequent increase in employment.

VI. Excise duties on tobacco and alcohol

Portugal imposes excise duties on both tobacco and alcohol.

1. Excise duties on tobacco

The tobacco excise duties (*Imposto sobre o tabaco*) are levied on manufactured tobacco for public consumption in Portugal, either from national manufacturing or imported nature.

The person liable for the payment of the excise duties is normally the economic agent that introduces the products for consumption in the market. This includes authorized warehouse keepers, registered traders, non-registered traders, tax representatives and importers. Furthermore, the holders (where the products are held for commercial purposes) and purchasers (in the event of sale by the courts or following administrative proceedings) may also be liable to tax the duties. Finally, in the event of unlawful production, holding or release for home use, the natural or legal persons producing or holding the tobacco products are also liable to the duty.

The excise duty is composed of a specific component on a set unit and an *ad valorem* component at the rate of 23% of the retail sale price. In the autonomous regions of Madeira and the Azores, special rates apply in the case of cigarettes manufactured by small producers (pursuant to Art. 3 (2) of Directive 92/79/EC). The duty is due on the basis of the declarations of release for home use for each day; a copy of the assessment is sent to the Directorate-General for Customs and Excise (DGAIEC) up to the following day. The duty is determined monthly (up to the tenth day of the month following that to which it relates) and it is payable up to the last week day of the month following that to which it relates.

The authors did not find any Court cases dealing with constitutional issues related with excise duties on tobacco. Since the levy of such duties is already subject to the rules set forth in a Directive and harmonized across the EU both in terms of tax base and rates, this would seem as one of the main candidates for an EU Tax.

2. Excise duties on alcohol and on alcoholic beverages

Portugal also levies excise duty on alcohol and on alcoholic beverages. The duties are payable by authorized warehousekeepers, registered traders, non-registered

traders, tax representatives and importers. Furthermore, holders (where the products are held for commercial purposes) and purchasers (in the event of sale by the courts or following administrative proceedings) may also be held liable for the duties. Also, in the event of unlawful production, holding or release for home use, natural or legal persons producing or holding the alcohol or alcoholic beverage are liable to the duty. Finally, small winegrowers whose output is not covered by the suspension arrangements and whose produce has not been made available to an authorized warehousekeeper, are also liable.

The excise duties are levied on the following alcoholic goods: beer, still and sparkling wine, other fermented still and sparkling beverages, intermediate products, spirituous beverages and ethyl alcohol produced on national territory or imported into it.

The rate for alcoholic products of intermediary nature is that of EUR 54.57 per hectolitre of alcohol, whereas for other of EUR 937.15 per hectolitre. As for beer, the duty is calculated by reference to hectolitre per degree Plato or the acquired alcoholic strength of the product. The rates vary from EUR 6.46/hl to EUR 22.70/hl (EUR *per* hl).

The duty is due on the basis of the declarations of release for home use for each day; a copy of the assessment is sent to the Directorate-General for Customs and Excise (DGAIEC) up to the following day. The duty is determined monthly (up to the tenth day of the month following that to which it relates) and it is payable up to the last week day of the month following that to which it relates.

We have no knowledge of exact figures; however, according to the Budget for 2007 it is estimated that the revenue of excise duties will be around 4.63% of the total tax revenue.

The authors have not found any Court cases dealing with constitutional issues related with excise duties on alcohol and on alcoholic beverages. Since the levy of such duties is already subject to the rules set forth in a Directive and harmonized across the EU both in terms of tax base and rates, this would seem to be one of the main candidates to proceed for an EU Tax.

VII. Communication tax

1. Telephone tax

Portugal has no tax similar to a telephone tax. Telecommunications services are treated as normal services and taxed accordingly.

2. Vehicle tax

The municipal tax on vehicles is the most similar tax levied in Portugal to the one envisaged as an EU Tax (i.e., a road transport tax). The municipal tax on vehicles

is payable by vehicle owners, generally those in whose name vehicles are registered. The tax is payable on the use of: (i) light-duty passenger and composite motor vehicles with a gross weight of 2,500 kg or less; (ii) motorcycles for personal transport; (iii) aircraft for private use; and (iv) pleasure crafts for private use.

The tax base is based on a set of criteria, according to the type of vehicle:

- a) motor vehicles: fuel used, cylinder capacity, voltage (for electrically propelled vehicles), age;
- b) motorcycles: cylinder capacity and age;
- c) aircraft: maximum authorized weight at takeoff;
- d) pleasure craft: engine rating, gross registered tonnage and age.

The tax is collected annually by the tax authorities on behalf of the municipalities on the dates, rates and conditions set by Decree by the Ministry of Finance or when the vehicle is acquired for new owners.

The authors have not found any Court cases dealing with constitutional issues related to the introduction of the municipal vehicle tax. The vehicle tax seems suitable for an EU Tax, which could find its legal basis in Art. 175 (2).

3. Air tax

Portugal has no tax similar to an air tax as envisaged as a prospective EU Tax.

VIII. Personal Income Tax

Personal Income Tax is levied on the yearly income of several categories: dependent employment, independent work, capital income, property income, capital gains and indemnities and pensions. The tax is collected from the income of resident and non-resident individuals. The taxable income is the result of the aggregation of the different categories, after applying deductions to each category and allowances such as health and educational expenses. In principle, certain indemnities, literary, artistic and scientific premiums and subsidies are not taxed as personal income. Also, capital gains derived from debt securities and shares that have been held by the taxpayer for more than 12 months and are not from companies whose permanent assets are composed of more than 50% immovable property are not taxed. Personal income tax is levied at a progressive tax rate that varies between 10.5% (up to EUR 4,544) and 42% (more than EUR 61,260). Withholding tax applies to certain items of income at rates that vary between 15% and 35%. There are a number of ancillary obligations, namely for the entities that pay the income so that the tax authorities may be able to control the tax due and paid. The tax is handled by the tax authorities and the revenues are collected by local tax offices. The use of the internet is being highly promoted and the majority of the obligations related to personal income tax may now be done using the internet. We have no knowledge of exact figures; however, according to the

Budget for 2007 it is estimated that the revenue of personal income tax will be around 25% of the total tax revenue.

In case C-345/05, the ECJ ruled on 26 October 2006 that in maintaining fiscal provisions such as that of Art. 10(5) of the Personal Income Tax Code, Portugal has failed to fulfil its obligations under the EC Treaty (Arts. 18, 39 and 43 EC Treaty). The provision in question granted an exemption of personal income tax on capital gains derived from the sale of real property used as the taxable person's own and permanent residence subject to the condition that the gains realized are reinvested in the purchase of another real property situated in the Portuguese territory. The Court ruled in paragraphs 21 and 22 of the judgment that *"it is clear that a taxable person who decides to sell property that he owns in Portugal and uses as his own residence in order to transfer his residence to another Member State and to purchase a new property there for the purposes of his accommodation is, in the context of the exercise of the rights conferred by Articles 39 and 43 EC, subject to more unfavourable tax treatment than that enjoyed by a person who maintains his residence in Portugal. That difference in treatment in relation to the taxation of capital gains may affect the estate of a taxable person who wishes to transfer his residence outside Portugal and, as a consequence, is likely to deter him from proceeding with such a transfer"*. Portugal has not yet revoked or made any amendment to this provision in the Portuguese Personal Income Tax Code.

Presently, there is another case pending before the ECJ related to Art. 43(2) of the Personal Income Tax Code. In a nutshell, the provision at stake establishes that the capital gains derived from the sale of immovable property, where the seller is a resident in Portugal, are only 50%. As this reduction is available only to resident taxpayers, the Court has asked whether this limitation infringes Arts. 12, 18, 39, 43 and 56 EC Treaty.

In light of the decisions that are being taken by the ECJ in relation to Personal Income Tax, the Portuguese legislator should revise the entire Portuguese tax law to comply with those decisions, especially eradicating the unjustified differences of treatment between residents and non-resident taxpayers and granting autonomous treatment to talent and frontier workers, a phenomenon that is increasing with the integration of the Spanish and Portuguese economies.

Manuel Porto has defended the position that the introduction of a resource related to personal income tax with a harmonization of the tax bases could be a good alternative. The advantage would be a greater accountability of the citizens with respect to the identification of their financial contribution.²⁵

According to Gabriela Pinheiro, the transfer to the EU of part of the revenue of this tax would place an equitable apportionment of the tax burden on European citizens in order to equalize the economic performances between the rich and poor regions of the EU. However, according to Pinheiro, this option is not advisable because it entails the acceptance of different criteria of justice having implications

²⁵ Manuel Porto, *Teoria da Integração e Políticas Comunitárias*, p. 475.

at the social security level. It is an extremely delicate issue because of the different cultural, economic and demographic concepts behind this tax and the social security systems in each Member State, which requires a very high degree of political integration.²⁶

IX. Tax on financial transactions

Portugal does not levy and financial transactions tax, notably on transactions of shares or bonds in the securities market. The Securities Market Commission only levies tax for its supervision duties of financial institutions, which seems a different type of revenue that the one which is envisioned by an EU financial transactions tax.²⁷

X. Climate charge on aviation

There is no climate charge on aviation in Portugal. However, Portugal was condemned by the ECJ on a case related to a passenger service tax for intra-Community flights. In this case the ECJ held that a provision of Portuguese law that established a higher service tax for intra-Community flights than that applied to domestic flights and that introduced a higher security tax for intra-Community flights than that applied to certain domestic flights violated the freedom to provide services within the EU and was in breach of Council Regulation 2408/92 on access of Community air carriers to intra-Community air routes.

The authors agree with the proposal set forth in the report "Financing the European Union" that an EU levy on aviation fuel might be a useful complement to a levy on motor fuel for road transportation. Even though this levy might increase transportation costs throughout Europe and decrease the mobility of its citizens, this levy could also raise the awareness of the pollution created by airplanes and the responsibility each citizen has to maintain the environment.

XI. Transfer of seigniorage revenue

According to Rui Henrique Alves, the introduction of the euro in Portugal did not have major consequences in relation to the seigniorage revenue of the Portuguese

²⁶ Gabriela Pinheiro, *A fiscalidade directa na União Europeia*, p. 78 and Manuel Pires, *Harmonização fiscal face à internacionalização da economia. Experiências recentes, A internacionalização da economia e a fiscalidade* (1993), p. 44.

²⁷ Stamp duties apply to a series of banking transactions, especially loans, interest payments and bank guarantees. However, the scope of a tax on financial transactions as envisioned for an EU Tax does not seem targeted to tax these events.

Central Bank, even though Portugal had a comparatively higher rate of inflation than other Member States.²⁸

Even though seigniorage revenue is income of the Portuguese Central Bank that is subject to corporate income tax in Portugal, the transfer of this revenue to the EU budget does not represent a big loss of tax revenue for the Portuguese tax authorities.

XII. The administration of a future EU Tax

The authors' understanding is that the principle of national procedural autonomy should be respected and hence envisage a framework where each Member State will proceed in applying its own domestic procedures for the assessment and collection of taxes to the EU Tax. However, our understanding is that the same articles of the EC Treaty that may be invoked as legal basis for an EU Tax also grant powers to the Community for the harmonization of the national procedures to the extent necessary for ensuring a uniform administration of the EU Tax. The main advantages of an administration of the prospective EU Tax according to national procedural rules is the integration of that tax into the tax system of the Member States without any need for special adjustments to its assessment and collection procedures and hence ensuring greater efficiency from the tax authorities. The main disadvantage is the imbalance that those liable to the EU Tax would be subject according to its domestic provisions. Furthermore, the disparities resulting in a different treatment of the taxpayers might undermine the idea of equality on a European-wide basis. This idea may be construed as a constitutional requirement of the concept of tax in Portugal.

In the authors' view, it is not possible to have partial harmonization in relation to procedural law. The situation in which there would be different procedural rules depending on the tax in question would create an unjustified complexity that could undermine the entire system.

The present system of collection of customs duties has not given rise to any special difficulties or disputes between the persons liable for the duties and the tax authorities.

The authors' understanding is that the principle of national procedural autonomy would prevent the adoption of a totally uniform legal procedure system. Furthermore, we do not believe that any of the legal bases found to be suitable for the purposes of granting taxing powers to the Community allows the introduction of uniform provisions. However, we would have to determine on a case-by-case basis whether a specific provision of the EC Treaty, which grants the Community taxing powers along with Art. 269, might be perceived as entailing such power for

²⁸ Rui Henrique Alves, *Políticas Fiscais Nacionais e União Económica e Monetária na Europa*, 2nd edition (2000) p. 86.

a uniform procedure, as for instance is the case for the provisions that relate to the customs union. We believe that the proposals discussed for an EU Tax mentioned above do not entail the required powers for such a uniform procedure.

In Portugal, as in the Austrian case, some taxes are administered by the tax authorities, while the revenue goes to the municipalities. However, we have no recollection on the tax authorities imposing more lenient standards in the collection of the taxes that are revenues of the municipalities.

The authors consider that there is no legal basis for the introduction of special tax authorities at the EC level. Furthermore, the problem of enforcement would always remain, as the EU has no direct *ius imperii* over European citizens.